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A SILVER CELEBRATION: IN HONOR OF THE 25TH ANNIVERSARY OF THE WILLIAM S. RICHARDSON SCHOOL OF LAW

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Foreword

Elijah Yip*

A silver anniversary is a memorable event for any law school, and for the William S. Richardson School of Law ("Richardson Law School"), it is certainly a milestone worth celebrating. This edition of the *University of Hawai'i Law Review* joins in that celebration. Twenty-five years is relatively young in the life of an academic institution. Yet, in that short span of time, the Richardson Law School has garnered much honor and respect—so much so that, when the editorial board of the law review solicited written submissions for the tribute section in this issue, the response was overwhelming. What follows in these tributes is a collection of fond memories, congratulatory remarks, and wishes for a bright future. The authors are a diverse group, ranging from alumni and faculty members of the Richardson Law School to distinguished members of the bench, including a Justice of the United States Supreme Court.

The tributes themselves will speak to the unique character of the Richardson Law School, but, perhaps, they should be complemented by a bit of historical background. The Richardson Law School opened its doors in 1973 to 53 first-year law students, each of whom paid $170 a year in tuition.[1] The faculty consisted of six professors.[2] Classes were conducted in a temporary wooden building in a remote part of the University of Hawai'i campus known as the "Quarry."[3] The Fall Semester curriculum consisted of Modern Methodology, Social Decision-Making, Judicial, Clinical Project/Legal Method Seminar Student Workshop, Legal Education and the Profession, Regulation of Economic Activity, and Real Property Law.[4]

Twenty-five years later, the Richardson Law School has graduated over 1,500 alumni throughout 31 states and 15 countries.[5] The Richardson Law School admits 85 students annually who pay a resident tuition of $6,500 a year (scheduled to increase to $9,000 by the year 2000).[6] With a student body of about 270 students,[7] the Richardson Law School is still one of the four

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1 *See* Lawrence C. Foster, *25 Years of Legal Education*, HAW. B.J., April 1998, at 6.

2 *See William S. Richardson School of Law Catalog*, 1997-99, at 4 [hereinafter *Catalog*].

3 *See* Foster, *supra* note 1, at 6.

4 *See id.*

5 *See id.*

6 *See Catalog*, *supra* note 2, at 4, 37.

7 *See id.* at 4.

smallest of the 180 ABA-accredited law schools.[8] The student body is also one of the most ethnically diverse in the country.[9]

Since 1973, the Richardson Law School has grown to become an institute of legal education that rivals any major law school in the nation. The faculty now consists of 18 full-time professors and approximately two dozen adjunct professors.[10] In 1979, under the direction of former dean Richard Miller, the Richardson Law School established the *University of Hawai'i Law Review*.[11] The Richardson Law School moved from the Quarry to its own complex on the Mānoa campus of the University of Hawai'i in 1983.[12] That year, the school was also renamed after William S. Richardson, the former Chief Justice of the Hawai'i Supreme Court.[13]

As the tributes will reflect, the Richardson Law School has much to be proud of. Thus, in honor of a quarter-century of excellence in legal education and dedication to public service, the law review celebrates the silver anniversary of the William S. Richardson School of Law and wishes it a golden future.

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[8] *See* Foster, *supra* note 1, at 6.

[9] *See* RICK L. MORGAN & KURT SNYDER, AMERICAN BAR ASSOCIATION APPROVED LAW SCHOOLS: STATISTICAL INFORMATION ON ABA APPROVED LAW SCHOOLS 65 (1999). According to statistics collected by the American Bar Association, 67.1% of the student body of the Richardson Law School belong to a minority ethnic group. *See id.*

[10] *See Catalog*, *supra* note 2, at 4.

[11] *See* David L. Callies, *A Career of Service*, 19 U. HAW. L. REV. vii, vii (1997).

[12] *See Catalog*, *supra* note 2, at 4.

[13] *See id.*

The Vision Thing

Dean Lawrence C. Foster*

It all started with a vision. Around thirty years ago, William S. Richardson ("CJ") had a vision: a law school in Hawai'i that would provide an opportunity for a first-class legal education to Hawai'i residents who were unable to go to the mainland for law school; a law school that would prepare generations of Hawai'i residents for leadership positions in business, government, and law; and a law school that would serve as a center of legal expertise for the State for law reform efforts.

Visions seldom materialize spontaneously. It took years of hard work by CJ and others to convince the state legislature to establish the school. For the first 25 years, the success of CJ's vision was primarily dependent upon the hard work of the faculty, staff, students, administration, and alumni of the law school. It was their efforts that built the quality and subsequent reputation of the school and its graduates.

Twenty-five years later, in 1998, the success of CJ's vision is evident to all: a top-tier law school, committed to public service that has literally changed the face of the Hawai'i bar. Moreover, it is also clear that this is a vision that has withstood the test of time. This vision is just as inspiring today as it was then.

Why should an alum or a member of our community give to the law school? I can think of at least two compelling reasons: giving back and investing in the future. Alumni give back because it was the law school that provided them with the skills with which they are now making a living. Non-alumni attorneys are giving back to the community, through the law school, for the benefits they have enjoyed over the years as lawyers in Hawai'i. Friends and alumni also give to the school as an investment in the future of Hawai'i, for they recognize that education is the key to our succeeding as a state.

The future of the law school is in your hands; share in the vision, give back to the community and the law school; invest in the future of Hawai'i.

Mahalo nui loa.

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* Dean, University of Hawai'i, William S. Richardson School of Law.

The Law School At Hawai'i: Past and Present

Ira Michael Heyman*

This brief history of the establishment of the William S. Richardson School of Law at the University of Hawai'i is both a glimpse of the past and an appreciation for a law school that has exceeded optimistic expectations at its founding. I was fortunate to play a personal role in its establishment by taking the work of a number of consultants and preparing for the University the final document for submission to the Legislature in 1972. I was then a law professor at the University of California at Berkeley. My experience in law teaching and my role as final consultant, which provided me useful knowledge about the University of Hawai'i, the Hawai'i legislature, and the Hawai'i bar, led the University to offer me the first deanship. I was sorely tempted given my appreciation for the Islands, my great respect for Chief Justice Richardson and President Harlan Cleveland, and the challenge to create the first law school in Hawai'i. But, with regrets, I decided to return to California and ironically soon thereafter entered into the world of university administration.

The William S. Richardson School of Law to a now far-away observer (and occasional visitor) is a successful institution with a history of accomplishments that are unusual for a professional school of modest size and of such recent vintage. As I read its course descriptions, it seems to have minimized offerings in "critical theory," but has stressed clinical practice experience in addition to both professional and policy-oriented courses. It has thus not lost the flavor injected at the outset by Professor Richard Miller and Dean David Hood, but the thrust to the experiential seems properly tempered by courses that teach lawyering skills and the broader contexts of legal rulemaking. In addition, the law school is taking advantage of its location with opportunities in Asian-Pacific legal transactions, environmental and land planning courses, and explorations in Native Hawaiian materials.

The measure of a law school, of course, is primarily in the excellence and achievements of the students and faculty. I am very pleased to see the solid credentials of its diverse faculty, to read faculty books and articles of great merit in my own field of land use, and I applaud the accomplishment of many of its over 1500 alumni.

I do not know when the seeds to establish a law school in Hawai'i were first sown, but I have reviewed letters, reports, and studies from 1966 through 1972

* Secretary, Smithsonian Institution, Washington, D.C.; A.B., Dartmouth College, 1951; J.D., Yale Law School, 1956.

reflecting on its creation. Clearly, its most important advocate from the very beginning is its namesake—William S. Richardson. I have looked at his correspondence with a number of mainland law deans and other luminaries seeking (and often receiving) information on the kinds of analyses accompanying proposals for new law schools elsewhere. There then followed four systematic studies evaluating whether creating a law school in Hawai'i was both feasible and desirable, and if so, what its programs should stress. I suspect that no other law school was evaluated as often and as deeply prior to its creation.

I was not privy to debate within the University of Hawai'i regarding the establishment of a law school. I doubt that there was unanimity (new ventures in the academic world are welcomed only cautiously). But clearly the University leadership decided it wished such an addition and, in response to a legislative request, undertook the first feasibility study which was completed in January 1968.

The first study was largely a preliminary inquiry. No money was appropriated for its preparation, which was done part-time by two University of Hawai'i staff members. Its conclusions were understandably tentative and partial and lacked the force of advocacy. But the report began to frame the relevant issues. The first issue was whether there was need for more lawyers in Hawai'i? The answer was: probably. This was based on analysis done elsewhere showing the national increase in legal transactions, and thus a posited shortage of well-trained lawyers, and the increase in applications to law schools throughout the United States. The upward trend in bar takers in Hawai'i was cited to infer both a need for more lawyers in Hawai'i and that more Hawaiians were seeking law school training than in previous decades. An increase in need was consistent with the growth in the numbers of lawyers in Hawai'i from 284 in 1950 to 472 in 1960, but without knowing the principal residences of bar takers one could only assume that more Hawai'i citizens reflected the increase.

The second issue was whether significant numbers of students would attend a law school at the University of Hawai'i. Data was sparse, but the report nevertheless posited that the increase in recent takers of the Hawai'i bar and their LSAT performance might indicate a demand for around 40 first-year places at a Hawai'i law school.

Unfortunately, no attempt was made to estimate how many additional qualified students without the means to attend mainland schools would seek a local legal education, if one were available. This shortcoming is probably understandable given the paucity of available data, but it sidesteps one of the prominent justifications advanced by advocates.

The report ends by stressing other significant justifications for a law school: (1) the encouragement of legal reform through research carried on by faculty

and students; (2) the enrichment of the teaching and research programs of the University of Hawai'i; (3) the potentialities of adding to the programs of the East-West Center studies in the law of Asian nations; (4) the training of legal personnel in the developing areas of Oceania; and (5) continuing education of practitioners in Hawai'i.

The report took a stab at cost figures for a school of 300-500 full-time students and 18-20 full-time faculty. They seem ridiculously low in 1998 dollars: non-recurring costs of $2.8-$3.5 million (largely for a building on the Mānoa campus and a library) and an annual operating expenditure of around $480,000 for salaries, administration, maintenance, and scholarships.

One recommendation of the first report was the employment of competent legal educators to make a detailed study including a full exposition of curriculum. Such a study was made by William Warren, Dean of Columbia University School of Law and Edward Means, a law professor at Northwestern. It was entitled, School of Law, University of Hawai'i: Its Feasibility and Social Importance and dated March 1969 (hereafter the Warren-Means Study).

The Warren-Means Study adds to the prior investigation by specifying in detail a possible curriculum, a planning time schedule, and an elaboration of necessary expenditures for the first, second, and third planning years, and alternative budgets for law school operations in the first five years at two scales of intensity.

The sections on the needs nationally and in Hawai'i for lawyers adds marginally to what previously was reported. Again, there is little elaboration of the potentialities of applications from qualified lower-income Hawaiians, although it is posited that their needs might be satisfied by scholarships available in traditional mainland schools. The Warren-Means Study, however, elaborates on the significant advantages, in addition to information on demand and supply of lawyers, that could be provided by a quality law school in Hawai'i. These include legal reform through research, analysis of existing laws and concepts in relation to great technological and social change, and the facilitation of interdisciplinary research given that law is an effective discipline for shaping legislative and political solutions to societal problems. Also mentioned was that a Hawaiian Law School would be an ideal place to carry on studies of Asian-American comparative law, a place to respond to urban and minority needs, a center for continuing education for attorneys, and as a participant in meeting the needs to provide an enlarged public defender system.

As indicated, the central focus and contribution of the Warren-Means Study is program and curriculum. It is interesting to note that despite its urging at the outset that Hawai'i create "an innovative institution not bound by tradition," the recommended curriculum looks quite like the curriculum at a traditional mainland law school when I joined the faculty at Boalt Hall in

1959. I intend no criticism by this observation: It could be well argued that a new school with untried students should rely on a conservative curriculum designed to assure the achievement of those intellectual skills thought to be both essential and best provided by the case method, Socratic methodology, and focus on conventional subject matters. I mention it, however, given the different turn of the Law School program at its inception relying so heavily on practice rather than case method.

The third study was Programs in Law at The University of Hawaii by Thomas Ehrlich and Bayless Manning (hereafter the Ehrlich-Manning Study). It was commissioned by Harlan Cleveland, and is dated December 1970. It is shorter, more contemporary in view, and more an advocate piece than the Warren-Means Study. Chiefly, however, it changes the focus of analysis by looking primarily at needs in Hawai'i and cost factors. It then proposes a plan of action to meet the primary needs that is quite different from those urged previously.

The Ehrlich-Manning Study establishes twelve needs. They are similar to those previously identified with somewhat greater stress on opportunity for low-income aspirants, training paraprofessionals, and provision of opportunities for interdisciplinary research with other faculty at the University of Hawai'i, education and training in legal perspectives for many groups (including undergraduates), and provision of legal services to low-income residents, especially through clinical programs.

The Report then turns to "Basic Considerations" and reflects the authors' pervasive consultations with many interested constituencies. Clearly, many complained about the cost of establishing a traditional law school program and others who perceived needs (e.g., for legal services for the poor) found it difficult to quantify or to address other ways for satisfying the needs (e.g., by paraprofessionals).

A central issue in the section turned on the advisability of continuing to rely on mainland law schools to provide the twelve educational functions they had previously identified. Obviously, mainland schools would produce lawyers for Hawai'i and thus resources for legal services and some training for public leadership. But the other functions would be largely unmet (including, for instance, the training of paraprofessionals, continuing education of the bar and judiciary, formulation of interdisciplinary curriculum at the University of Hawai'i involving academic lawyers, and concentration on legal issues of particular importance in Hawai'i. This analysis suggested centering efforts (and certainly priorities) on those legal programs that best met the untended needs.

An important sub-issue concerned the educational advisability for and against training Hawai'i lawyers on the mainland. The authors were impressed by the force of the argument by some Islanders that training

elsewhere was a useful antidote to insularity. On the other hand, while costs could be avoided in providing quality legal education by relying on mainland institutions, the considerable opportunities to design programs where law students work closely with agencies of state government and with the surrounding community would be lost.

A Plan of Action followed designed to satisfy unmet needs and to deal with cost issues sensitively. The latter had been analyzed in the prior studies and in Norman Mellers' work that resulted in a later published report, the Hawaii Law Study, prepared for the Legislative Reference Bureau. The Plan recommended that the University establish a professional program in law, and as an initial and interim step include only a third year of professional training relying on transfer students from mainland schools who have satisfactorily completed two years of training. Further, the University was urged to establish a paraprofessional program and thereafter establish various secondary programs in law. Finally, the authors recommended that the University appoint, as soon as possible, a director and assistant director of legal education programs to start the two recommended programs and deal incrementally with other initiatives.

The justifications for the third-year approach suggest that it could satisfy most of Hawai'i's needs and objectives with the sole exception of offering opportunities, for low-income aspirants. These could be met in the interim by a revolving loan and grant fund outlined by the authors. Arguably, if cost was a predominant factor, a third year-only program would suffice to meet most needs if coupled with paraprofessional training.

Commencing operations, as the Report suggested, finessed determining in the Report the space needs for a three-year law school and how these might be met. It did require, however, a budget analysis for the programs recommended which were about half as much as the operating budget for a full law school. Soon after the submission of the Ehrlich-Manning Report to the President, the Norman Meller Hawaii Law School Study was made to the Legislature. It is an informative document that applies cost-benefit analysis to the possible legislative decisions regarding a law school and associate programs and summarizes and evaluates all of the prior studies.

The result of all of the foregoing was positive legislative action on May 28, 1971, declaring that "there shall be a school of law at the University of Hawaii" and appropriating funds to complete the research and development phase. The third-year approach was rejected and committees in both Houses sought admission of a first-year class by 1973 or 1974. Critical to this decision was access for lower-income students.

One further consultant report was thus made necessary and I was asked to lead that effort. My task, of course, was to fashion actual plans, and to recommend detailed outcomes to result in the establishment of the University

of Hawai'i Law School as soon as feasible. I was helped in this by wise assistants, cooperative University administrators, a host of helpful legislators, and the wise counsel of Bayless Manning, Chief Justice Richardson, and President Harlan Cleveland.

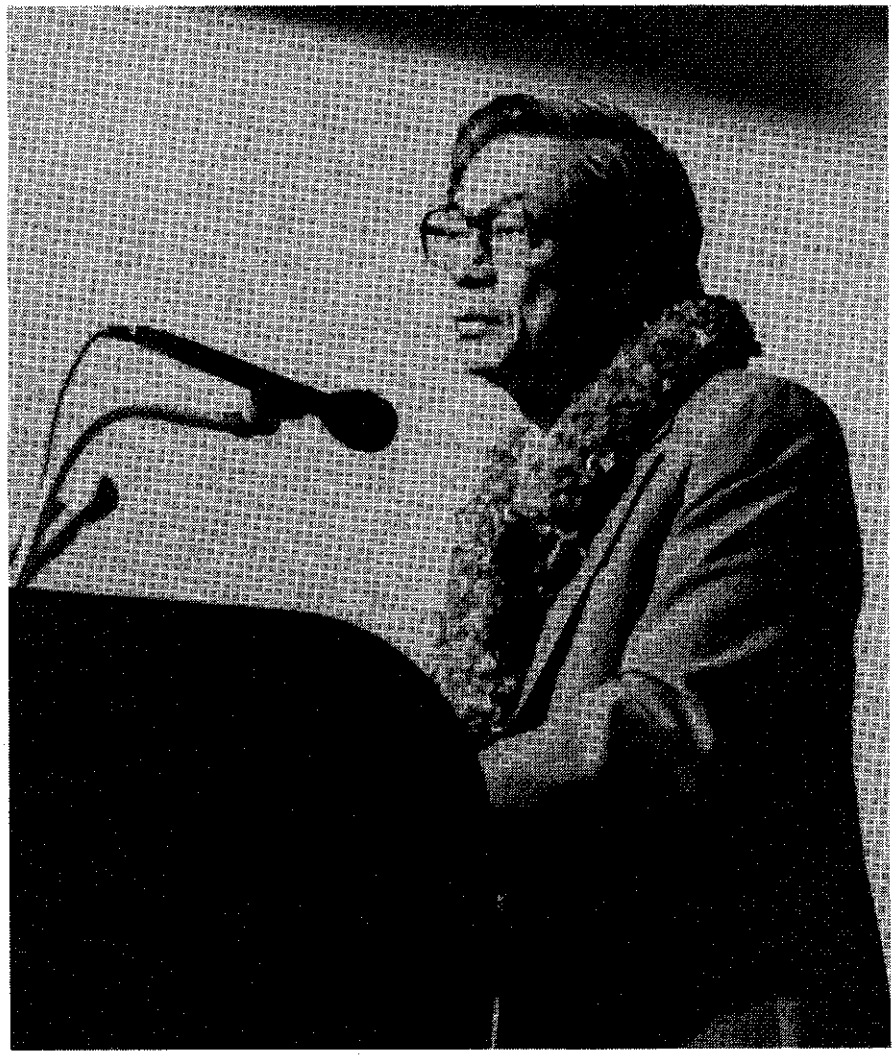
I need not belabor the contents of this ultimate report. Some of it summarizes previous analyses and insights (e.g., the Ehrlich-Manning twelve objectives) and some of it analyzes competing models. A few central topics for my recommendations suffice to give a flavor of my conclusion. The resulting law school should, I recommended, have:

- approximately 250 students, starting with a class of 50 the first year increasing gradually in time to approximately 90;
- a first-year curriculum that bears a "strong resemblance to the time-tested first-year curriculum design of leading mainland law schools, with conventional courses some of which could be taught from functional rather than conceptual perspectives to stress the understanding of legal problems anchored in the social, economic, and political processes from which they emerge;
- an advanced curriculum offering both conventional and emerging subjects (e.g., environmental law), individual study opportunities, supervised field placements in Hawaiian legal institutions, and opportunities for specialized research especially concerning problems of special importance to the State;
- an emerging set of courses for students outside the Law School;
- an eventual faculty of 15 to 20 with liberal use of visitors and a few potential joint appointees with other University of Hawai'i faculties;
- a relatively small core law library with carefully organized access to the Supreme Court and University libraries in order to minimize initial costs;
- an initial location downtown, with a modest additional campus location from the outset to assure interactions, and with eventual determination of site to be made later;
- an opening program budget of around $500,000 building to $900,000 in five years; and
- an elaborate timetable to accomplish the foregoing.

I have found it fascinating to review the "founding documents" and compare the suggestions made with the eventual outcomes. For instance, the "School" could have been devoted largely to a third-year curriculum for transfers, with ample opportunity for clinical placements, and a training center for paraprofessionals. It could have been located downtown with heavy reliance on library resources of other institutions. It could have offered a quite conventional curriculum. Other combinations were possible. But look at what has occurred: a school firmly located on the Mānoa campus with (1) an extensive library of its own, (2) a worthy curriculum while not particularly

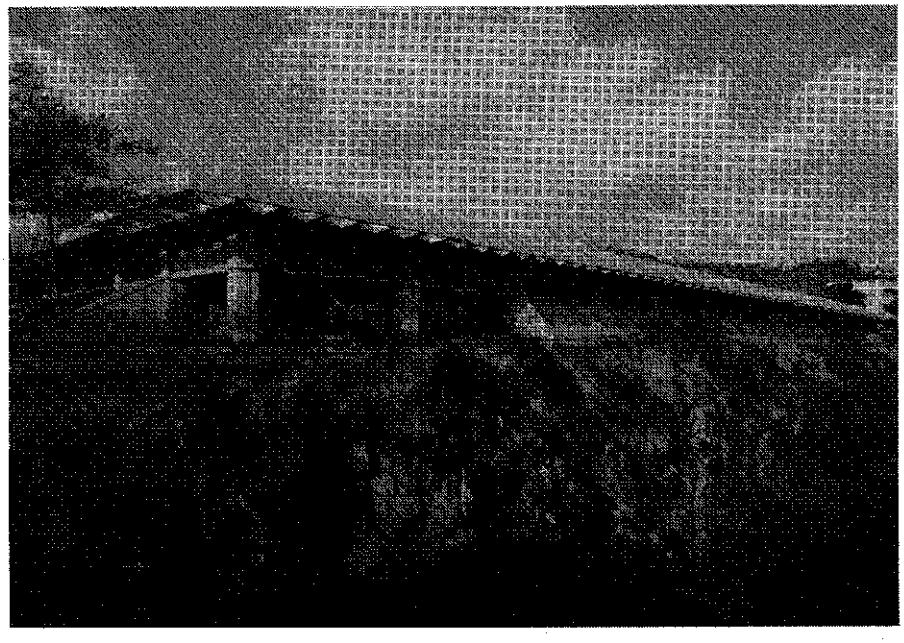
avant garde providing ongoing clinical practice opportunities (including service to low-income folk) and focus on uniquely Hawaiian problems, (3) a capacity to raise private funds (including endowed chairs) and attract notable visitors, (4) a competitive student body and a small, but active and loyal alumni core, (5) a notable contributor in Asian studies and comparative law, and (6) an interesting and achieving faculty in teaching and research. Those of us who, for whatever reasons, saw the need to limit scope in the face of realities have been proven wrong. The combined pressures of the bar, the faculty with interests in the creation of knowledge as well as its dissemination, the accrediting agencies, the desires and demands of students for a competitively advantageous educational experience, and a number of skillful leaders at the school, have overcome the seeming obstacles of practicality. Perhaps this is because, undergirding the process, the creation of the school had to satisfy two powerful demands—access to the legal profession for able low-income applicants from Hawai'i and a center to facilitate the solution of legal and policy problems of the State. Only a full-scale law school could do both.

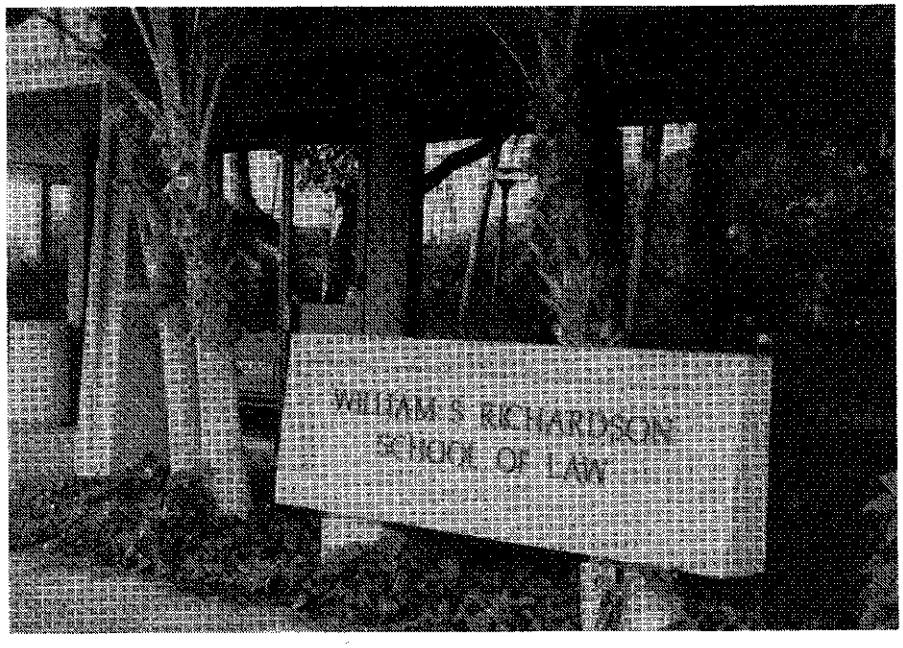
Tributes to the William S. Richardson School of Law on Its 25th Anniversary



Chief Justice William S. Richardson

A Silver Celebration: In Honor of the 25th Anniversary of the William S. Richardson School of Law





Justice Ruth Bader Ginsburg*

Justice John Paul Stevens and Justice Anthony M. Kennedy, my predecessors as a Jurist-in-Residence, told me that the program was among the most rewarding teaching ventures they had experienced. Any exaggeration I suspected proved undue. After spending February 2-5, 1998, with the faculty and students of the William S. Richardson School of Law, I found that, if anything, my colleagues' good reports were understated. Now over, my stay is something to remember when it is time to dream.

In the classes in which I participated, the students were engaging. At formal lectures, the audience was altogether *sympatique*. And in conversations throughout the week, many people asked thoughtful, sometimes hard, but unfailingly polite, questions. The diversity of cultures and ages was extraordinary, and at most sessions I counted at least as many women as men.

On the social side, there were delectable receptions and dinners, an unforgettable ride on Pacific waves in an outrigger canoe paddled by an expert crew, and a captivating halau hula. Most of all, I will recall the caring and civility, even gentleness, that marked my exchanges.

To all involved in the planning and realization of my visit, may I say Mahalo, and to all concerned with the School of Law, cheers and best wishes for the next 25 years.

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* Associate Justice, Supreme Court of the United States.

The Honorable Myron H. Bright*

I was an early visitor to the University of Hawaii School of Law before construction of the William S. Richardson School of Law building. That first visit occurred in November of 1982. At that time, Professor Philip Elman invited me to speak to his class about my experience as a judge and I visited with students and faculty. I liked what I saw—a diverse student body intensely interested in the study of law and a faculty dedicated to educating young men and women to become lawyers.

Accompanied by my wife Fritzie, I returned again and again to this Law School. It has been a great pleasure for us. I participated in jurists-in-residence programs in the years 1987 (with Justice John Paul Stevens), 1990 (again with Justice John Paul Stevens), 1992 (with Justice Byron R. White), 1994 (with Justice John Paul Stevens), 1996 (with Justice Anthony M. Kennedy) and in 1998 (with Justice Ruth Bader Ginsburg). I have also taught an accelerated course in appellate practice on two occasions. I am very proud of my association with the students, faculty, administration and staff over these several years and with the lawyers of Hawaii, many of whom are graduates of the William S. Richardson School of Law.

I congratulate and salute the lawyers who have graduated from this excellent school and serve the public, the deans (past and present), the faculty and staff during the past twenty-five years, and the citizens of Hawaii who support a great law school and a great university—the University of Hawai'i at Mānoa. Aloha!

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* Circuit Judge, United States Court of Appeals for the Eighth Circuit.

The Honorable David Alan Ezra*

I began my teaching career at Richardson School of Law in 1978, this year marking my twentieth year as an adjunct professor. My two decades of association with the law school have given me many fond memories, and brought me many fine friends. When I began teaching in 1978 I had the dubious distinction of being assigned an office in the old quarry complex which had a sink hole in the middle of the floor. It goes without saying that office hours were always an adventure. Things have changed much since those early days in that dusty quarry. The construction of the law school building on Dole Street brought a new optimism to the school. But things have not always been easy nor free from controversy. One thing however, has never changed, and that is the enthusiasm, and vitality of our students. And while I am very proud of the quality of our distinguished faculty, in my view it has been the dedication of our students to a quality legal education in Hawai'i which has been largely responsible for the law school's rise to a position of prominence in legal education now recognized nationally.

I am again privileged this year to teach a class of over twenty bright and energetic second and third year students, the course in Federal Courts. It is a course with many complex jurisdictional and constitutional issues to be mastered. But my students never disappoint me in their ability to grasp this often difficult material, and to challenge me intellectually with their insight. Over these many years it has been my great joy to see my former students graduate and become successful in the practice of law, business, government and community service here in Hawai'i. We have all been indeed fortunate for the many significant contributions of the Richardson School of Law these past twenty-five years, and I am confident that our students will continue to have a positive and meaningful impact on our community in the years to come.

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* Chief Judge, United States District Court for the District of Hawai'i.

Temporary classroom buildings at the 'Quarry'

The Honorable Alan C. Kay*

I wish to extend my congratulations to the William S. Richardson School of Law upon its 25th Anniversary. I particularly congratulate former Chief Justice William S. Richardson for his foresight, Dean Larry C. Foster for his leadership, and the faculty, students, alumni, and supporters. The law school's rapid rise to being ranked within the top 50 law schools in the nation is indeed remarkable. The outstanding array of judges and attorneys who have graduated from the school are proof of the fruit which it has borne. In serving as Counselor of the Aloha Branch of the American Inns of Court I am constantly impressed with the quality and dedication of the students with whom I come in contact. I am confident that the school will continue to excel.

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* District Judge, United States District Court for the District of Hawai'i.

The Honorable Samuel P. King*

In 1972, I was sworn in as a United States district judge for Hawai'i. In 1972, David A. Hood was appointed first Dean of the Law School and Director of Legal Education for the University of Hawai'i. Thus Hawai'i's law school as the intellectual center of legal thought in the Pacific, and I as a federal district judge who has held court throughout the Pacific, grew up together.

Early on, the law school and I formed an association which continues to this day. Being a new federal judge, I wondered how best to learn the requirements of my position other than just on the job training. The solution offered by the law school was to let me be their adjunct professor on Federal Courts for several semesters. This was a wonderful education for me and also got me the leading available text books on the subject. Whether the students learned as much from the course as I did is questionable.

From the beginning, I looked to the law school for externs and clerks. Mary Durant from the first class was an extern in my chambers. Thomas Kaulukukui from the second class was a law clerk for me following his graduation.

When I took senior status in 1984, I promised one of my two clerkships for local graduates. Even before that I had already had several local clerks over the years. In recent years, both of my two authorized law clerks have usually been local graduates.

I say without qualification that those clerks who have served with me have been well trained excellent lawyers.

A law school is the final piece that completes the structure of the rule of law which we endorse as basic to our society. We look to it not only to produce lawyers but also to provide critical overviews of our courts, our laws, our legal procedures, our performance in promoting justice.

Twenty-five years of service is a pretty good beginning. Congratulations are in order, and also continuing support toward an even brighter Golden Anniversary.

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* Chief Judge Emeritus, United States District Court for the District of Hawai'i.

The Honorable Ronald T. Y. Moon*

The Hawai'i legislature authorized the creation of the law school at the University of Hawai'i in 1971. Hawai'i is a much different place now then it was then, in large part because of the positive contributions the law school and its graduates have made to law and the politics of Hawai'i's state government. The law school's graduates have influenced the development of the law, in service to their clients and the people of the State of Hawai'i , from the very beginning of the school. The school's graduates have become not only members of a learned and honorable profession, but also public servants with service in the constitutional convention, the legislature, as Governor, and in the Judiciary.

The law school was established to give local students an opportunity for a career in the law and to provide a forum for research in law of particular importance to Hawai'i.[1] It has certainly met those goals. The law school provides local students of modest means and of all ethnic and cultural backgrounds the chance to enter the legal profession without incurring additional expenses that moving to the mainland would require. In the later 1800's, former Chief Justices Charles C. Harris and Albert F. Judd established a law school that brought native Hawaiians and others into the bar.[2] Little information is available about that law school, and it may not have been more than "reading law" with the justices or members of the bar, but the Richardson Law School has built upon and expanded that concept by providing an opportunity for all local ethnic groups to enter the legal profession. The results are a bar and a Judiciary that looks more like "us": diverse in race, gender, national origin, sexual identity, and religion. The mix of ethnic groups from the Richardson Law School and mainland law schools broadens our views of the law and the society it regulates. Hawai'i's lawyers and judges boast a breadth of cultural experiences that add depth to the practice and application of the law.

The Richardson law School, with its emphasis on *pro bono* activity and issues important to Hawai'i, and its yearly output of educated and trained members of the community makes our legal community, both members of the bar and the Judiciary, more aware and respectful of ethnic and cultural variations and assists us in addressing legal issues with a cultural sensitivity that contributes and expands our understandings of justice and the rule of law.

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* Chief Justice, Hawai'i Supreme Court.

[1] *See* H.R. STAND. COMM. REP. No. 633, 6th Leg., Reg. Sess. (1971), *reprinted in* 1971 HAW. HOUSE J. 956, 956-958.

[2] *See* In re Resolutions on the Death of the Late Chief Justice Judd, 12 Haw. 427, 432 (1900).

The fact that the law school is celebrating its twenty-fifth anniversary is a tribute to its graduates and their commitments to justice and public service. Unlike the recognized need for lawyers that led to the law school's creation,[3] some vocal critics of today's society blame lawyers for society's problems. Such critics do not realize the contributions lawyers make to good governance and that, unfortunately, few lawyers are attracted to public service. The Richardson Law School's graduates seem to be an exception to the trend and offer their needed talents to the honor of public service in spite of the lack of resources committed to funding representation for the poor, the oppressed, and the least amongst us. The Richardson Law School's commitment to ethical responsibility, public service, and the promotion of justice awakens the conscience of those who would abandon a fundamental commitment to these principles and that, I submit, is a significant reason why the law school has, will, and must continue to thrive.

The Supreme Court of Hawai'i, the Intermediate Court of Appeals of Hawai'i, and the Hawai'i trial courts benefit greatly from the local talent that exits our law school each year. Half or more of the law clerks hired by the Judiciary are graduates of the Richardson Law School. Since my appointment to the bench in 1982, I have had a total of twenty-nine law clerks at the circuit and supreme court levels—sixteen of whom graduated from the Richardson Law School. I have found one distinct advantage in hiring Richardson Law School graduates: they do not require lessons in translating words or phrases used by witnesses during trial or as set forth in trial transcripts such as "pau," or "he gave me stink eye," or "I was driving makai on Keeaumoku, turned onto Kapiolani and headed in the ewa direction," and so forth. Seriously, our local law school graduates provide a valuable service to the Judiciary as they continue training in our courts and act as bridges between the courts, the bar, and the community.

In conclusion, I applaud the law school's first twenty-five years of service to the bar, the community, and the cause of justice. I encourage and support the law school as it continues its mission of providing excellence in legal education and scholarship and in promoting justice, ethical responsibility, and public service.

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[3] *See* H.R. STAND. COMM. REP. No. 633, 6th Leg., Reg. Sess. (1971), *reprinted in* 1971 HAW. HOUSE J. 956, 956-958 at 956 (noting that Hawai'i had the fourth lowest ratio of citizens to lawyers in the nation and noting the difficulties in getting adequate representation for the poor); and SEN. STAND. COMM. REP. No. 797, 6th Leg., Reg. Sess. (1971), *reprinted in* 1971 HAW. SEN. J. 1144, 1144-1146.

The Honorable Thomas K. Kaulukukui, Jr.*

I entered law school in 1974 and was in the second graduating class in 1977. I am fortunate to have an especially broad perspective of how my legal education trained me for an uncertain future. I went on from law school to serve as a clerk for a federal judge; a commercial litigator; an adjunct law professor; a circuit judge; a business executive; a trustee; and now a parent of a Richardson Law School graduate. I am grateful that the school and its faculty prepared me well to meet each and every challenge. The school has developed its own proud history, but its enduring legacy will be measured by how its graduates serve their communities. In that regard, we can all be proud of our record.

* Former Circuit Judge, Circuit Court of the First Circuit, State of Hawai'i.

The Honorable James R. Aiona, Jr.*

Without a doubt the William S. Richardson School of Law has been a benefit to the State of Hawai'i. Without it myself, as well as many other residents, would not have been able to attend law school, and become productive professionals within this community. For myself it was the school's pre-admission program for students of Hawaiian ancestry which provided me with the opportunity of becoming a member of the legal profession. For others it provided affordable legal education.

Honolulu is not a small city, and the legal profession is large. But as a result of the law school the legal community is a tight-knit profession, with much more civility than those of a similar size. Networking among the various attorneys is relatively east, and as a result of this ability to obtain assistance, the practice of law in this community is not as "intense" and "competitive" as other legal communities. Again this can be attributed to the number of William S. Richardson graduates practicing at "home."

Twenty-five years of existence solidifies the school's integrity and commitment to the legal community. In twenty-five years the school has established the quality of its curriculum, faculty, and reputation throughout the country and Pacific Region. An existence of twenty five years sends a clear message that the school is "here to stay."

Being a graduate of the school's sixth class is "special." Memories—of the school's campus (two portable buildings in the "quarry"), establishment of the Ete Bowl, traditional school parties, and small accessible faculty as compared to the school's present facilities, status, and faculty—really punctuate the definition of a "pioneer." It is especially thrilling to know that the foundation laid in 1973 has been perpetuated for twenty-five years. The spirit of Aloha and feeling of Ohana continues to be the cornerstone of the William S. Richardson School of Law.

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* Circuit Judge, Circuit Court of the First Circuit, State of Hawai'i.

The Honorable Daniel K. Akaka*

It is with great pleasure that I extend my warmest aloha and best wishes on this 25th anniversary of the William S. Richardson School of Law.

Tonight, you come together to commemorate an important milestone marking twenty-five years of achievement and contribution of this law school, its graduates and faculty. The William S. Richardson School of Law has served Hawai'i's community well. It has provided many in our community the opportunity to study the law; and provided an academic base for our legal profession and law-related education forums, programs and activities.

As you celebrate this 25th anniversary of the William S. Richardson School of Law, may I also take this means to congratulate your Honorary Chairs, Judge Betty Vitousek and the school's namesake, Chief Justice William S. Richardson. Tonight is as much a celebration to give recognition to you who have given so much of yourselves over these many years to help the arrival of this anniversary. My mahalo to you for your many contributions to your profession and our community.

The William S. Richardson School of Law continues to preserve and sustain its commitment to excellence in providing quality education with high standards of achievement. As we look to the future, I am confident that this school, with the help of its alumni and friends, will continue to uphold this commitment to excellence.

On this joyful celebration of the reunions of the Class of 1978 and the Class of 1988 and the William S. Richardson School of Law's 25th anniversary, my congratulations and best wishes.

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* United States Senator, State of Hawai'i. This message was originally presented at the Silver Celebration Dinner on April 18, 1998.

The Honorable Neil Abercrombie*

It is a pleasure to send my heartfelt Aloha to all of you attending this evening's Silver Celebration. Tonight the William S. Richardson School of Law, University of Hawai'i at Mānoa, celebrates 25 years of educating and contributing some of Hawai'i's finest and most distinguished advocates and leaders in both the public and private sectors.

The William S. Richardson School of Law was recently recognized as one of the top 50 law schools in the United States. Part of its success is attributable to its rich ethnic diversity and the outstanding capabilities by students who have attended. This is reflected in the number of graduates who have consistently outperformed other law school graduates on the Hawai'i State Bar Examination.

The commitment to our community by the law school is demonstrated by the countless hours of "pro bono" work that is a requirement for graduation. Through instilling a sense of duty and service to the community, the graduates become an invaluable addition to our people and state.

Mahalo to the William S. Richardson School of Law, the University of Hawai'i, and to each of you for your contributions.

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* United States Representative, First District, Hawai'i. This message was originally presented at the Silver Celebration Dinner on April 18, 1998.

The Honorable Patsy T. Mink*

I am delighted to join in commemorating the Silver Anniversary of the William S. Richardson School of Law.

On the one hand, it seems incredible that 25 years have passed since the founding of the law school; on the other hand, it is remarkable that the law school has reached its current level of excellence in 25 short years. I was so proud to learn that the University of Hawai'i's law school was ranked in the top 50 nationwide!

Having a law school at the University has provided so many of Hawai'i's bright college graduates with the opportunity to pursue a career in law that would not otherwise have been possible for them. The distinguished list of the school's alumni is a testament to the significant contribution the school has made to our state.

I join all of you in extending my sincere congratulations and thanks to the many people who have fostered the development of our law school. In particular, I want to acknowledge former Chief Justice William S. Richardson; former deans David A. Hood, Cliff Thompson, Richard S. Miller, and Jeremy T. Harrison; Dean Lawrence C. Foster; and, especially the faculty and students, past and present.

Best wishes for a wonderful anniversary celebration.

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* United States Representative, Second District, Hawai'i. This message was originally presented at the Silver Celebration Dinner on April 18, 1998.

Lieutenant Governor Mazie K. Hirono*

It is a pleasure to join you in celebrating the 25th anniversary of the University of Hawai'i School of Law, an institution that has created professional careers, enlivened social discourse and inspired a generation of students to public service.

From the outset the School of Law had an ambitious agenda: not only would it represent a uniquely island-oriented opportunity for legal education, it also would provide a curriculum of such quality that its graduates would be competitive wherever fortune and circumstance took them.

For 25 years the school has met these goals with academic competence and professional rigor. Graduates of the Richardson School of Law bear enviable credentials; their standing is assured.

We're all proud of the school. It is the source of superior legal education, and it makes an important contribution to the community. I join its faculty, students and members of the bar in applauding its accomplishments and pledge to it my continuing support.

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* Lieutenant Governor, State of Hawai'i.

Jon Van Dyke*

I was invited to join the faculty of the William S. Richardson School of Law in 1976, and have had the honor and pleasure of teaching at this School during all but the first three years of its existence. Because I teach Constitutional Law (a required course), I have taught almost every graduate of the School for at least one semester. I also teach International Law, International Human Rights, and International Ocean Law, and have been able to work with many of the students in smaller classes as well.

The students at our Law School have always been motivated, intelligent, hard-working, curious, lively, and friendly. They come from diverse cultures and backgrounds, many arriving at law school after successful careers in other fields. From the outset of the School, we have had substantial percentages of women in the student body, and they have played important leadership roles in the School. We have also graduated many lawyers from ethnic groups that have been traditionally underrepresented in Hawai'i's bar—including persons of Native Hawaiian and Filipino ancestry—and we have trained a number of talented individuals from Micronesia, Guam, and Samoa. Our students come to class ready to learn and respond with interest and enthusiasm to the material put before them. They ask tough questions of the faculty and require us to keep current with the developments and theoretical thinking in our fields.

Our student body has been particularly enriched by the students that have entered our School through the Pre-Admission Program, which identifies disadvantaged students who show the promise to become lawyers but do not have the numerical criteria to enter through the regular admission process, and in the Pacific and Asian Legal Studies program, which seeks students with experience in this region. We also emphasize environmental studies and encourage students to focus on this field. The students on our Philip Jessup International Law Moot Court Team have won a National Championship and many other awards for brief-writing and oral performances. The other moot court teams we have fielded have always held their own in national and regional competitions and have frequently brought back trophies in triumph. Our Law Review has produced distinguished issues year after year which provide valuable commentary for our bench and bar.

Although many students venture off to the big cities of North American and Asia for their careers, many others remain in Hawai'i, and one of the wonderful experiences that I have had is to watch how they blossom into able lawyers and distinguished leaders in our community. Sometimes when I am

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* Professor of Law, University of Hawai'i, William S. Richardson School of Law; B.A., Yale University, 1965; J.D., Harvard Law School, 1967.

at court waiting to argue a motion, I will see a series of former students speak up on their cases before mine is called. Even those students who seemed shy and nervous in class invariably speak right up, arguing their position persuasively and with skill. On occasion, I have had the chance to work with former students on litigation or consulting assignments, and it has been a personal thrill to experience the transformation of a teacher-student relationship into one of lawyerly collegiality. It would take too long to mention our many alumni who are using their skills for the betterment of the community, but they are in evidence everywhere and Hawai'i is unquestionably a better place because of the differences they are making.

Our Law School began in humble quarters in the early 1970s, but through steady leadership and a clear focus on our goals, the School has become accepted as a fixture at the University and the State. We have been blessed with hard-working and capable Deans and Acting Deans—David Hood, Jerry Dupont, Cliff Thompson, Marvin Anderson, Richard Miller, Jeremy Harrison, and now Larry Foster. Each has helped the School through difficult challenges and each shares the credit for building its stature. Marv Anderson played a particularly crucial role in ensuring the survival of the School. He came here after being Dean for about ten years at the Hastings College of the Law (University of California) in San Francisco, and he shepherded the planning and construction of the buildings we currently occupy. He later served as Chancellor of the Mānoa campus and then at the East West Center, and helped our entire academic community aim for excellence and adopt procedures that have served us well during the past two decades. We have had other able administrators over the years, providing crucial support for our academic mission, including Leigh-Wai Doo, Judy Kirdendall, Larry Kam, Joanne Punu, Bob Daguio, and our current Associate Dean Carol Mon Lee.

The faculty at our Law School has been a remarkably talented and congenial group. Each member of the faculty is an excellent classroom instructor, has contributed important scholarship to promote the development of the law, and has participated actively in community affairs. Many travel frequently to Asia and the Pacific Islands to work with colleagues in our region on important legal issues of mutual interest. The faculty has been stable, for the most part, and we have been fortunate to have only occasional turnover. Some of those individuals who have left the faculty have gone on to distinguished careers in the Honolulu bar or have done well in other academic communities. We are still mourning the untimely death of Professor Judy Weightman, who guided our Pre-Admission Program for a decade, and served as a sparkplug for the faculty, always reminding us of what we could do with a little more effort and, at the same time, always keeping our professional work in perspective with her wry sense of humor and infectious laugh. We have also benefited over the years by having excellent adjunct

professors to teach specialized courses, including U.S. District Judge David Ezra, who now teaches the Federal Courts course, and U.S. Magistrate (and former Chief Justice of the Federated States of Micronesia) Edward C. King, who teaches the course on Pacific Islands Law.

Our library has not always been properly funded, but it nonetheless continues to serve as a valuable research center, and we are grateful to the work of Jerry Dupont, Bo Pickron, Igor Kavass, and Lei Seeger in building and maintaining our collection. Our School owes much of its sense of community to the administrative and faculty secretaries who have been with us for virtually the entire life of the School, Yvonne Kobashigawa (the secretary for all our Deans), and Frieda Honda, Helen Shikina, and Jane Takata, who have always served the faculty with skill and good cheer.

In all phases of the School's existence, it has faced challenges and setbacks, and the present era is no exception. The decline of the East-West Center has meant fewer colleagues in some important fields and fewer scholarships for our students. The Law of the Sea Institute was forced to leave our Law School in 1996 because of a lack of University financial support. The funding problems facing the University have meant that some departments we used to collaborate with have fewer faculty in areas in which we would like to be engaged in interdisciplinary work.

Nonetheless, the William S. Richardson School of Law is doing fine. The 1998 ranking of the School in the Top 50 Law Schools by U.S. News & World Report confirmed what we already knew—that we have an excellent small law school at the University of Hawai'i. In the coming years, we hope to build an LL.M. or M.C.L. program for graduate students interested in Pacific and Asian Legal Studies and to expand our student body somewhat in order to be able to enrich our curriculum and add faculty positions.

Each May, our graduation is a sad-happy affair for the faculty. We are sad that students with whom we have worked for three years will be leaving the campus for their careers and lives, but happy that they have mastered the many challenges we have confronted them with and are fully capable of becoming fine attorneys. And then in each August, the rhythm of our academic calendar begins again and a new group of talented and motivated students arrive, eager to start the process of learning legal analysis.

The vision that Chief Justice William S. Richardson had when he launched our School has been fulfilled, and we hope to continue building on that vision to provide an even stronger center for learning and thinking about the law for Hawai'i and the Asia-Pacific region.

Calvin Pang*

We cannot forget for a moment that a huge part of what makes this school great is our students. Their energy, creativity and passion drive so much of what goes on here. Sometimes I worry about the dispiriting aspects of legal education and the practice of law. Then I catch an occasional glimpse of the joy with which many of our students live life, and I think "we're going to be okay."

I think of how the students say good-bye to those who depart our law school community. I think of how they rise in protest against things that impact them and their education. I think of how they assume responsibility on the teams we send to nation and international student competitions. I think of the raw intelligence and emotion they bring to class discussions and to clinic clients. I think of how they are available to each other, to their communities, and to us, their teachers. Then, I think, "Boy, we pick 'em good."

On the other hand, they picked us too. Which makes us pretty lucky.

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* Assistant Professor of Law, University of Hawai'i, William S. Richardson School of Law; B.S., Case Western Reserve University, 1976; M.P.H., University of Hawai'i at Mānoa, 1981; J.D., University of Hawai'i, William S. Richardson School of Law, 1985.

Hazel Beh*

It is an honor to have the opportunity to express my gratitude to the William S. Richardson School of Law on its 25th Anniversary. I am a proud graduate of the Class of 1991 and a member of its distinguished faculty.

I am indebted to those leaders in our state who saw the great potential a law school in Hawai'i held for our citizens. They persevered against a chorus of doubting voices and convinced skeptics that having a law school in the state would immeasurably improve access to justice for Hawai'i's citizens. They envisioned a law school that would prepare lawyers to tackle the unique and important issues that faced our island state and to become not only "movers and shakers," but also facilitators and peacemakers. They realized that a good law school in Hawai'i could enrich and stimulate Hawai'i's legal community and help to keep the law new and exciting for all who practice in this state. They also recognized that a law school in Hawai'i could give men and women yearning to join this wonderful profession—an opportunity that an ocean of barriers otherwise prevented. These community leaders also realized that establishing a public law school at the University of Hawai'i would raise the stature of the University and offer its best and brightest undergraduates the potential of a very exciting career.

I am also indebted to a law school faculty who has demonstrated extraordinary integrity and competence in their own work and who have held their students to these same high standards. Their uncompromising commitment to academic excellence and professional responsibility ensured that the school's graduates would be welcomed into Hawai'i's small legal community. The onerous "C" curve that they adopted early in the school's history told everyone that William S. Richardson School of Law coddled no one, and that our graduates could perform ably alongside the best and brightest from any institution in the nation. The rapid ascent of this school to its national ranking among law schools and its stellar reputation in Pacific Asian Legal Studies and Environmental Law are due largely to the faculty's collective vision of how good this school could be. They did not compromise in their work, they did not allow students to compromise the quality of their efforts, and they have held the university to its commitment to provide students with a first-class legal education.

I am indebted to a law school administration who brought this school to accredited status with the American Bar Association and membership in the

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* Assistant Professor of Law, University of Hawai'i, William S. Richardson School of Law; B.A., University of Arizona, 1973; M.A., 1975, Ph.D., 1985, University of Hawai'i at Mānoa; J.D., University of Hawai'i, William S. Richardson School of Law, 1991.

selective American Association of Law Schools. The administration wisely insulated the school's admissions process from outside influences and was willing to take the consequences for that decision. The administration, early on, recognized that coveted slots in each entering class must be awarded on an applicant's merits and potential and not on who one knew or what pressure could be brought to bear on the selection committee. By ensuring the integrity of the admissions process, the administration ensured the community's high regard for the school's graduates.

I am also indebted to a once fairly homogenous state bar who welcomed the diversity in both color and gender that the William S. Richardson School of Law graduates brought to its ranks. There is hardly a firm in town that does not seek out our graduates for employment. Many law firms also willingly and generously provide gifts, scholarships and other monetary awards to our students and financial support for faculty research. Each year, countless practicing lawyers judge our student competitions, serve as adjunct faculty, and participate in our classes as guests. Now, we are them and they are us. Our state bar is achieving the diversity of our state and we are all the better for it.

Finally, I am grateful and indebted to all of this school's graduates, both those who came before me and those who came after me. Every year, as students begin their studies, they are cautioned to begin at once to establish a lifetime reputation for honesty and civility. When our graduates conduct their lives and practices with integrity and treat others with respect, they bring honor to this school and to each other. The stature of our graduates in the legal profession brings honor to me, one of your ranks, and I thank you.

Sherri Burr*

I feel fortunate to be visiting the William S. Richardson School of Law during its 25th Anniversary year and while I am working on a project on the art of leadership. The Richardson School of Law strikes me as a special place. It was named for a legendary leader in the Hawaii bar and seems destined to lived up to that designation by reaching the top tier of law schools as it celebrates the 25th year of its existence.

The Richardson School of Law is also special because of the integrity and creativity of its students, and the dedication of its faculty and staff. As I listened to UH students in my classes and have watched them perform in activities ranging from international moot court and client counseling competitions to dancing in the Halau, I often think that if more law students and lawyers were like them, our profession would rise in the esteem of the public. UH law students are competent and competitive without the unpleasantness that plagues many law schools. Further, because these students are served by a staff and faculty committed to their growth, the State of Hawai'i will benefit from having the UH law school in its midst for many decades to come.

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* Visiting Professor of Law, University of Hawai'i, William S. Richardson School of Law; Professor of Law, University of New Mexico; A.B., Mount Holyoke College; M.P.A., Princeton University, 1988; J.D., Yale Law School, 1981.

Speeches Presented at the 25th Anniversary Celebration Ceremony

The Making of a Law School

Frank Damon*

As I look out over this assembly, I can see that most of you are too young to remember, and some of us perhaps too old to fully recall, what it was like before Hawai'i had its own Law School.

So let me take you back about 30 years when it all began. What were some of those early hopes and dreams at a time when others considered a local Law School as unnecessary?

Hawaii was in the early stages of adjusting to statehood. The economy and the population were growing and with that came new challenges. Thus, one argument for creating our own law school was to give us the ability to solve our own problems and not depend upon outsiders. For who else could better understand the uniqueness of Hawai'i and its multi-ethnic culture, its history, and the many distinct differences inherent in an island community?

The statistics supported the argument. Hawai'i ranked near the bottom compared to all other states in the ratio of lawyers to the whole population. And while some argued that our population was too small to support a law school, we found that five other states with smaller populations already had thriving law schools.

Supporting this desire to participate in solving our own problems, was another underlying reason. As I recall, this was not formally cited by proponents, but it was a definite factor in their minds. It was stated by the late Governor John A. Burns when he addressed the opening of the Legislature in 1969. He said:

> I sense among some elements of our community a subtle inferiority of spirit which becomes for them a social and psychological handicap.
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> You who have grown up here know full well what I mean. You know, too, that there should be no basis for this feeling.

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* B.A., Yale University, 1950; LL.B., University of Colorado School of Law, 1953. This is a transcript of a speech presented at the 25th Anniversary Celebration Ceremony on September 4, 1998.

> Our people are equal to their counterparts anywhere, and they should be proud of their ethnic roots, and of the riches and treasures of their Pacific and Asian cultures.

Thus, a Hawai'i law school could be an equalizer by providing an opportunity to join the legal profession for Hawai'i citizens regardless of race, social or economic background—and not, for example, just for those who had the resources to enter a mainland law school.

Another major point was best expressed by Chief Justice Richardson in 1968 when he said: "we do not do so—solely to meet Hawaii's needs, but this attitude is narrow and provincial."

What he and others envisioned was a law school that reached beyond Hawai'i and beyond the narrow concept of being just another state law school or a trade school. Our school should reach to and benefit—the rest of the University, the Hawai'i legal profession, the entire Hawai'i community, and beyond our own shores the rest of this country, and even the entire Pacific region.

This would be an institution which not only developed capable attorneys, but imbued them with the highest ethical standards and a personal commitment to public service.

Those were the hopes and dreams of our founders.

Today, the William S. Richardson School of Law is more than just another state law school. It is distinguished by its history and embodies those founding values.

True, the school has had its share of growing pains. But as the speakers who follow me will articulate, its achievements are numerous.

On the lighter side, some of those achievements could be listed in the Guinness Book of Records; such as:

The only law school with a hula halau;

The only law school with a dean who speaks fluent Chinese.

The only law school in the world that has taken a U.S. Supreme Court Justice on an outrigger canoe ride.

But on the more serious side, there are accomplishments that will have a lasting impact on the community here in Hawai'i and throughout the Pacific.

I hope I'm not intruding on the other speakers today, but let me mention just one. I speak of ethics and civility. It was well described to me just last week by a UH law graduate now in private practice in Honolulu. He said:

> My classmates and I were first impressed and then imbued with the school's emphasis on ethics and civility. This occurred not only in our courses and in the expressions of individual professors, but it was also reflected in a more subtle way—a sense of ohana, of decency and of cooperation.

He also added that this spirit was pervasive and that today it is reflected in our community in the actions and conduct of the hundreds of UH law graduates in private practice as well as those in business and the academic world.

In conclusion (the two most eagerly anticipated words in any speech), I believe we can all feel comfortable that those original goals and values of the founders have been and continue to be met.

So for all of us here, and for those who follow, we bear a responsibility and an obligation to remember and to pass on, that history and rich heritage, to never lose sight of those values, and to protect and nurture them as we move into the 21st century.

A Graduate's Salute

Wayson W. S. Wong*

I am very proud to represent the William S. Richardson School of Law Alumni Association (WSRSLAA) at this program.

I have been privileged to be a member of the first graduating class of this law school and my daughter, Kimberly, is a member of the most recent graduating class. We together with the other 1,575 alumni of the law school bid you our fondest aloha.

The guiding purposes of the WSRSLAA has been to:

1. Provide a channel of communication between the law school, its alumni and its friends.
2. Further professional, educational and social activities among those sharing an interest in the law school
3. Encourage and provide funds to support the purposes.

We try to accomplish those purposes as follows.

Every year we sponsor at least one educational seminar to enhance legal professionalism within the bar. The seminar is usually open to any member of the public. In the past, professor Randy Roth has provided valuable information about federal income tax and Tony Kitchen of the HSBA has provided interesting information about using the Internet and the vast legal library within it—the Cornell Law Library on-line and the Library of Congress on-line.

Our social events are great. We have sponsored the famous Ete Bowl that pits the alumni ladies, affectionately known as the Bruzers, against the bright-eyed students who insist on being called Etes or Titas to the Max. It's an exciting game on Flag football, and these ladies give it their all. It creates a wonderful opportunity for fellowship among and between the alumni and the students.

We also sponsor golf, softball and bowling tournaments. We always hope we can raise money to further support the students, but the additional goal is to foster a spirit of belonging, cooperation and assistance among our alumni.

Our Association also hosts the Careers In Law Symposium for first-year students.

In recent years, we have had the honor and privilege of co-hosting an annual reunion, especially with the 20th anniversary graduating class. We started

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* B.S., University of Hawai'i at Mānoa, 1973; J.D., University of Hawai'i, William S. Richardson School of Law, 1976. This is a transcript of a speech that was presented at the 25th Anniversary Ceremony on September 4, 1998.

with my class of 1976 at the Blaisdell; everyone really enjoyed the event. The class of 1977 had a wonderful get together at the Queen Emma Summer Palace last year. This year, we had a great celebration with the law school at the Ala Moana Hotel. Our alumni particularly appreciated the praise and war words of support and encouragement by our Governor at that celebration.

Our Association is an active growing one. Our 1998 Alumni Association Directory is indeed impressive. It includes attorneys all over the world, from Denmark to Shanghai, from a former governor to many sitting judges, outstanding educators and talented litigators, and we really invite our other alumni to join us.

In its fledgling years, the Association needed tremendous effort, patience and caring. And thanks to very dedicated people like Jim Williston, Frank Hayashida, Robyn Au, Judith Sterling, Christobel Kealoha, Alexa Fujise, Stu Kaneko and so many others that deserve our recognition—we have made it. We are here to share and support.

We alumni understand that it takes hard work and dedication to maintain this great law school. We also understand that it takes money. We have been very active in fundraising activities for the school. Our alumni participation in fund raising is more than twice that of various other law schools such as Hastings and the University of Washington, but we need to do much better.

Financial need should not be a disqualifying factor for qualified Hawaii students who want a legal education. In the face of necessity tuition increases, our alumni need to work much harder to insure that financial need is not such a disqualifying factor. In the months and years to come, I hope but know that the WSRSLAA and our alumni will be up to this significant challenge. We all can rededicate our efforts in this regard. We, and everyone here, can make our caring contributions to the 25th anniversary challenge fundraiser by the end of this year.

The members of the WSRSLAA sincerely thank all of you here for giving us the opportunity to obtain an excellent legal education from one of the great law schools in this country. Mahalo Nui Loa.

Brandy Makers

Calvin Pang*

This is a bottle of brandy. It was retrieved from my grandfather's apartment when my dad and his brothers decided it was time for Grandpa to go to a nursing home. At first, the boys were going to throw it away since no one else in the family drank. But in a flash of insight, one of my uncles recalled the comfort, calm warmth, and even power that brandy brought to my Grandpa in the last years of his life. And so, he kept it as a memento. And here it is.

I bring this bottle not as a symbol of celebration but as a symbol of promise. Let me explain.

Brandy came to the new world by way of the Dutch. The Dutch thought it might be a good idea to reduce wine to a concentrate to that it could be more easily ported to other parts of the world. The ideas was that when one reached his destination, all he had to do was add water and, voila, wine. But as fate would have it, someone tried the concentrate. You could imagine what his initial response was: "Wow, why add water!?" And thus the birth of the liquor we now know as brandy.

The old name for brandy is "distilled spirits of wine." I like it because it suggests what the nature of the human spirit is. From what I am told, brandy packs a punch. You can't drink too much of it or drink it too quickly. And for good reason; it is wine distilled down to its essence. Even its vapors can be quite intoxicating. It is the enlivening quality of wine without which wine would only be bland liquid, maybe a little colored, but with no sparkle.

When we admit a student into this school, we look for this kind of sparkle. GPAs and LSATS are good, but an applicant becomes a truly viable and outstanding candidate only when his or her application suggests a dancing spirit. So when a new bunch of students get here—and we just got a new busload three weeks ago—we know that they are going to be terrific human beings with spirits ready to be stirred.

I would like to suggest that it is our duty as a law school to see that a student's spirit—the part that makes him or her truly human—is stirred and prodded to grow. For failing to do this would make us guilty of what other law school have been faulted for doing: that is, making proficient technicians in the law who have little concern for the human element that should underlie

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all that we do. This would be dangerous. As the great legal philosopher Karl Llewellyn once said: "Compassion without technique is a mess, but technique without compassion is a menace."

Several years ago, retired Chief Justice Warren Burger of the U.S. Supreme Court encouraged law schools to work harder to create excellent lawyers, stating that lawyers were important cogs in the machinery of society. While he meant this in a positive way, I find myself uneasy with his metaphor. Because if cogs are all we expect, cogs are all we're going to get. As we enter our second twenty-five years, my promise is that we will do better than just make cogs. We will be brandy makers; well, not really, but you know what I mean. We will take our place in encouraging and development of great people who are also competent lawyers. Of course, the development of great people cannot be our duty alone. Friends, families, employers have their roles too. But we have our part and we will not shirk it. It is our gift to you.

My vision is that the world will know that a lawyer from this school is not just a lawyer; that what comes from this school are people with wisdom and compassion, who can be warriors when they must, but who will, even in the heat of the fight, will actively seek ways for healing and reconciliation to occur. If we can accomplish this vision, we will impact the world in grand ways, and this school will truly be a valuable resource.

My students all know that I sometimes end class with a story. Today my closing story is this. Several weeks ago, I spoke with my uncle who is the custodian of this bottle, and asked him why my grandpa favored brandy. He said, "Your Grandfather was an old Chinese man. Like other old Chinese men, he believed that brandy gave him life." I don't know if there is any scientific basis for Grandpa's belief. But I think it makes for a pretty good metaphor. Ladies and gentlemen, thank you for listening. And thank you for supporting us as we continue to make brandy.

A Skeleton in the Legal Closet: The Discovery of "Kennewick Man" Crystalizes the Debate over Federal Law Governing Disposal of Ancient Human Remains

Michael J. Kelly*

> Hope springs eternal in the human breast;
> Man never Is, but always To be blest.
> The soul, uneasy, and confin'd from home,
> Rests and expiates in a life to come.
> Lo, the poor Indian! Whose untutor'd mind
> Sees God in clouds, or hears him in the wind;

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His soul proud Science never taught to stray
Far as the solar walk or milky way;
Yet simple Nature to his hope has giv'n,
Behind the cloud-topp'd hill, an humbler heav'n.
–Alexander Pope, An Essay on Man. Epistle i (1733)

I. INTRODUCTION

The blushing red sun cast a last furtive glance over the shoulder of the horizon as it prepared to sink into the night once again. These final, weak rays reflected in the eyes of our hero, a tall rather lanky man, as he stalked along a ridge of the Columbia mountain range, silhouetted against the fading sky. His ears pricked at the first bayful cries of the timber wolf, singing the setting sun to sleep. Clearly, it was time to descend into the verdant river valley below and seek some shelter. The man drew his furskins about him more tightly, pulled forth his crude stone knife, and began the journey down through the conifers and jagged rocks.

The first mountain dew was settling on the grass, and he could feel the cool wetness of it beginning to soak just a little through his well-worn moccasins as he ambled ever downward. Ambling was about all he could do, given that nasty spear wound he had received to his hip recently during an ill-advised attack on a neighboring tribe. It had healed somewhat, but the embedded stone spear point, the scar, and the awkward gait remained. Here he was, traveling through the mountains well past his life-expectancy of thirty-five. Moreover, his previously fractured ribs were always forgotten until he breathed hard, as he was doing now on this descent. Yes, after only forty-five summers, he was already an old man.

Stopping on an outcropping more than two thirds of the way to the flat-lands, he stood and looked out over the grassy plain to the river. He would reach that river in the next day or so, and then follow it until it conjoined with another river, moving east away from the protective mountains. At least he wouldn't have to worry about those saber-toothed cats anymore. He took a deep, raspy breath, wiped a hand across his damp, fair brow, and continued on. He would meet his fate a week later and die at the point where the rivers meet. The year was 7,200 B.C., and the riverbed where his body was found in 1996 A.D. was at the confluence of the Columbia and Snake Rivers in the Pacific Northwest, close to the border between the states of Washington and Oregon.[1]

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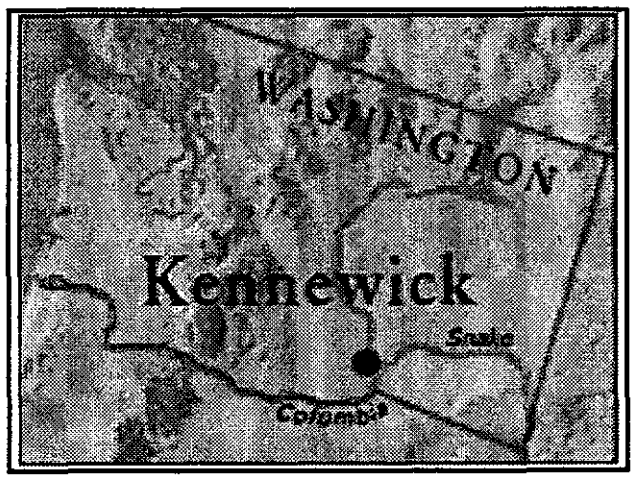
[1] *See generally*, James Chatters, Smithsonian Institution, *Northern Clans, Northern Traces: Journeys in the Ancient Circumpolar World* (visited July 14, 1998) <http://www.nmnh.si.edu/arctic/html/kennewick_man.html>; *see also* Andrew Slayman, *A*

Why did this man die? From whence did he come and what was his destination? Why was a fairly tall, fairly old individual with distinctive Caucasian physical traits traipsing across the eastern Washington plain with a spear-point embedded in his hip bone during an era and in a place where no Caucasoid humans were ever known to be? Was he utterly alone, a lost drifter, or was he a straggler from a larger migration that occurred when the Laurentide Ice Sheet receded from this part of North America six thousand years earlier?[2] Scientists, from archaeologists to paleoanthropologists to molecular chemists, desperately want to answer these questions and pose more of them in an attempt to place this person in an understandable context. However, it remains unclear whether they will be able to do so given the current, confused state of federal law touching on the proper disposal of recently discovered ancient human remains.



II. BACKGROUND: THE DISCOVERY & SEEDS OF DISSENSION

The discovery of this man's body is a fascinating tale of its own. On a warm, sunny July afternoon in the summer of 1996, two boys were wading in the Columbia River that winds through mid-state Washington, near Kennewick, waiting for a boat race to begin. The foot of one young man struck something round, and he bent down to pick it up. What he discovered when he lifted the object out of the water was a skull. After contacting local

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Battle over Bones, ARCHAEOLOGY Jan./Feb. 1997, at 16.

[2] Illinois State Museum, *Ice Ages: The Retreat of Glaciers in North America* (visited July 14, 1998) <http://www.museum.state.il.us/exhibits/ice_ages/index.html>.

police, the area was cordoned off and a search began that unearthed an entire skeleton. The body was taken to the coroner's office and, upon a suspicion that the remains were older than anyone had previously thought, anthropologist James Chatters was brought in to make a determination.[3] This is where our story begins; the story of the prehistoric traveling man that died so long ago at the confluence of the Columbia and Snake Rivers, and who has come to be known as "Kennewick Man".

The discovery proved to be portentous. Initially, Dr. Chatters thought, from a cursory look at the remains, that this was a white pioneer that had been buried on the family farm.[4] However, he was obliged to take a closer look upon finding a stone spear point lodged in the dead man's upper pelvis. His examination revealed that the bones were over 9,000 years old. Prehistoric human remains are a rarity in North America, even more so if they display what are commonly considered Caucasian traits. [The f]ollowing are the results of Mr. Chatters preliminary autopsy:

> The skeleton is nearly complete, missing only the sternum and a few small bones of hands and feet. All teeth were present at the time of death. This was a male of late middle age (40-55 years), and tall (170 to 176 cm), slender build. He had suffered numerous injuries, the most severe of which were compound fractures of at least 6 ribs and apparent damage to his left shoulder musculature, atrophy of the left humerus due to the muscle damage, and the healing projectile wound in his right pelvis. The lack of head flattening from cradle board use, minimal arthritis in weight-bearing bones, and the unusually light wear on his teeth distinguish the behavior and diet of Kennewick Man from that of more recent peoples in the region. A fragment of the fifth left metacarpal analyzed by AMS has an isotopically-corrected age of 8410 +/- 60 B.P. (UCR 3476) (ca 7300 to 7600 B.C.). Amino acids and stable isotopes indicate heavy dependence on anadromous fish. DNA was intact, but two partially-completed extractions were inconclusive.
>
> The man lacks definitive characteristics of the classic mongoloid stock to which modern Native Americans belong. The skull is dolichocranic (cranial index 73.8) rather than brachycranic, the face narrow and prognathous rather than broad and flat. Cheek bones recede slightly and lack an inferior zygomatic projection; the lower rim of the orbit is even with the upper. Other features are a long, broad nose that projects markedly from the face and high, round orbits. The mandible is v-shaped,with a pronounced, deep chin. Many of these characteristics are definitive of modern-day caucasoid peoples, while others, such as

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[3] *See* Douglas Ackerman, *Kennewick Man: The Meaning of "Cultural Affiliation" and "Major Scientific Benefit" in the Native American Graves Protection and Repatriation Act*, 33 TULSA L.J. 359, 360 (1997).

[4] *See* Dave Schafer, *Doc, Gorton Send 2nd Letter to Corps Addressing Bones*, TRI-CITY HERALD, Oct. 12, 1996, at A1.

the orbits are typical of neither race. Dental characteristics fit Turner's (1983) Sundadont pattern, indicating possible relationship to south Asian peoples.[5]

Drawing by Jamie Claire Chatters

Since the specimen was discovered on a "navigable waterway," it came under the jurisdiction of the U.S. Army Corps of Engineers, a federal agency subject to federal laws and regulations. Consequently, the Corps was seized by the question of what to do with its newfound and potentially troublesome charge. The Corps did not have to wait long for controversy to ensue. Upon resurfacing after millennia below the ground, Kennewick Man stumbled forth once again into the light of day to bring powerful antagonistic forces together that would ultimately invoke law, politics, ethics, science, religion and morality to stake their claims. Almost immediately a tug-of-war began, pitting several interested and combative groups against one another in an all out gambit to control the bones.[6]

Upon the announcement in the press about the true age and potential identity of the bones, several Native American tribes laid claim to them on the basis of ancestry and under the authority of federal law allowing for repatriation of Native American human remains discovered on lands that had been historically occupied by the claimant tribes.[7] Because of the age and

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[5] *See* Chatters, *supra* note 1. At the 1998 annual meeting of the Society for American Archaeology, Dr. Chatters and other scientists conjectured about whether Kennewick Man was actually a murder victim since it was clear that the Cascade-style spear point embedded in his pelvis contributed ultimately to his death. Professor Bonnichsen of Oregon State University noted, "[He] was shot in the hip. There was reactive bone growth." However, it remains unclear "who threw the spear." *See* Diedtra Henderson, *Ancient Bones Seem to Say Kennewick Man was Homicide Victim*, SEATTLE TIMES, Mar. 27, 1998, at A1.

[6] *See* M.L. Lyke, *Pagans, Tribes, Scientists Battle over Ancient Bones*, WASH. POST, Sept. 10, 1997, at A1.

[7] *See* Native American Graves Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3013 (Supp. III 1992). Note that NAGPRA applies not only to Native American groups within the

location of the skeleton, the Corps decided to repatriate it to local Native American tribes despite the concurrence of Dr. Chatters and Professor MacMillan of Central Washington University with Professor Krantz of Washington State University that the remains "cannot be anatomically assigned to any existing tribe in the area, nor even to the western native American type in general. It shows some traits that are more commonly encountered in material from the eastern United States or even European origin, while certain other diagnostic traits cannot be determined."[8] However, just before the Corps was set to return the remains, a group of eight forensic scientists filed suit in federal district court disputing whether the remains were, in fact, Native American and seeking an injunction on the repatriation until they could first study the bones.[9] Subsequently, a group of Norse Pagans also claimed ancestry, basing their claim on the Caucasian physical characteristics of the skeleton.[10]

Consequently, the "Kennewick Man," as he came to be known, found himself caught in a three-way battle between passionate Native Americans, invoking the powerful weapons of moral high ground and federal law, calculating scientists seeking expansion of human knowledge through arguments of logic and common sense, and fringe-group Norse Pagans falling back on their constitutional rights to freedom of religion. Meanwhile, the Corps was left holding the proverbial bag as the responsible federal agency with legal and physical custody of the bones.[11]

Leaving aside the claim by the Pagan group, the conflict between the scientific and American Indian communities is based on sympathetic points that each can understand and yet neither can back away from in good faith.[12] While the scientific community generally agrees that recent, identifiable human remains should be repatriated as soon as possible, they are very

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continental United States and Alaska, but also is specifically inclusive of Native Hawaiian groups in an attempt to broadly cover all those tribes, groups and individuals that are considered "native" to what is now geographically considered the United States. *See id.*

[8] *See* Slayman, *supra* note 1, at 17-18.

[9] *See* Bonnichsen v. United States, 969 F. Supp. 614 (D. Or. 1997); *see also* Timothy Egan, *Old Skull Gets White Looks, Stirring Dispute*, N.Y. TIMES, Apr. 2, 1998, at A12.

[10] *See* Bonnichsen, 969 F. Supp. at 618-19. While the Asastru Folk Assembly had previously been associated with white supremacist elements, representatives claim that those elements have been expelled.

[11] *See* Mike Lee, *One Year After Kennewick Man Surfaced, Battle over 9,200-Year-Old Skeleton Rages On*, TRI-CITY HERALD TRIBUNE, July 27, 1997, at C1. Dutch Meier, spokesman for the Army Corps of Engineers, Walla Walla District, said "The corps finds itself still in the middle of what is a very sensitive issue on several fronts." *Id.*

[12] *See generally* Mary Curtius, *Indian Remains are Bones of Contention at Berkeley Science: Professor Calls Them Invaluable Teaching Tools, Battles Colleagues and Tribal Leaders over Return to Museum*, L.A. TIMES, Apr. 27, 1998, at A1.

hesitant to repatriate prehistoric, unidentifiable remains.[13] Not only is this because prehistoric remains possess much more critical scientific, molecular and anthropological information than recent remains, but also because they are rarer.[14] Once unidentified remains are repatriated to what may or may not be the correct native tribe, they are buried in an undisclosed place, never again to yield up any more scientific information.[15] Understandably, forced repatriation of prehistoric human remains is often viewed as a crushing loss to scientists and archaeologists.[16] Understandably too, Native Americans view the process as belated justice toward their ancient elders that restores the spiritual integrity of those who have gone before.[17] "Generally, Native American's religious beliefs embody the idea that the spirit of an ancestor dwells within the physical remains as buried."[18]

III. AN UNAVOIDABLE CONFLICT OF INTEREST

There is a certain irony that the divergent perspectives of the scientific and Native American communities have come to clash on this issue, for at one time both worked together toward the common goal of preserving American

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[13] *See* George Johnson, *Indian Tribes' Creationists Thwart Archeologists*, N.Y. TIMES, Oct. 22, 1996, at A1:

> 'I can understand the loss of a collection when it relates to the recent past,' said Dr. Douglas Owsley, a forensic anthropologist at the Smithsonian Institution's Museum of Natural History, which has been compelled to turn over hundreds of prehistoric skeletons for reburial. 'Certain collections should not have been acquired in the first place. But we're seeing irreplaceable museum collections that can tell us so much about the prehistoric past lost and lost forever.'

Id.

[14] *See* Mike Lee, *Old Bones Open New Divisions*, TRI-CITY HERALD, July 26, 1998, at A1.

[15] *See* Tina Griego, *Bones of Contention; Scientists, Indian Tribes Deliberate over Disposition of Ancient Remains*, ROCKY MOUNTAIN NEWS, June 28, 1998, at 4A.

[16] *See* H.R. REP. NO. 101-887, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. (104 Stat.) 4367.

> For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them. This effort has touched off an often heated debate on the rights of the Indian versus the importance to museums of the retention of their collections and the scientific value of the items.

Id.

[17] *See* James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 13 (1992). "Many Indians assert that disinterment stops the spiritual journey of the dead, causing the affected spirits to wander aimlessly in limbo .... Reburial within Mother Earth enables the disturbed spirits to resume their journey." *Id.*

[18] Peter R. Afrasiabi, *Property Rights in Ancient Human Skeletal Remains*, 70 S. CAL. L. REV. 805, 812 (1997).

Indian heritage.[19] As John Peterson, an archaeologist for Colorado's Bureau of Reclamation, notes:

> Anthropologists in general have probably done more to preserve a record of Native American cultures than any other entity in American society. . . . [Historically] [m]useums were seen [by Native Americans] as places of safekeeping in the face of zealous missionaries, abetted by the Indian Bureau, who confiscated and destroyed symbols of Indian 'heathenism.'[20]

Just as there is an inherent struggle on the international level between undeveloped nations that are rich in antiquities seeking to preserve their past and artifact hunters and museums of the post-industrial world trying to collect/curate it,[21] so too is there now a struggle on the domestic front between Native Americans seeking to protect their ancient dead and scientists wishing to study those very bones.[22] To provide for an over-arching repatriation process, Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA")[23] in 1990.[24] This law generally mandates the identification and return of Native American human remains that are in the custody of museums [, universities receiving federal funds] and federal agencies.[25]

While NAGPRA attempts to balance the interests of both communities, that balance is difficult to achieve when the law is applied in particular to ancient remains.[26] The relationship between culturally identifiable and unidentifiable human remains is largely one between recent and prehistoric human remains respectively. In other words, there is usually no problem with the cultural identification of recent human remains; it is the ancient, prehistoric human

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[19] *See* John E. Peterson, II, *Dance of the Dead: A Legal Tango for Control of Native American Skeletal Remains*, 15 AM. INDIAN L. REV. 115, 122 (1990).

[20] *Id.* at 122-123.

[21] *See, e.g.*, Michael J. Kelly, *Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio animo Ferundi/Lucrandi*, 14 DICK. J. INT'L L. 31 (1995).

[22] *See* Peterson, *supra* note 19, at 115.

[23] *See* NAGPRA, 25 U.S.C. §§ 3001-3013 (Supp. III 1992).

[24] *See, e.g.*, Martin Sullivan, *A Museum Perspective on Repatriation: Issues and Opportunities*, 24 ARIZ. ST. L.J. 283 (1992).

[25] *See* Daniel A. Hurtado, *Native American Graves Protection and Repatriation Act: Does it Subject Museums to an Unconstitutional "Taking"?*, 6 HOFSTRA PROP. L.J. 1, 2-5 (1993).

[26] *See* Richard L. Hill, *Fate of Some Ancient Remains Might Lie in Suggestions of NAGPRA Review Panel*, PORTLAND OREGONIAN, June 27, 1998, at D1.

> [NAGPRA] was intended to bring a balance between the religious and cultural interests of tribes who hold remains as sacred and the research interests of scientists who want to glean information about America's past from bones. Finding a balance has been difficult, especially when it comes to what to do with unidentifiable remains that might be impossible to link biologically or culturally with modern tribes.

Id.

remains that are most often culturally unidentifiable.[27] So, while NAGPRA is a law that goes a long way toward solving the problem of repatriation for recent, culturally identifiable human remains, it falls short of addressing the dilemma of repatriation for prehistoric, culturally unidentifiable human remains.[28]

This is a very important distinction because, under NAGPRA, if the remains are culturally identified as Native American and linked to a currently existing tribe that has laid claim to it, then no additional scientific research may be conducted without permission of the tribe since the remains must be "expeditiously returned."[29] However, if the remains are culturally unidentifiable, and no additional information has been requested by a claimant, then scientific research may continue[30] in an effort to identify the remains for the purposes of disposition. Consequently, the impact of this law on a prehistoric subject, such as Kennewick Man, is tremendous no matter which category it falls into.

A. The Perspective of the Scientific Community: Study It

Scientists who study Native American culture do so out of a high regard for and sensitivity toward American Indians and their history. But, paleoanthropologists who study prehistoric cultures require the actual human

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[27] *See* Diedtra Henderson, *Balancing Tradition and Science — Grave Protection Undergoes Scrutiny as Tribes, Science Battle over Claims to Ancient Remains*, SEATTLE TIMES SCI. REP., June 23, 1998, at A8.

[28] *See id.*

> Among the most glaring oversight in the 1990 act, many say, is that it didn't do a good job explaining what should happen with truly ancient remains, those more than 9,000 years old, which are difficult to link to existing tribes. Some tribes are willing to employ procedures such as DNA tests and radiocarbon dating; others protest using such tests, even when a fragment of a bone or a single strand of hair is all that is destroyed.

Id.

[29] *See* 25 U.S.C.A. § 3005(a), (b) (1990).

[30] *See* Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1416-17 (D. Haw. 1995)(citing 25 U.S.C. § 3003(b)(2) (1990)). This case, one of the first dealing the NAGPRA statute, considered the question of whether Native Hawaiian human remains disinterred by the Department of Defense on the Mokapu Peninsula and studied/inventoried by the Bishop Museum must be returned to Hui Malama and whether the study documents must be kept sealed. *See id.* The court determined that, while Hui Malama had standing to sue in place of the Mokapu remains, which did not have standing as such, the federal agency acted properly in conducting its inventory, and could study the remains to the extent required in order to identify them, after which the remains could no longer be studied if there is a claim filed under NAGPRA for their repatriation. However, the inventory is a public document subject to Freedom of Information Act requirements. *See id.* at 1417.

remains of ancient individuals to help unlock the mysteries of bygone ages.[31] While geologic and field data can sometimes provide a good context to answer questions about a given prehistoric culture, the human remains contain data that cannot be replicated,[32] such as indicators of diet, lifestyle, origin, morphology.[33]

The conflict between scientists and Native Americans on the issue of repatriation of ancient human remains is inevitable because scientists necessarily regard prehistoric human remains as "source material" that allows them to open a window into prehistory.[34] Indeed, from the perspective of science, "[i]t is disturbing to see skeletal . . . material reburied. From the viewpoint of a skeletal biologist this is similar to burning the books in our libraries."[35] Consequently, since the passage of NAGPRA, and the concomitant empowerment of the Native American community to legally reclaim, repatriate and rebury their dead ancestors (both recent and ancient), it was only a matter of time before the discovery of a "Kennewick Man" brought this conflict into sharp focus.

Doug Owsley, Chief of Physical Anthropology at the Smithsonian Institution, considers this issue to be one of either opportunities seized or missed. "What happens in this case really bears on whether there will be the opportunities to ask questions of the past . . . whether scientific studies will be able to [be] done to other skeletons that are found like it in the future."[36] Indeed, the quantity and quality of information that ancient human remains such as Kennewick Man can yield up are not lost on Owsley, one of the scientists suing the federal government for the right to study the find. "You literally could count on your fingers the amount of (skeletons) that are available from this time period. As a consequence, each of them . . . can add to the database substantially."[37]

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[31] *See* Lee, *supra* note 14, at A1. "Scientists such as . . . plaintiff Doug Owsley . . . shade Kennewick Man in almost existential terms as a guide to the past for all Americans. . . . [T]he ancient remains have the potential to help people 'come to terms with their place in the universe.'" *Id.*

[32] *See* Afrasiabi, *supra* note 18, at 816.

[33] *See* Griego, *supra* note 15, at 4A; *see also* Eric Niiler, *An Ages-Old Question: New Time-Dating Techniques Are Helping Archaeologists Put History in Order*, SAN DIEGO UNION-TRIB., June 10, 1998, at E1.

[34] *See* Peterson, *supra* note 19, at 121.

[35] *Id.* at 119 (quoting Bass, *Skeletal Biology on the United States Great Plains: A History and Personal Narrative*, 17 PLAINS ANTHROPOLOGIST MEMOIR 3 (1981)).

[36] Lee, *supra* note 14, at A1.

[37] *Id.*

B. The Perspective of Native Americans: Bury It

It is important to note that human rights principles formed the basis for the negotiation and subsequent promulgation of NAGPRA.[38] The law was enacted in an effort to rectify past desecrations of Native American burial sites and human remains.[39] These desecrations grew out of a societal bias for preserving white American cultural artifacts while exploiting Native American antiquities for economic profit and scientific analysis.[40]

Moreover, there has historically been a difference between how white American and Native American human remains have been treated, both socially and legally.[41] This has been characterized as an extension of the dichotomy between the degree of respect accorded traditional Anglo-American religions and the disrespect accorded Native American religions, often referred to as mere superstitions.[42] From a legal perspective, the inequity of respect accorded Native American human remains compared to those of white Americans can be understood by looking back to the development of American common law during the nineteenth century. Historically, Native Americans did not avail themselves of the U.S. court system to settle disputes regarding human remains; consequently, as Professor Price of the University of Missouri notes, "[w]hen the foundations of this nation's common law were being formed, the courts and legislators had little opportunity to consider issues involving disposition of prehistoric aboriginal remains . . . ."[43] Furthermore, when such issues later presented themselves in

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[38] *See* Roger W. Mastilar, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1063 (1992/1993):

> In the case of NAGPRA, the arguments used to support the request for repatriation of cultural property to Native Americans were founded on human rights principles. Recognition of human rights was the basis offered for enactment of the law during public hearings and upon introduction of the bill on the floor of the House and Senate.

Id. (citations omitted).

[39] *See* Afrasiabi, *supra* note 18, at 810 & n.24.

[40] *See* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 578 (1995).

[41] *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 (1992):

> American social policy has historically treated Indian dead differently than the dead of other races. Unfortunately, it has been commonplace for public agencies to treat Native American dead as archaeological resources, property, pathological material, data, specimens, or library books, but not as human beings.

Id.

[42] *See* Ackerman, *supra* note 3, at 376-78.

[43] H. MARCUS PRICE, III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 21 (1991)(citing 16 U.S.C. §§ 431-33).

the courts, judges were "forced to apply an established body of statutes and common law to situations that law had not previously considered and with which it was ill suited to deal."[44]

Exacerbating these inequities were the thousands of instances of grave-robbing and funerary desecration by white Americans against Native American remains. Moreover, the atrocities inflicted on Native Americans over the past two centuries by the U.S. government in this regard are both horrifying and tragic.[45] That the federal government was flirting with experiments based on eugenics in the mid-1880's is evident from the following passage contained in the Report of the U.S. House of Representatives that accompanied NAGPRA:

> In 1868, the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands Native American human remains and funerary objects being sold or housed in museums and educational institutions around the country.[46]

As noted earlier, ancient human remains have historically and legally been considered "archaeological resources" and not actual people. NAGPRA is the first federal legislation to accord a certain degree of human dignity to prehistoric Native American remains instead of treating them solely as property in which rights can be vested and permits can be issued to excavate.[47] Nonetheless, these remains do not possess legal character on their own. A federal court in Hawai'i has specifically held that human remains have no legal standing generally and are indeed not granted standing as legally recognized persons under NAGPRA.[48]

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[44] *Id.* at 24. "This resulted in decisions like *Carter v. City of Zanesville* (Ohio, 1898), in which the court held that decomposed skeletal remains of prehistoric Indians did not constitute a body as contemplated at law . . . ." *Id.* (citing Carter v. City of Zanesville, 52 N.E. 126 (Ohio 1898)).

[45] *See* Trope and Echo-Hawk, *supra* note 41, at 39-40.

> Dr. Samuel Morton, the father of American physical anthropology, collected large numbers of Indian crania in the 1840s. His goal was to scientifically prove, through skull measurements, that the American Indian was a racially inferior 'savage' who was naturally doomed to extinction. Morton's findings established the 'Vanishing Red Man' theory, which was embraced by government policy-makers as 'scientific justification' for relocating Indian tribes, taking tribal land, and conducting genocide—in certain instances—against American Indians.

Id. at 40 (citations omitted).

[46] H.R. REP. NO. 101-887, at 10 (1990), *reprinted in* 1990 U.S.C.C.A.N. (104 Stat.) 4367.

[47] *See generally*, Jack F. Trope & Walter R. Echo-Hawk, *supra* note 41, at 58-75.

[48] *See* Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. at 1406 (citing 25 U.S.C. §§ 3001-13 (1990)).

Consequently, under the circumstances of white domination of the North American continent during the past several centuries, it is no wonder that American Indians want whole-heartedly to rectify the wrongs done to their ancestors. By repatriating their dead and restoring a degree of respect to their ancient elders, Native American tribes can thereby feel that they have in some measure kept faith with their lineal heritage.

IV. THE FRAMEWORK FOR CONFRONTATION: NAGPRA PROVISIONS & REGULATIONS

Professor Meltzer of Southern Methodist University, a noted anthropologist, sums up the importance of NAGPRA as follows:

> NAGPRA heralds a fundamental change in the relationship between archaeologists and Native Americans. Archaeologists can no longer ignore Native American concerns, nor excavate sites and remove human remains with impunity. Museums are returning remains to native groups who, to the vocal dismay of many archaeologists, are reburying them. Some darkly predict, while others cheer, the end of American archaeology. I doubt it will come to that. But it is certainly the beginning of a new way of doing archaeology, and as with all new things there are growing pains, for this one is born of a deep-rooted clash in values – science and religion – compounded by ambiguity in law and interpretation. There has been fierce rhetoric on both sides and, inevitably, NAGPRA is now being challenged in the courts.[49]

A. Legislative History

The legislative history of NAGPRA demonstrates the remarkable degree of consensus reached among the scientific, Native American, museum/university, and government regulatory communities that past wrongs against the treatment of Native American human remains should indeed be rectified.[50] However, before examining the promulgation and subsequent passage of NAGPRA, it is important to consider what legislation controlled on these issues before 1990. Prior to the passage of NAGPRA, several federal laws dealt with the subject of Native American human remains generally, some provisions of which concerned prehistoric remains.

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[49] David J. Meltzer, *North America's Vast Legacy*, ARCHAEOLOGY Jan./Feb. 1999 at 58.

[50] *See* Trope & Echo-Hawk, *supra* note 41, at 38-75.

1. Prior legislation

The Constitution grants Congress the power to regulate commerce with Native American governments.[51] The U.S. Supreme Court has interpreted this clause as providing Congress plenary power over Indian affairs.[52] Consequently, while there are some state laws that provide in varying degrees for repatriation and Native American burial site protection,[53] federal legislation is the logical species to control broadly applied policies concerning Native Americans generally and Indian remains specifically.

The Antiquities Act of 1906 granted exclusive jurisdiction to the federal government over all "prehistoric resources" located on land that was either owned or controlled by the federal government.[54] The Act allowed for the issuance of permits to excavate on federal lands, but was ambiguous as to whether Native American human remains were considered "prehistoric resources," and, thus, subject to excavation.[55] Moreover, since every "resource" excavated with a permit must be "preserved" in a public museum, Native American tribes who repatriate their ancestors would be in compliance with this law if those remains were added to their collections but not if they were re-interred.[56] However, since the criminal sanctions of this Act were held to be unconstitutionally vague,[57] it came to be considered effectively emasculated.[58]

The successor to the Antiquities Act of 1906 was the Archaeological Resources Protection Act of 1979 (ARPA).[59] This Act resolved the defini-

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[51] *See* Hurtado, *supra* note 25, at 70-71 (citing U.S. CONST. art. I, § 8, cl. 3).

[52] *See id.*, at 70 (citing Oneida County v. Oneida Indian Nation, 470 U.S. 226, 234 (1985)).

[53] *See* Catherine Bergin Yalung & Laural I. Wala, Comment, *A Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992) (citing ALASKA STAT. §§ 41.35.010 to .240 (Michie 1988); ARIZ. REV. STAT. ANN. §§ 41-844, -865, -866 (West 1992); CAL. PUB. RES. CODE § 5097.94(a) (West 1984); CONN. GEN. STAT. ANN. § 10-386(a) (West 1996); FLA. STAT. ANN. § 872.05(4) (West 1994); IDAHO CODE § 27-503(1) (1990); IOWA CODE ANN. §§ 305A.1 to .10, *renumbered* 263B.1 to 263B.10 (West 1988); ME. REV. STAT. ANN. tit. 22, § 4720 (West 1980); MASS. GEN. LAWS ANN. ch. 38, § 6B (West 1985); MINN. STAT. ANN. § 307.08(7) (West Supp. 1991); MONT. CODE ANN. §§ 22-3-801 to -811 (1991); NEB. REV. STAT. §§ 12-1201 to -1212 (Michie Supp. 1990); NEV. REV. STAT. §§ 383.150 to .190 (1989); N.H. REV. STAT. ANN. § 227-C:8-g (1989); N.C. GEN. STAT. §§ 70-26 to -40 (1985); WASH. REV. CODE § 27.34.220(5)(1989); W.VA. CODE § 29-1-8A(c)(1)(Supp. 1991)).

[54] *See* PRICE, *supra* note 43, at 25.

[55] *See id.*

[56] *See* Peterson, *supra* note 19, at 137.

[57] *See* United States v. Diaz, 499 F.2d 113, 114-15 (9th Cir. 1974).

[58] *See* David J. Lazerwitz, *Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands*, 69 IND. L.J. 601, 603 (1994); *see also* Peterson, *supra* note 19, at 138.

[59] *See* PRICE, *supra* note 43, at 30 (citing 16 U.S.C. §§ 470aa-470ll).

tional dilemma of the Antiquities Act by specifically defining "archaeological resource" as any material remains of past human life or activity that is at least one hundred years old.[60] Nonetheless, many tribes took issue with the characterization of (what they believe to be) their ancestors as "resources," because that term alludes to the socially justifiable practice of "exploitation."[61] Also, while Native Americans must be given notice under ARPA of any permits issued for excavations that might result in harm to Indian heritage, "tribal complaints are considered advisory only, and need not be heeded."[62] Indeed, it was pursuant to an ARPA permit, issued by the Walla Walla District Corps of Engineers, that Dr. Chatters returned to the confluence of the Columbia and Snake Rivers to further excavate the remainder of Kennewick Man's skeleton.[63]

Consequently, although these laws were important steps along the path of rectifying past deficiencies in the treatment of Native American human remains, they did not go far enough to either mandate or sufficiently encourage active repatriation of remains to tribes for re-burial. Therefore, new legislation was deemed necessary to specially address the repatriation issue and empower tribes to participate in the process.

2. *The Phoenix Dialogue*

Between 1986 and 1990, tribal governments and representatives began to push for much stronger legislation that would afford them meaningful protection for their grave sites and deceased ancestors.[64] Several bills were introduced in both houses during this period, but none came to fruition except for the National Museum of the American Indian Act, which only covered the identification and repatriation of Native American remains held by the Smithsonian Institution.[65] Eventually, under the auspices of the Heard Museum in Arizona, the "Phoenix Dialogue" took place among representatives of the federal government, tribal councils, antiquities dealers, museum curators, Native American religious groups, physical anthropologists and archaeologists. This was essentially an attempt to talk through possible solutions to the repatriation dilemma offered from the divergent perspectives of the various parties.[66]

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[60] *See id.*

[61] *See, e.g.*, Trope & Echo-Hawk, *supra* note 41, at 42.

[62] *See* PRICE, *supra* note 43, at 30.

[63] *See* Chatters, *supra* note 1.

[64] *See* Trope & Echo-Hawk, *supra* note 41, at 54-55.

[65] *See id.* at 56.

[66] *See id.* at 57-58. The "Phoenix Dialogue" is formally known as The Report of the Panel for a National Dialogue on Museum/Native American Relations.

With mutual consultation, respect for human remains and unprecedented information-sharing as the cornerstones of the negotiations, all parties came to agree upon most of the elements that found their way into the first draft of NAGPRA. Indeed, the Phoenix Dialogue formed the basis on which the necessary consensus was built to proceed with drafting NAGPRA.[67] Without the development of the Phoenix Dialogue, it is unlikely that NAGPRA would have passed with such relative ease in the 101st Congress.

B. Promulgation, Passage and Implementation of NAGPRA

There was surprisingly little debate in the House or the Senate during the promulgation of NAGPRA.[68] Because most of the difficulties were ironed out during the Phoenix Dialogue, the only amendments offered on the floor of either house were friendly ones aimed at synthesizing NAGPRA with already existing grave protection and repatriation legislation that had been passed earlier for the Smithsonian Institution.[69] The Smithsonian legislation, which did not cover cultural patrimony such as funerary objects, has since been amended to bring it in line with all of the provisions of NAGPRA.[70]

Congress viewed the passage of NAGPRA as a part of its fiduciary responsibility to Native Americans.[71] The version of NAGPRA that emerged as law in 1990 was narrow in its application, applying only to federal agencies or those museums and universities that possessed Native American human remains or funerary objects that receive federal funding.[72] Because of this limiting definition, private collections in institutions not receiving federal funding are not covered by NAGPRA.[73]

Substantively, NAGPRA makes little attempt to address the problem of

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[67] *See id.* at 58.

[68] *See* 136 CONG. REC. S17173-02 and H12336-02 (daily ed. Oct. 26, 1990).

[69] *See id.* The Smithsonian legislation is known as the National Museum of the American Indian Act.

[70] *See* Telephone Interview with Tom Killion, Director of the Repatriation Office at the National Museum of Natural History, Washington D.C. (December 16, 1996)(notes on file with author); *see also* 20 U.S.C.A. § 80q-9 (West 1996).

[71] *See* Trope & Echo-Hawk, *supra* note 41, at 60.

> The trust responsibility of the Federal Government to Indian tribes and people is a judicially-created concept that requires the United States to 'adhere strictly to fiduciary standards in its dealings with Indians.' The trust doctrine has given rise to the principle that enactments dealing with Indian affairs are to be liberally construed for the benefit of Indian people and tribes . . . .

Id. (quoting FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207 (Rennard Strickland et al. eds., 1982)).

[72] *See* 25 U.S.C.A. §§ 3001(8) and 3003(a) (West 1991).

[73] *See* 43 C.F.R. § 10.2(a)(3)(iii) (1999).

prehistoric, culturally unidentifiable, human remains.[74] The law does provide that if remains cannot be culturally identified, then an interested tribe may still claim them if it can prove "by a preponderance of the evidence" that it has a "cultural affiliation" with the remains.[75] This can be demonstrated by a wide array of evidence such as biological, kinship, anthropological, linguistic, archaeological, geographical, oral traditional, folkloric, historical, expert opinion or any other relevant information.[76]

C. The Question of Ancient Human Remains

NAGPRA establishes a Review Committee that is charged with resolving not only disputed claims among all parties, but also questions concerning what to do with ancient human remains that are culturally unidentifiable but may be claimed by a tribe, nonetheless, under one of the cultural affiliation criteria listed above.[77] When the Department of the Interior promulgated its regulations to fully implement NAGPRA in 1996, it broke out a special subpart to deal exclusively with determining cultural affiliation:

> (c) Criteria for determining cultural affiliation. Cultural affiliation means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and the human remains . . . of an earlier group:
>
> (1) Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under these regulations and the Act; and
> (2) Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:
> (i) Establish the identity and cultural characteristics of the earlier group,
> (ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or
> (iii) Establish the existence of the earlier group as a biologically distinct population; and
> (3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a

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[74] *See* John Hughes, *From Human Rights to Cancer, Kennewick Man Spawns Capitol Hill Debate*, THE COLUMBIAN, June 15, 1998, *available in* 1998 WL 11742864. As to legislative intent, "[House] Resources Committee Chairman Don Young said that when he helped pass [NAGPRA], he had remains from the past few hundred years in mind. 'I did not envision a 10,000-year-old person,' the Alaska Republican said." *Id.*

[75] *See* 25 U.S.C.A. § 3005(a)(4) (West 1990).

[76] *See id.*

[77] *See id.* at § 3006(c)(3)-(5).

> present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.
> (d) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.[78]

Moreover, subsection (f) provides that "[c]laimants do not have to establish cultural affiliation with scientific certainty."[79] Consequently, the burden of proof for determining cultural affiliation is fairly clear. Finally, any recommendations that the NAGPRA Review Committee makes regarding disposition of culturally unidentifiable human remains are to be made after consulting with relevant Native American tribes and scientific and museum groups.[80]

As to timing of implementation, the Department of the Interior was slow to promulgate regulations for implementation of NAGPRA,[81] and museums were slow to complete the required inventories of their collections.[82] However, most inventories are now close to completion and new federal regulations are on-line. What remains to be settled is the question of how to approach culturally unidentifiable ancient human remains. The Review Committee has taken comments on this issue several times[83] and even drafted two proposals

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[78] 43 C.F.R. § 10.14(c)-(d) (1999).

[79] *Id.* at (f).

[80] *See* Trope & Echo-Hawk, *supra* note 41, at 64 (citing 25 U.S.C.A. §§ 3006(c)(5), (e)(1991)).

[81] *See Oversight Hearing on P.L. 101-601, the Native American Graves Protection and Repatriation Act Before the Senate Comm. on Indian Affairs*, 104th Cong. (1995)(statement of Elizabeth Blackowl, President, Pawnee Tribe of Oklahoma).

[82] *See* Extension of Time for Inventory, 61 Fed. Reg. 36,756 (1996)(extending appeals for 58 institutions in July 1996 by the National Park Service pursuant to § 5(c) of NAGPRA).

[83] *See Oversight Hearing on P.L. 101-601, supra* note 81 (statement of Dan Monroe, American Assoc. of Museums):

> The most difficult unresolved NAGPRA issue involves the disposition of unidentified human remains and associated funerary objects. The Review Committee is required to make a recommendation to the Secretary on this important matter. The fundamental problem is that NAGPRA provides for return of human remains and cultural items where cultural affiliation with a specific tribe is established.
>
> There are many Native American human remains that cannot be identified or affiliated with a specific tribe.
>
> The Review Committee has taken testimony on this controversial issue from the Native Americans, scientists, museum professionals, and federal agencies. The controversy is hottest with respect to disposition of ancient Native American remains. These remains can seldom be affiliated with a specific tribe.

Id.

for resolution of the matter that were scrapped for their inadequacy, but has yet to come up with a standardized solution to the dilemma.[84]

Indeed, it may be the nature of the beast that a case-by-case analysis is the most prudent approach to take in this regard. Prehistoric remains, found throughout the world[85] in addition to North America, are relatively rare and almost always found under unique circumstances. Often, any tribe from which they may have been a part may no longer exist. Alternatively, the prehistoric remains may be a common ancestor to several currently existing tribes that might each have equal claim to them.[86] Not surprisingly, the Review Committee, after careful consideration of the deluge of comments received on this issue from diverse quarters, decided to fall back and punt:[87] "The committee believes that decisions regarding disposition of a small number of generally very ancient human remains will require amendments to NAGPRA by Congress."[88]

V. NAGPRA'S IMPACT ON KENNEWICK MAN, AND SUBSEQUENT DEVELOPMENTS

> Kennewick [Man] hits NAGPRA right where it is weakest. The law requires remains be repatriated to the "lineal descendants" of the individual, but proving lineal descent at that distance is no easy task. Some argue it is impossible. Either one assumes *a priori* that all persons occupying pre-Norse North America are Native Americans (the tribal and [C]orps' view, in this instance), or that Kennewick [Man] cannot be traced to a specific tribe, at the very least without study to ascertain its affiliation, assuming one is detectable from this early period (the view of archaeologists suing the [C]orps), or that Kennewick [Man] is a wayward European (as a California-based group of Old Norse worshipers believes). Figuring out which one is valid or legal – two very separate issues – will likely take years, and possibly require resolution in the Supreme Court.[89]

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[84] *See* Hill, *supra* note 26.

[85] For a brief overview of laws requiring repatriation of ancient human remains in other countries, see Afrasiabi, *supra* note 18, at 820-22, where the cases of Tasmania, China, Israel and Australia are discussed.

[86] The Smithsonian has recently encountered this situation with the Pawnee tribe. The prehistoric human remain is actually a common ancestor of several tribes who may potentially lay claim to it for reburial.

[87] *See* Draft Recommendations Regarding the Disposition of Culturally Unidentifieable Human Remains and Associated Funerary Objects, 61 Fed. Reg. 43,071 (1996).

[88] *Id.*

[89] Meltzer, *supra* note 49, at 59.

As noted earlier, Kennewick Man is unique for its distinctly Caucasoid features.[90] Because of these features, anthropologists have determined the remains to be culturally unidentifiable vis-a-vis Native American ancestry.[91] Nonetheless, several local tribes, including the Umatilla Indian tribe of central Oregon, have laid claim to the remains under NAGPRA, which allows the tribes to claim remains found on lands that were aboriginally occupied by the claimant tribes.[92] Subsequent to the filing of that claim, the Kennewick Man's legal fate suddenly drew a simmering academic debate on NAGPRA's operation into a boiling legal/political battle.[93] This battleground rests partially on the issue of aboriginal inhabitance.[94]

Temporal occupation of given areas of land by specific Indian tribes where prehistoric human remains have recently been discovered has clearly become the key bone of contention between Native Americans and paleoanthropologists over the question of who retains control of such important remains.[95] The oral traditions of some tribes tell them that they have lived in a given area since time began.[96] But scientists, armed with geologic and anthropologic data, disagree.[97] In southern Idaho, the 10,600 year-old remains of a woman found in a gravel quarry were ordered [to be] reburied in 1991 after the Shoshone-Bannocks claimed her as one of their ancestors even though scientists believe that the Shoshone have occupied the area for less than a thousand years.[98] However, in the spirit of compromise, the tribe granted permission for carbon dating prior to reburial, but no invasive DNA testing was allowed.[99]

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[90] *See* Timothy Egan, *Tribe Stops Study of Bones that Challenge History*, N.Y. TIMES, Sept. 30, 1996, at A12.

[91] *See id.* Dr. Krantz of Washington State University has determined, "[t]his skeleton would be almost impossible to match among any of the Western American Indian tribes." *Id.*

[92] *See* George Johnson, *Indian Tribes' Creationists Thwart Archaeologists*, N.Y. TIMES, Oct. 22, 1996, at A2.

[93] *See* Henderson, *supra* note 27.

[94] The basis for making a determination of "aboriginal occupation" rests on an historical review of final judgments made by the Indian Claims Commission of the United States Court of Claims regarding Indian lands. *See* Ackerman, *supra* note 3, at 366.

[95] *See* Griego, *supra* note 15; *see also*, Henderson, *supra* note 27.

[96] *See* Griego, *supra* note 15. See also Johnson, *supra* note 13:

> Since [NAGPRA] was passed in 1990, American Indian creationism, which rejects the theory of evolution and other scientific explanations of human origins in favor of the Indians' own religious beliefs, has been steadily gaining in political momentum. Adhering to their own creation accounts as adamantly as biblical creationists adhere to the Book of Genesis, Indian tribes have stopped important archaeological research on hundreds of prehistoric remains.

[97] *See* N. Scott Momaday, *Disturbing the Spirits*, N.Y. TIMES, Nov. 2, 1996, at A23.

[98] *See id.*

[99] *See id.* DNA testing is a more intrusive analysis than carbon dating; it requires samples

As for Kennewick Man, as noted earlier, relevant local tribes called for immediate repatriation upon learning of the discovery and its location,[100] spurring the Army Corps of Engineers to forbid any DNA testing or additional photographs and require repatriation in compliance with NAGPRA.[101] Aghast at losing such valuable information, several scientists went to federal district court seeking an injunction to stop the repatriation. The case, however, while not dismissed, was put on hold after the Corps elected to extend the deadline for repatriation.[102] Nonetheless, Judge John Jelderks, magistrate for the federal district court in Oregon, retained jurisdiction in the matter pending completion of the administrative law processes.[103]

A. Department of Interior Intervention

Subsequently, the Corps asked the Department of the Interior ("DOI") to take this "political hot potato" off its hands,[104] which it did in March of 1998,[105] two years after the skeleton's discovery. Three months later, the government filed its forth in a series of required status report with the federal district court,[106] determining that "the site of the discovery does not fall within any area recognized as the aboriginal land of any Indian Tribe . . . ."[107] Logistically, this decision had to be reached before the government could study the bones since NAGPRA automatically confers ownership rights over Native American remains to those tribes that aboriginally occupied the lands

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to be extracted from the bone. *See e.g.*, Eric Niiler, *An Ages-Old Question: New Time-Dating Technologies are Helping Archaeologists Put History in Order*, SAN DIEGO UNION-TRIB., June 10, 1998, at E1.

[100] The tribes were informed by the Corps and Dr. Chatters of the discovery pursuant to NAGPRA provisions requiring such notification.

[101] *See id.* Some of the anthropologists suggest that the find points to both the possibility of mixed ancestry for modern Native Americans and the fear that traditional Native American creation beliefs will be directly challenged by scientific evidence. *See* Ackerman, *supra* note 3, at 379-81.

[102] *See* Mike Lee, *Scientists Lose Bid to Study Ancient Kennewick Bones*, TRI-CITY HERALD, June 3, 1997, at A1; *see also* Mike Lee, *Ancient Bones Get New Review*, TRI-CITY HERALD, Oct. 3, 1997, at A1.

[103] *See id.*; *see also* Bonnichsen v. United States, 969 F.Supp 628, 632 (D. Or. 1997). "This action will be stayed pending completion of the administrative proceedings. The court will retain jurisdiction over this matter. The Corps will maintain custody of the remains until this case is resolved. Plaintiffs' request for permission to study the remains while this action is pending is denied without prejudice." *Id.*

[104] *Interior Department is Asked to Mediate Bones Case*, N.Y. TIMES, Apr. 3, 1998, at A25.

[105] *The Battle over Kennewick Man*, PORTLAND OREGONIAN, June 10, 1998, at C11.

[106] Bonnichsen v. United States, Civil No. 96-1481 JE, Federal Defendant's Fourth Quarterly Status Report (D. Or. filed July 1, 1998).

[107] *Id.*

on which the remains were found.[108]

Consequently, after making this legal determination, government scientists are now free to study the bones[109] with the stated purpose of discovering "whether the remains are subject to NAGPRA," (e.g. whether the remains are indeed "Native American") and if so whether this Native American shares any cultural affiliation with an existing Native American tribe.[110] In developing procedures to examine the skeleton, DOI pledged to do so in consultation with the tribes that have laid claim to it under NAGPRA and with input from the plaintiff-scientists in the case.[111]

The Draft Study Plan, filed with the court in May, 1998, calls for removal of the remains to the Burke Museum in Seattle, where a two to three-step analysis of Kennewick Man will be conducted: "First, DOI will determine whether or not the remains meet the 'definition of Native American' for the purposes of . . . [NAGPRA]. Second, if the remains are Native American, the DOI will determine to whom the disposition of the remains is appropriate under the requirements of NAGPRA."[112] If, however, no such cultural affiliation as "Native American" can be determined, then the government may consider utilizing techniques such as DNA testing or isotope extraction and analysis, which would cause a certain amount of bone destruction.[113]

While the claimant tribes did not officially comment on DOI's Draft Study Plan,[114] it was, nevertheless roundly criticized by the prominent plaintiff-scientists, who called it "vague and incomplete."[115] Describing the plan as "not really addressing the substantive science," the anthropologists noted that vital detailed descriptions of test procedures, who will conduct them, when the reports will be prepared or how DOI will decide if the bones are indeed Native

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[108] *See id.* (citing 25 U.S.C. §3002(a)(2)(C)).

[109] *See* Mike Lee, *Scientists Say Kennewick Man Bones Treated Poorly*, TRI-CITY HERALD, July 2, 1998, at A1. DOI agency spokesperson, Stephanie Hanna, noted that this determination gives the agency "leeway to learn more" about the remains. *See id.*

[110] Bonnichsen v. United States, 969 F. Supp. 628, 651 (D. Or. 1997).

[111] *See id.*

[112] Francis McManamon, *Time-Line for Transfer and Examination of Remains* (visited August 31, 1998) <http://www.tri-cityherald.com/bones/documents/studyplans.html>. "The investigations will be conducted in phases, ordered so that the first stage will be nonintrusive and nondestructive." Initially, the focus will be on whether or not the remains are those of a Native American, as defined in NAGPRA. *See id.*

[113] *See id.* These techniques "may require the destruction of a small amount, typically only a few grams, of bone to conduct the test."

[114] While many tribal leaders oppose destructive scientific testing, the Colville tribe, one of the claimants to Kennewick Man, specifically said that they would allow invasive DNA tests to "be the sole guage of Kennewick Man's modern kinship." Mike Lee, *Scientists Unhappy with Study of Old Bones*, TRI-CITY HERALD, July 16, 1998, at A1.

[115] *See id.*

American were missing.[116] Moreover, the plaintiffs' attorneys denounced DOI's decision to allow only DNA testing if other non-intrusive tests failed to show a link between the remains and modern Native Americans.[117]

B. Proposed NAGPRA Amendment

Even if the Kennewick Man dilemma is resolved by DOI's intervention, the controversy surrounding it has spurred action on Capitol Hill. Representative Doc Hastings (R-Wash.) has introduced legislation in the House that is designed to amend NAGPRA and, thereby, solve the quandary created by the law's ambiguous language regarding unidentifiable, ancient remains.[118] As would be expected, two camps have formed to alternatively defeat and support the amendment. Overall, the Native American community and the government opposes this legislation and the scientific community supports it.[119]

Specifically, Representative Hastings' bill, H.R. 2893 (*see Appendix*), would delete section 3(C) of NAGPRA providing for repatriation on the basis of coincidence between the land on which remains were found and the aboriginal occupation of that land by a claimant tribe.[120] Mr. Hastings justifies this on the basis that American Indian tribal borders have historically been fluid and, given the migratory nature of tribes over thousands of years, pinpointing evidence of aboriginal occupation during a given era is impossible.[121] Furthermore, H.R. 2893 lowers the standards for scientific study of remains, allowing more study to occur, even upon cultural identification and determination of affiliation as "Native American," until it is decided that the benefits of extended study would be "outweighed by preservation or cultural concerns."[122]

While this bill may strike a tone of reasonableness, and may truly be directed toward resolving contentious controversies like that sparked by

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[116] *See id.*

[117] *See id.* "These are an essential part of the investigation of the skeleton and must be done . . . . (DNA) is an independent line of evidence that is needed in order to reach reliable determinations . . . ."

[118] *See* Mike Lee, *Doc Wants Corps to Report on Bones Handling*, TRI-CITY HERALD, July 17, 1998, at A3.

[119] *See* Dave Hogan, *Hearing Looks at Graves Protection Act*, PORTLAND OREGONIAN, June 11, 1998, at A10 (stating that the White House has waded into this political battle by supporting the Native American community and coming out against the bill; however, the Administration's position that Hastings' legislation "would destroy the law's balance between tribal and scientific concerns" clearly shows their inability to grasp the intricacies of this situation since no balance has yet been reached on the question of ancient, unidentifiable human remains).

[120] *See* H.R. 2893, 105th Cong. § 1 (1998).

[121] *See* Doc Hastings, *Testimony of Representative Doc Hastings, R-Wash* (visited August 30, 1998) <http://www.tri-cityherald.com/bones/documents/testimony/hastings.html>.

[122] *See id.*

discovery of Kennewick Man in 1996, the opposition that H.R. 2983 faces is considerable.[123] DOI considers any amendment on the issue of remains disposal to be unnecessary, as they stated in their letter to Judge Jelderks answering several of his questions:

> [W]e consider that NAGPRA and its implementing regulations provide all necessary guidance for the disposition of the human remains in question. to [sic] summarize, NAGPRA does not prohibit appropriate scientific study to determine whether the human remains at issue are Native American within the meaning of NAGPRA. If they are, NAGPRA provides for their disposition to a lineal descendant, or, in the absence of a lineal descendant, to an Indian tribe qualified under the section 3 (a) categories. If there is no lineal descendant or if there is no qualified Indian tribe under section 3 (a) categories, or, if no Indian tribe which is determined to own the remains makes a claim for the remains, section 3 (b) directs the Secretary of the Interior to provide for their disposition in accordance with published regulations.[124]

At a House Resource Committee hearing on the bill, scientists came out officially in favor of the amendment,[125] while Native Americans testified stridently against it.[126] Armand Minthorn, of the Umatilla Tribes, first noted that NAGPRA had basically been successful in accomplishing its goal of

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[123] *See* John Hughes, *Administration Backs Indians on Kennewick Man*, NEWS TRIBUNE (Tacoma, WA), June 11, 1998, at A3.

[124] Francis P. McManamon, *Interior Department Answers Judges Questions*, Testimony before the House Resource Committee on H.R. 2983, on June 10, 1998 (visited Aug. 31, 1998) <http://www.tri-cityherald.com/bones/documents/mcmanamonletter.html>. Representative Hastings responded to this position by the Administration in testimony before the House Resource Committee concerning his amendment:

> I would also like to make a brief observation in response to the . . . statement presented by the Administration. Although it was readily apparent to me that NAGPRA was not intended to apply to unaffiliated ancient remains, the Department of the Interior and the Park Service have failed to recognize this fact over the past eight years. I am encouraged, however, by the personal interest Secretary Babbitt has taken in this issue . . . . Nevertheless, I'm convinced that his effort to revise Departmental policies would be significantly aided by Congressional action to remove any uncertainties about our legislative intent.

Doc Hastings, *supra* note 122.

[125] *See Testimony for the American Association of Physical Anthropologists, 1998: Hearing on H.R. 2983 Before the House Resource Committee*, 105th Cong. (1998)(statement of Phillip L. Walker, Am. Ass'n of Physical Anthropologists)(visited Aug. 31, 1998) <http://www.tri-cityherald.com/bones/documents/testimony/walker.html>; *see also Testimony for the Society for American Archaeology, 1998: Hearing on H.R. 2983 Before the House Resource Committee*, 105th Cong. (1998)(statement of Vin Steponaitis, President, Soc'y of Am. Archaeology)(visited Aug. 31, 1998) <http://www.tri-cityherald.com/bones/documents/testimony/steponaitis.html>.

[126] *See* John Hughes, *Bill to Allow Study of Kennewick Man Opposed by Feds*, THE COLUMBIAN (Vancouver, WA), June 11, 1998, at B6.

repatriation and then argued that this amendment would effectively turn NAGPRA on its head, upsetting the balance of interests in favor of the scientific community to the detriment of profound Native American concerns over the disposal of their ancestors:

> It would be the ultimate irony that the amendments in H.R. 2893 would so contort [NAGPRA] that it would be used to force tribes to turn over cultural items in their possession to scientists for study. H.R. 2893 establishes a presumption that a great many Native American cultural items do not belong to Native Americans unless restrictive criteria are satisfied. It then places scientists in a primary position of making that determination without, in fact, even requiring them to do so. The bill so twists NAGPRA that, instead of seeking to assure that the majority of our cultural items are returned to us, it would assure that those items be turned over to scientists, upon their demand for whatever studies they might dream up, quite possibly into perpetuity. This bill has nothing to do with respecting our culture, our ancestors, or our history. Instead, it has everything to do with giving the scientific community all it wants and continuing the unnecessary desecration of our ancestors. We oppose H.R. 2893 and urge that this Committee reject it.[127]

C. The Possibilities for Cooperation

Banking on passage of proposed legislation is always a risky proposition; more so when the legislation concerns a matter as volatile as the disposal of Kennewick Man. Consequently, if Representative Hastings' bill falters in Congress, the contending parties are left in their original contentious positions, albeit more informed after DOI completes its proposed studies. Nevertheless, disposing of Kennewick Man in an ad hoc manner does not solve the systemic deficiencies of NAGPRA if other finds such as this are made in the future.[128]

Exemplifying the degree of cooperation that can yield satisfactory results to both sides under NAGPRA is the recent discovery of human bones found in a cave on Prince of Wales Island in Alaska. The human remains were radio-carbon dated at about 9,730 years old.[129] Scientists believe that the find

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[127] *See Testimony for the Confederated Tribes of the Umatilla Indian Reservation, 1998: Hearing on H.R. 2983 Before the House Resource Committee*, 105th Cong. (1998)(statement of Armand Minthorn, Confederated Tribes of the Umatilla Indian Reservation)(visited Aug. 30, 1998) <http://www.tri-cityherald.com/bones/documents/testimony/minthorn.html>.

[128] *See* Lee, *supra* note 14. "While evidence about the history of the bones is slim, there's plenty to show that America hasn't resolved its approach to such discoveries - which doesn't bode well for future finds. More are almost certain to come, perhaps even in Kennewick." *Id.*

[129] *See* Karen Freeman, *9,700 Year-Old Bones Back Theory of a Coastal Migration*, N.Y. TIMES, Oct. 6, 1996, at A32.

could buttress the theory that humans lived and migrated along the Alaskan coastline during the last Ice Age.[130]

Pursuant to NAGPRA, as soon as the remains were discovered, work stopped and local Native American tribal councils were consulted. The councils allowed the bones to be sent to the Denver Museum of Natural History for further scientific study; however, Aaron Isaacs, Jr. of the Klawock Cooperative Association, noted that "[i]f it is determined that it is a burial site, then we will ask the anthropologists to stop any further excavation, because we do not want anybody digging up our graves."[131] Consequently, the tribes were able to establish a workable threshold for scientific study: research could continue unless and until it was determined that the remains came from a burial site, at which point research would stop and re-interment would begin.

According to the government, this level of cooperation is already provided for in the text of NAGPRA. Following is a response from DOI to one of a series of questions posed by federal Magistrate Judge Jeldreks in the Kennewick Man case:

> 11. Are scientific study and repatriation of human remains mutually exclusive or can both objectives be accommodated?
> Both can be accommodated, depending on the particular circumstances of each situation. In some cases, scientific study may be necessary in order to determine whether NAGPRA is applicable and, if so, to determine appropriate disposition under the statute. Additionally, individuals or Indian tribes that exercise ownership and control of the remains under section 3 (a), insofar as Federal law is concerned, may study the remains, or authorize others to study the remains, as they see fit.[132]

Of course, this premise relies heavily, perhaps too heavily, on the presumption that all of the concerned parties will act reasonably. Compromise, however, has not been the key ingredient in the case of Kennewick Man. Indeed, it is when such willingness to compromise fails that the operation of NAGPRA likewise falters.

VI. CONCLUSION

The struggle over how to handle ancient, unidentifiable Native American human remains is a contentious one. While federal law allows for repatriation of these remains to Native American tribes based on those tribes' aboriginal

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[130] *See id.*

[131] *Id.* The Klawock Cooperative Association is one of the Native American tribal councils that was consulted by Dr. Timothy Heaton of the University of South Dakota after the bones were found. *See id.*

[132] McManamon, *supra* note 125.

occupation of the land on which the remains were found,[133] science often determines that either no tribes existed on that land at the time the remains were deposited or that several different tribes may have occupied the area and ascertainment of a single tribe's geographic presence is impossible. Consequently, DOI had to first find that the tribes claiming cultural affiliation with Kennewick Man were not geographically connected to him before government scientists could proceed with their study of the remains in an effort to deduce any cultural affiliation.

Although Kennewick Man's situation is still very much in flux, as DOI's study commences and Representative Hastings' proposed bill navigates its way through a politically charged Congress, his discovery and subsequent legal plight has served to both highlight deficient provisions of a very important law and bring into full public debate a long-simmering academic/ethical quarrel over the disposal of ancient human remains. Whichever way the legal and political winds ultimately blow, we (Native Americans, scientists, and the public at large) are all richer for Kennewick Man's sudden appearance in 1996.

As Dr. Chatters, the noted anthropologist who first discovered the true age and significance of Kennewick Man, notes, "[it's] [l]ike following someone's tracks for years and all the sudden you catch up with them and they turn around and they are not who you expected them to be. It really changes your way of thinking."[134] While it is important to return human remains to the people from which they came, it is equally important to avoid committing a crime against science.

Kennewick Man was already a part of the "human story" as he stepped out of the 7th century B.C., whether he was a member of a larger migration that crossed the land bridge over the Bering Strait or a respected, battle-wounded member of a prehistoric American Indian tribe. Now, he is again part of our "human story" as he steps back into it nine thousand years later. On that point, rather than emphasizing the separate histories of various ethnic groupings of mankind, it is important on occasion to appreciate the perspective of a "collective human story;" one that perhaps this man-out-of-time can more easily fit into and, consequently, better us all.

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[133] Many tribes' oral histories hold that the tribe has occupied a given area of land forever.

[134] *Kennewick Man is Raising Questions About our Human Ancestors* (CNN NewsNight television broadcast, Sept. 4, 1997, Transcript #97090403V01).

APPENDIX

H.R. 2893--105th Congress, 1st Session

To amend the Native American Graves Protection and Repatriation Act to provide for appropriate study and repatriation of remains for which a cultural affiliation is not readily ascertainable.

In the House of Representatives on November 7, 1997, Mr. Hastings of Washington introduced H.R. 2893; which was referred to the Committee on Resources.

Relevant NAGPRA Text Modified to Reflect the Amendment
Italicized indicates new text;
~~strikeout~~ indicates deleted text.

SEC. 3. OWNERSHIP. 25 USC 3002

(a) Native American Human Remains and Objects.-The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act, shall be (with priority given in the order listed) -

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony -

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered; *or*

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects.~~; or~~

~~(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe -~~

~~(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or~~

~~(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.~~

(b) Unclaimed Native American Human Remains and Objects.-Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations

promulgated by the Secretary in consultation with the review committee established under section 8 of this title, Native American groups, representatives of museums and the scientific community.

(c) Intentional Excavation And Removal Of Native American Human Remains And Objects.-The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if -

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) Inadvertent Discovery of Native American Remains and Objects.-

(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to *those* Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has

been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section. *Any person or entity that disposes of or controls a cultural item referred to in the preceding sentence shall comply with the applicable requirements of subsection (c).*

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) Relinquishment.-Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

(f) Recording and Status of Items Excavated or Discovered after November 16, 1990.-- Cultural items excavated or discovered after November 16, 1990, except those items whose ownership or control is established under paragraph(1) or paragraph (2)(A) of subsection (a)--

(1) shall be reasonably recorded according to generally accepted scientific standards;

(2) shall remain under the control of the agency having primary management authority for the land on which the cultural item was excavated or discovered until 90 days after the publication in the Federal Register of a notice setting out a general description of the item, its estimated age, and the general area of discovery; and

(3) are subject to the study provisions of subsection 7(b).

SEC. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS. 25 USC 3003

...

(b) Requirements.-

(1) The inventories and identifications required under subsection (a) of this section shall be -

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall

supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and, *except as expressly set forth in sections 3(f) and 7(b),* this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

...

(d) Notification.-

(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information -

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

SEC. 7. REPATRIATION. 25 USC 3005

...

(b) *STUDY AND RECORDING.--*

(1) In cases of human remains and associated funerary objects for which no lineal descendants have been identified and in cases of other cultural items:

(A) If the cultural affiliation of a cultural item has not been established, studies may be conducted in an attempt to establish such an affiliation or to obtain scientific, historical, or cultural information. If the cultural affiliation

of a cultural item is determined pursuant to this subparagraph, the federal agency or museum having custody of the cultural item shall, not later than 90 days after such determination, notify any culturally affiliated Indian tribe or Native Hawaiian organization of their affiliation. Such notice shall be given in the manner specified in paragraphs (2) and (3) of section 5(d).

(B) If the cultural affiliation of a cultural item has been established with an Indian tribe or Native Hawaiian organization, studies of such item may be conducted if needed for the completion of a specific scientific study, the outcome of which is reasonably expected to provide significant new information concerning the history or prehistory of the United States. If the culturally affiliated tribe or organization requests the return of the cultural item, the federal agency or museum shall return such item to the Indian tribe or Native Hawaiian organization not later than 90 days after the date on which the scientific study is completed. Study of a cultural item under this subparagraph shall not be permitted to delay return of the item for more than 180 days after the item is made available for study, unless a longer period of study is agreed upon by the culturally affiliated tribe or organization that has requested return of the cultural item.

(2) Not later than 180 days after a study conducted under this subsection is completed, the Federal agency or museum with custody of the cultural item shall provide a report of the results of the study to any Indian tribe or Native Hawaiian organization that has an established cultural affiliation with the cultural item studied.

(3) If study of a cultural item pursuant to subparagraph (A) or (B) of paragraph (1) is requested, the Federal agency or museum with custody of such item must make such item reasonably available for such study unless the Secretary determines that the Federal agency or museum has presented clear and convincing evidence that the potential scientific benefit of the requested study is substantially outweighed under the circumstances by curatorial, cultural, or other reasonable considerations.

(4) Nothing in this subsection shall be construed to require any museum to undertake or permit any study of a cultural item that is contrary to policies of the museum or to its prior agreements.

~~Scientific Study.—If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.~~

The Jurisdictional Limits of Federal Criminal Child Pornography Law

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I. INTRODUCTION

Child pornography is a problem.[1] Recent developments in computer

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[1] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 749 (1982)("In recent years, the exploitative use of children in the production of pornography has become a serious national problem."); *id.* at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."). Indeed, few, if any, crimes incite as strong an adverse reaction as do crimes relating to child pornography. Typical is the following excerpt from H.R. REP. No. 99-910, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5953, the legislative history accompanying the Child Sexual Abuse and Pornography Act of 1986: "Of all the crimes known to our society, perhaps none is more revolting than the sexual exploitation of children,

technology have made the problem worse.[2] In response, Congress has enacted

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particularly for the purpose of producing child pornography." I share those feelings.

Nonetheless, I also believe that there is a risk that such feelings, consciously or unconsciously, can lead to a lessening of the rights afforded persons accused of such crimes. Others have agreed. *See* Paula Franzese et al., *Censorship on the Internet: Do Obscene or Pornographic Materials Have a Protected Status?*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 279, 299 (1995)("[C]hild pornography is virtually indefensible. No one likes a child pornographer; no one likes a pedophile. So proposals to regulate conduct to attack this problem do[] not inspire traditional First Amendment debate. People are willing to set free-speech concerns aside in the name of protection of children."); Samantha L. Friel, Note, *Porn by Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U. L. REV. 207, 222 (1997)("Laws purporting to address the dangers of child pornography tend to meet with more popular acceptance than other laws which might inspire constitutional debates."); *see also* Glenn H. Reynolds, *Virtual Reality and "Virtual Welters": A Note on the Commerce Clause Implications of Regulation Cyberporn*, 82 VA. L. REV. 535, 541-42 (1996)(observing in this context that there is a "natural tendency to forget that parts of the Constitution outside the Bill of Rights — even the Commerce Clause — may serve as important guarantors of liberty"). If there does exist a particular prejudice against persons accused of child pornography-related crimes, one might suspect an unusually high conviction rate in this area – and in fact, there is. *See* C.G. Wallace, *Federal Agent Hunts Down Child Porn on Net*, MOSCOW-PULLMAN DAILY NEWS, March 6 & 7, 1999, at 7A (reporting that child pornography cases initiated by the FBI have a 99% conviction rate, and that the U.S. Customs Service has never lost a case of Internet child pornography). Though such high conviction rates might be attributable in whole or in part to other causes, further investigation seems warranted.

[2] The worsening of the child pornography problem caused by computers is due both to an increasing sophistication in the technological capabilities of computers relating to the creation, storage, and transmission of child pornography, and to ever-increasing access to that technology and to the Internet. Several legal scholars have addressed the technological capability aspect of the problem. *See, e.g.*, Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 439-40 (1997); Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories*, 83 GEO. L.J. 1849, 1862-64 (1995); Franzese, *supra* note 1, at 298-99; Joseph N. Campolo, Note, *Childporn.GIF: Establishing Liability for On-Line Service Providers*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 721, 721-27 (1996); Patricia N. Chock, Note, *The Use of Computers in the Sexual Exploitation of Children and Child Pornography*, 7 COMPUTER/L.J. 383, 389-91 (1987); Pamela A. Huelsten, Note, *Cybersex and Community Standards*, 75 B.U. L. REV. 865, 867-73 (1995); John C. Scheller, Note, *PC Peep Show: Computers, Privacy, and Child Pornography*, 27 J. MARSHALL L. REV. 989, 989-91 (1994); Jennifer Stewart, Comment, *If This Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INT'L L. 205, 210-19 (1997).

With respect to the issue of increasing access to computer technology, the United States Supreme Court has observed that the Internet, "an international network of interconnected computers, . . . now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world." Reno v. ACLU, 521 U.S. 844, 849-50 (1997).

legislation, and particularly criminal legislation, aimed at addressing child pornography.[3] In fact, over the past two decades, the reach of federal criminal

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> The Internet has experienced extraordinary growth. The number of host computers — those that store information and relay communications — increased from about 300 in 1981 to approximately 9,400,000 by . . . 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet [as of 1996], a number that is expected to mushroom to 200 million by 1999.

Id. at 850 (footnotes and quotation marks omitted). Access to the Internet allows users to obtain a wide variety of materials, including sexually explicit images. *See id.* at 849-55; *see also* Stephen Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117, 119-20 (1997).

[3] Though numerous federal statutes deal in some way with the issue of child pornography, this Article is principally concerned with those statutes that criminalize the transportation, receipt, distribution, sale, and/or possession of child pornography itself: 18 U.S.C.A. §§ 2252, 2252A (West Supp. 1999) and 18 U.S.C. 2260(b) (Supp. III 1997). Accordingly, this Article does not directly address those other portions of chapter 110 of part I of Title 18 of the United States Code ("Sexual exploitation and other abuse of children") that criminalize the use of children in the production of child pornography and related aspects of the child pornography industry (*see* 18 U.S.C.A. § 2251 (West Supp. 1999)("Sexual exploitation of children")), 18 U.S.C. § 2251A (1994)("Selling or buying of children"); 18 U.S.C. § 2257 (1994)("Record keeping requirements"); 18 U.S.C. § 2260 (Supp. III 1997)("Production of sexually explicit depictions of a minor for importation into the United States"), subsection (a) ("Use of minor")); that relate to the forfeiture of child pornography and related items (*see* 18 U.S.C.A. § 2253 (West Supp. 1999)("Criminal forfeiture"); 18 U.S.C.A. § 2254 (West Supp. 1999)("Civil forfeiture"); or that provide some sort of remedy to the victims of child pornography (*see* 18 U.S.C.A. § 2255 (West Supp. 1999)("Civil remedy for personal injuries"); 18 U.S.C. § 2259 (Supp. III 1997)("Mandatory restitution")). *See also* 18 U.S.C.A. § 2427 (West Supp. 1999), which defines the term "sexual activity for which any person can be charged with a criminal offense" for purposes of Chapter 117 ("Transportation for Illegal Sexual Activity and Related Crimes") as including "the production of child pornography, as defined in section 2256(8)".

This Article also does not directly address those federal criminal statutes that relate to the more general (and in some ways separable) issue of obscenity. *See* 18 U.S.C. § 552 (1994) ("Officers aiding importation of obscene or treasonous books and articles"); 18 U.S.C. § 1460 (1994)("Possession with intent to sell, and sale, of obscene matter on Federal property"); 18 U.S.C. § 1461 (1994)("Mailing obscene or crime-inciting matter"); 18 U.S.C. § 1462 (Supp. III 1997)("Importation or transportation of obscene matters"); 18 U.S.C. § 1463 (1994) ("Mailing indecent matter on wrappers or envelopes"); 18 U.S.C. § 1464 (1994)("Broadcasting obscene language"); 18 U.S.C. § 1465 (Supp. III 1997)("Transportation of obscene matters for sale or distribution"); 18 U.S.C. § 1466 (1994)("Engaging in the business of selling or transferring obscene matter"); 18 U.S.C. § 1467 (1994)("Criminal forfeiture"); 18 U.S.C. § 1468 (1994) ("Distributing obscene material by cable or subscription television"); 18 U.S.C. § 1469 (1994)("Presumptions"); 18 U.S.C. § 1470 (West Supp. 1999)("Transfer of obscene material to minors")); 47 U.S.C. § 223 (West Supp. 1999)("Obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications"); 47 U.S.C. § 559 (Supp. III 1997)("Obscene programming").

child pornography law has been extended dramatically,[4] particularly in response to advances in computer technology,[5] and further congressional legislation appears likely.[6]

Though the jurisdictional reach of these statutes initially might appear to be almost limitless, a careful parsing of the statutory language reveals that they are limited in several significant respects.[7] Moreover, though perhaps not unconstitutional on their face, the proper interpretation of these statutes, particularly with respect to their jurisdictional reach, is informed by a consideration of federal constitutional provisions and principles.[8] In particular, the Commerce Clause,[9] the Fifth Amendment Due Process Clause,[10] and perhaps even constitutional notions of federalism[11] serve as outer limits to the jurisdictional reach of these statutes, possibly leading to their nullification in certain applications.[12] International law also stands as a

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[4] The historical development of federal child pornography legislation generally is discussed in UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 602-07 (1986) [hereinafter ATTORNEY GENERAL'S REPORT]. For more recent discussions of the development of federal child pornography legislation, *see* Burke, *supra* note 2, at 449-52; Lisa S. Smith, *Private Possession of Child Pornography: Narrowing At-Home Privacy Rights*, 1991 ANN. SURV. AM. L. 1011, 1012-21 (1993); Campolo, *supra* note 2, at 727-38; Annemarie J. Mazzone, Comment, United States v. Knox*: Protecting Children from Sexual Exploitation Through the Federal Child Pornography Laws*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 167, 174-92 (1994). The historical development of 18 U.S.C. §§ 2252, 2252A, and 2260(b) in particular is discussed in section II.A *infra*.

[5] For a general summary of federal criminal law as it relates to the dissemination of child pornography by computer, *see* William P. Keane, *Impact of the Communications Decency Act of 1996 on Federal Prosecutions of Computer Dissemination of Obscenity, Indecency, and Child Pornography*, 18 HASTINGS COMM. & ENT. L.J. 853 (1996).

[6] Numerous bills dealing with pornography, particularly in connection with computers, have been introduced in both the House and the Senate during the past several Congressional sessions. *See also infra* note 193 (discussing Congress' recently commissioned study on limiting the availability of pornography on the Internet).

[7] *See* discussion, *infra* Part II.

[8] *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994)(recognizing (in connection with the interpretation of § 2252) that "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions"); *see also id.* at 74 (describing 1984 amendments to § 2252 as a congressional effort to "expand the child pornography statute to its full constitutional limits").

[9] *See* U.S. CONST. art. I, § 8, cl. 3; *see also infra* Part III.

[10] *See* U.S. CONST. amend. V; *see also* discussion *infra* Part V.

[11] *See* discussion *infra* Part VI.

[12] There might be other federal constitutional limits to these statutes. For example, though the regulation of child pornography generally has been found not to implicate First Amendment (i.e., U.S. CONST. amend. I) concerns see, e.g., New York v. Ferber, 458 U.S. 747, 753-73 (1982); a federal district court recently declared § 2252A(a)(5)(B) (relating to the simple possession of child pornography; *see infra* note 31), and its incorporation of the definition of "child pornography" contained in 18 U.S.C. § 2256(8)(B) (Supp. III 1997)(relating to visual

potential limitation to the extraterritorial reach of these statutes.[13]

The remainder of this Article is divided into several parts. In Part II, I describe those federal statutes that criminalize activities relating to child pornography, and discuss the jurisdictional limits of these statutes primarily in terms of their express language. In Part III, I consider the extent to which the Commerce Clause, as recently interpreted by the United States Supreme Court, might limit the jurisdictional reach of these statutes. In Part IV, I consider whether international law imposes any limitations to the extraterritorial reach of these statutes, and in Part V, I consider the same with respect to the Fifth Amendment Due Process Clause. Finally, in Part VI, I consider whether the constitutional relationship between the federal and state governments also might affect the determination whether (or to what extent) such statutes should be enacted with respect to certain child pornography-related activities. I will conclude that although the jurisdictional reach of federal criminal child pornography law is broad, it is, or should be, limited in each of these respects.

II. THE STATUTORY LIMITS OF FEDERAL CRIMINAL CHILD PORNOGRAPHY LAW

The federal criminalization of activities relating to child pornography itself consists of three statutes: 18 U.S.C. §§ 2252, 2252A, and 2260(b). Each of these statutes prohibits the transportation, shipment, receipt, distribution, and sale of child pornography, as well as the possession of child pornography with intent to sell.[14] In addition, § 2260(b) prohibits the possession of child

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depictions of persons engaging in sexually explicit conduct that only appear to be minors; *see infra* note 14), to be unconstitutionally vague and overbroad. *See* United States v. Hilton, 999 F. Supp. 131 (D. Me. 1998), *rev'd*, 167 F.3d 61 (1999), *cert. denied* No. 98-9647, 1999 WL 386695 (U.S. Oct. 4, 1999). Several legal scholars have reached the same conclusion. *See, e.g.*, Burke, *supra* note 2, at 470. *But see* David B. Johnson, Comment, *Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited*, 4 ALB. L.J. SCI. & TECH. 311, 326 (1994)). But to the extent such other constitutional provisions actually or potentially apply equally to state, as well as federal, child pornography laws, they are beyond the scope of this Article.

[13] *See* discussion *infra* Part IV. There might be other nonconstitutional limits as well. But to the extent such other limits actually or potentially apply equally to other federal criminal statutes, they are beyond the scope of this Article.

[14] Sections 2252 and 2260(b) actually do not speak in terms of child pornography per se, but rather in terms of "visual depiction[s] involv[ing] the use of a minor engaging in sexually explicit conduct." By contrast, § 2252A expressly uses the term "child pornography," which is statutorily defined as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where —

pornography with intent to transport, ship, or distribute, and §§ 2252 and 2252A prohibit the reproduction of child pornography for distribution, as well as the simple possession of child pornography. But in several other respects, §§ 2252, 2252A, and 2260(b) differ. In order to better understand these differences, it might be helpful to consider the historical development of these statutes.

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(8) (Supp. III 1997); *see also* § 2256(1) (defining "minor" for purposes of §§ 2252 and 2252A as "any person under the age of eighteen years"); § 2256(2) (defining "sexually explicit conduct" as "actual or simulated (A) sexual intercourse, including genital-genital, oral-genital, and anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person"); § 2256(5) (defining "visual depiction" as including "undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image"). Thus, though there is considerable overlap between §§ 2252 and 2260(b), and § 2252A insofar as the nature of the items prohibited (and in fact, it appears that, in this sense, everything prohibited by §§ 2252 and 2260(b) is also prohibited by § 2252A), § 2252A is broader in two important respects: § 2252A also applies to depictions that only appear to represent minors engaging in sexually explicit conduct, and it applies to activities that merely convey the impression they relate to visual depictions of minors engaging in sexually explicit conduct. Because § 2252A potentially relates to depictions that do not actually involve the use of minors engaging in sexually explicit conduct, Congress provided some relief in the form of § 2252A(c), which states:

It shall be an affirmative defense to a charge of violating paragraphs (1), (2), (3), or (4) of subsection (a) that —

(1) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct;

(2) each such person was an adult at the time the material was produced; and

(3) the defendant did not advertise, promote, present, describe, or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2252A(c). Notably, though, the affirmative defense provided for in § 2252A(c) does not apply to § 2252A(a)(5), the paragraph relating to the simple possession of child pornography.

Though these distinctions between §§ 2252 and 2260(b) and § 2252A are important, they are not significant insofar as the remainder of the analysis presented in this Article is concerned. Accordingly, I hereinafter use the term "child pornography" generally to describe materials proscribed under all three statutes.

A. Historical Development of §§ 2252, 2252A, and 2260(b)

Of §§ 2252, 2252A, and 2260(b), the first was § 2252 ("Certain activities relating to material involving the sexual exploitation of minors"), which was enacted in 1978 as part of the Protection of Children Against Sexual Exploitation Act of 1977.[15] As originally enacted, § 2252 only prohibited the sale or distribution for sale of child pornography, or the transportation, shipment, or receipt of child pornography "for the purpose of sale or distribution for sale."[16] In addition, the statute expressly applied only to child pornography produced "for pecuniary profit."[17] Moreover, § 2252 originally required that the child pornography at issue, in addition to depicting "sexually explicit conduct," be "obscene."[18] Finally, each of the crimes described in § 2252 as originally enacted included a requirement that the child pornography move in interstate or foreign commerce.[19]

Section 2252 was significantly amended in 1984 as part of the Child Protection Act of 1984.[20] The 1984 amendments eliminated the "for the purpose of sale or distribution for sale" and "pecuniary profit" requirements, the prohibition of the sale of child pornography, and the requirement that the distribution of child pornography be for the express purpose of selling it.[21] The 1984 amendments also added a prohibition of the reproduction of child pornography for distribution.[22] Finally, the 1984 amendments eliminated the

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[15] *See* Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 7 (1978). As originally enacted, § 2252(a) provided:

> Any person who —
> (1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale or distribution for sale, any obscene visual or print medium, if —
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual or print medium depicts such conduct; or
> (2) knowingly receives for the purpose of sale or distribution for sale, or knowingly sells or distributes for sale, any obscene visual or print medium that has been transported or shipped in interstate or foreign commerce or mailed, if —
> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
> (B) such visual or print medium depicts such conduct;
> shall be punished as provided in subsection (b) of this section.

Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 8. For purposes of § 2253, a "minor" was originally defined as a person under the age of 16. *See* Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 8.

[16] Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 7-8.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Pub. L. No. 98-292, § 4, 98 Stat. 204, 204 (1984).

[21] *See id.* at § 4-98 Stat. at 204-05.

[22] *See id.*

requirement that the child pornography be "obscene," and raised the age of majority to 18.[23]

The Child Protection and Obscenity Enforcement Act of 1988 amended § 2252 to expressly provide that the movement of child pornography prohibited by the statute encompassed movement accomplished "by any means including by computer."[24]

Just two years later, § 2252 was again amended as part of the Child Protection Restoration and Penalties Enhancement Act of 1990.[25] The 1990 Act amended § 2252(a)(2) to include child pornography received or distributed that "contains materials" that have moved in interstate or foreign commerce.[26] The 1990 amendments also added paragraphs (a)(3), prohibiting the sale or possession with intent to sell child pornography, and (a)(4), prohibiting the simple possession of child pornography.[27] Also included in paragraphs (a)(3) and (a)(4) was a broadened jurisdictional element, which includes child pornography "produced using materials" that moved in interstate or foreign commerce, as well as an alternative jurisdictional element that is not based on the movement of either the child pornography itself or the materials used to produce it, but rather is based on the location of the sale or possession of the child pornography.[28]

Section 2252 was most recently amended through the Protection of Children From Sexual Predators Act of 1998.[29] Most significantly, the number of matters containing child pornography required for a conviction of the possessory crimes described in § 2252(a)(4) was reduced from three or more to one or more.[30] An affirmative defense to the possessory crimes described in § 2252(a)(4) also was created for defendants possessing less than three such matters who "promptly and in good faith" (and "without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof") "took reasonable steps to destroy each such

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[23] *See id.*

[24] Pub. L. No. 100-690, § 7511(b), 102 Stat. 4485, 4485 (1998)(codified as amended in scattered sections of 18 U.S.C.). The Child Protection and Obscenity Enforcement Act of 1988 was enacted as part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 1, 102 Stat. 4181, 4181.

[25] *See* Pub. L. No. 101-647, § 323(a), (b), 104 Stat. 4816, 4818 (1990). The Child Protection Restoration and Penalties Enhancement Act of 1990 was enacted as part of the Crime Control Act of 1990, Pub. L. No. 101-647, § 1, 104 Stat. 4789, 4789.

[26] Pub. L. No. 101-647, § 323(b), 104 Stat. 4816, 4819.

[27] *See id.* at § 323(a), 104 Stat. at 4818.

[28] *Id.*

[29] *See* Pub. L. No. 105-314, §§ 202-03, 112 Stat. 2974, 2977-78 (1999).

[30] *See* Pub. L. No. 105-314, § 203(a)(1), 112 Stat. 2974, 2978.

visual depiction," or "reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction."[31]

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[31] *See* Pub. L. No. 105-314, § 203(a)(2), 112 Stat. 2974, 2978. In its current form, 18 U.S.C. § 2252(a) provides:

Any person who —

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if —

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce by any means including by computer or through the mails, if —

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(3) either —

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly sells or possesses with intent to sell any visual depiction; or

(B) knowingly sells or possesses with intent to sell any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means, including by computer, if —

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

or (4) either —

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country as defined in section 1151 of this title, knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction; or

(B) knowingly possesses 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which was produced using materials which have been mailed or so shipped or transported, by any means including by computer, if —

(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(ii) such visual depiction is of such conduct;

shall be punished as provided in subsection (b) of this section.

As amended by the Protection of Children From Sexual Predators Act of 1998, § 2252(b) provides:

(1) Whoever violates, or attempts or conspires to violate, paragraphs (1), (2), or (3) of

Section 2252A ("Certain activities relating to material constituting or containing child pornography") was enacted as part of the Child Pornography Prevention Act of 1996.[32] Section 2252A prohibits essentially the same activities relating to child pornography as § 2252, and in most respects, the two statutes are nearly identical.[33] Structurally, perhaps the most significant difference between §§ 2252 and 2252A is that the crime of reproduction of child pornography for distribution found in paragraph (2) of § 2252(a) was placed in paragraph (3) of § 2252A(a), resulting in the crimes found in § 2252(a)(3) (relating to the sale of or possession with intent to sell child pornography) and § 2252(a)(4) (relating to the simple possession of child pornography) being placed in § 2252A(a)(4) and (5), respectively. More substantively, the primary distinction between §§ 2252 and 2252A concerns

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subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but if such person has a prior conviction under this chapter, chapter 109A [("Sexual Abuse")], or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

(2) Whoever violates, or attempts or conspires to violate, paragraph (4) of subsection (a) shall be fined under this title or imprisoned not more than 5 years, or both, but if such person has a prior conviction under this chapter, chapter 109A, or chapter 117, or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 2 years nor more than 10 years.

Newly enacted § 2252(c) provides:

It shall be an affirmative defense to a charge of violating paragraph (4) of subsection (a) that the defendant –

(1) possessed less than three matters containing any visual depiction proscribed by that paragraph; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any visual depiction or copy thereof –

(A) took reasonable steps to destroy each such visual depiction; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

[32] *See* Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, 3009-28 to -29 (1996). The Child Pornography Prevention Act of 1996 was enacted as part of the Omnibus Consolidated Appropriations Act, 1997. *See* Pub. L. No. 104-208, 110 Stat. 3009, 3009-749. Like § 2252, § 2252A also was amended by the Protection of Children From Sexual Predators Act of 1998. *See* Pub. L. No. 105-314, §§ 202-03, 112 Stat. 2974, 2978.

[33] Indeed, in large measure, § 2252A appears to be little more than a more grammatically correct version of § 2252.

the latter's express use of the statutorily defined term "child pornography," a term that also was added as part of the 1996 Act.[34]

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[34] *See* Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, 3009-28; *see also supra* note 14. As recently amended, 18 U.S.C. § 2252A(a) provides:

> Any person who —
>
> (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;
>
> (2) knowingly receives or distributes —
>
> (A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or
>
> (B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;
>
> (3) knowingly reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer;
>
> (4) either —
>
> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or
>
> (B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or
>
> (5) either —
>
> (A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or other material that contains an image of child pornography; or
>
> (B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, shall be punished as provided in subsection (b).

The penalties for the violation of, attempt to violate, or conspiracy to violate § 2252A(a)(1)-(4) are the same as those prescribed for violations of § 2252(a)(1)-(3). *See* 18 U.S.C. § 2252A(b)(1). Similarly, the penalties for the violation of, attempt to violate, or conspiracy to violate § 2252A(a)(5) are the same as those prescribed for violations of § 2252(a)(4). *See* 18 U.S.C. § 2252A(b)(2). Finally, in addition to the affirmative defense provided in § 2252A(c) (*see supra* note 14), newly enacted § 2252A(d) provides:

> It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant –
>
> (1) possessed less than three images of child pornography; and
>
> (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof –
>
> (A) took reasonable steps to destroy each such image; or

Section 2260 ("Production of sexually explicit depictions of a minor for importation into the United States") was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994,[35] meaning that it was enacted after the enactment of § 2252, but before the enactment of § 2252A.[36] Though § 2260(b) prohibits many of the same activities as do §§ 2252 and 2252A (and actually prohibits some activities not expressly prohibited under those statutes), § 2260(b) specifically relates to activities and persons located outside of the United States, though only where there is an intent that the child pornography at issue is to be imported into the United States.[37]

In summary, then, §§ 2252(a)(1) and 2252A(a)(1) prohibit the transport or shipment of child pornography; §§ 2252(a)(2) and 2252A(a)(2), the receipt or distribution of child pornography; §§ 2252(a)(2) and 2252A(a)(3), the reproduction of child pornography for distribution; §§ 2252(a)(3) and 2252A(a)(4), the sale of or possession with intent to sell child pornography; and §§ 2252(a)(4) and 2252A(a)(5), the simple possession of child pornography. Each of these statutes now require only that a single item of child pornography be involved in order to secure a conviction.[38]

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

As the language of §§ 2252 and 2252A suggests, there are other, less significant distinctions between these statutes beyond those already discussed. *See infra* notes 38-41 and accompanying text.

[35] *See* Pub. L. No. 103-322, § 160001(a), 108 Stat. 1796, 2036-37 (1994)(enacting statute originally as § 2258).

[36] Apparently as a result, and because § 2260 has not since been amended, § 2260(b) does not incorporate the statutory definition of "child pornography" utilized in § 2252A.

[37] As codified, 18 U.S.C. § 2260(b) ("Use of visual depiction"), provides:

> A person who, outside the United States, knowingly receives, transports, ships, distributes, sells, or possesses with intent to transport, ship, sell, or distribute any visual depiction of a minor engaging in sexually explicit conduct (if the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct), intending that the visual depiction will be imported into the United States or into waters within a distance of 12 miles of the coast of the United States, shall be punished as provided in subsection (c).

Section 2260(c) provides:

> A person who violates subsection . . . (b), or conspires or attempts to do so —
> (1) shall be fined under this title, imprisoned not more than 10 years, or both; and
> (2) if the person has a prior conviction under this chapter or chapter 109A, shall be fined under this title, imprisoned not more than 20 years, or both.

As of the writing of this Article, I have not been able to locate any reported cases in which § 2260 has been interpreted or applied.

[38] Sections 2252(a)(4) and 2252A(a)(5) actually vary slightly as to the precise nature of the item(s) prohibited. Section 2252(a)(4) prohibits the possession of "1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any [child pornography]." By contrast, § 2252A(a)(5) prohibits the possession of "any book, magazine, periodical, film,

videotape, computer disk, or other material that contains an image of child pornography." Thus, under § 2252(a)(4), there must exist at least one "matter" that "contains" child pornography, whereas under § 2252A(a)(5), the particular "material" at issue must "contain" at least one image of child pornography. Though this distinction might seem to have little significance following the 1998 reduction in the number of items required for a conviction, it continues to have significance with respect to the affirmative defenses described in § 2252(c) (which focuses on the number of *matters* possessed) and § 2252A(d) (which focuses on the number of *images* possessed).

The meaning of the term "matter" for purposes of § 2252(a)(4) as it relates to child pornography found on a computer has been the subject of some debate. In *United States v. Lacy*, 119 F.3d 742, 748 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1571 (1998), the Court of Appeals for the Ninth Circuit held that "matter" must refer to a computer hard drive or floppy disk, *accord, United States v. Wilson*, 182 F.3d 743-44 (10th Cir. 1999). Conversely, in *United States v. Vig*, 167 F.3d 443, 446-48 (8th Cir. 1999), *cert. denied*, No. 98-9901, 1999 WL426456 (U.S. Oct. 4, 1999), and No. 98-9902 (U.S. Oct. 4, 1999), the Court of Appeals for the Eighth Circuit, expressly rejecting the reasoning of the *Lacy* court, held that "matter" refers instead to computer image files found on any particular hard drive or floppy disk. Relying on the Seventh Circuit Court of Appeals' decision in *United States v. Hall*, 142 F.3d 988, 999 (7th Cir. 1998), the *Vig* court reasoned that the statutory language of § 2252(a)(4)(B) "indicates that 'other matter' is simply something which, at a minimum, must be capable of containing a visual depiction. The computer image files all contained one, and some more than one, visual depiction." *Vig*, 167 F.3d at 447 (footnote omitted). With respect to the *Lacy* court's reasoning, the *Vig* court opined:

> To conclude, as defendants argue, that a hard drive is the computer equivalent of a book, magazine, periodical, etc., would result in the absurd scenario where an individual who possesses three books with one visual depiction apiece violates the statute, but an individual with hundreds of images on a hard drive does not. . . . "A computer hard drive is much more similar to a library than a book; the hard drive can store literally thousands of documents and visual depictions. Each file within the hard drive is akin to a book or magazine within that library."

Id. at 448 (quoting United States v. Fellows, 157 F.3d 1197, 1201 (9th Cir. 1998), *cert. denied*, No. 98-9780, 1999 WL413044 (U.S. Oct. 4, 1999)). Finally, the *Vig* court rejected the defendants' appeal to legislative history. The defendants argued that § 2252A(a)(5)(B), which was enacted in 1996, "criminalized the knowing possession of 'any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images of child pornography,'" *Vig*, 167 F.3d at 448, and that the Senate Judiciary Committee, in speaking to a similar amendment proposed with respect to § 2252(a)(4), had commented that "'since a single computer disk is capable of storing hundreds of child pornographic images, current law effectively permits the possession of substantial collections of child pornography, a loophole that will be closed under this section.'" *Id.* (quoting S. REP. NO. 104-358 (1996)). But the *Vig* court concluded that the addition of § 2252A(a)(5)(B) did not necessarily mean that the Vigs' conduct was not already criminalized by § 2252(a)(4)(B), and that "the Committee's remarks, which go against the plain meaning of the statute and [were] made six years after the passage of section 2252(a)(4)(B), are [not] entitled to much weight." *Vig*, 167 F.3d at 448.

Judge Arnold dissented, having concluded that *Lacy* was "correctly decided." *Id.* at 451. (Arnold, J., dissenting). "Even if that case, for the reasons that the court mentions today, adopted a construction of the statute that is problematic, I believe that the rule of lenity requires a result different from the one that the court reaches in this case." *Id.* (Arnold, J., dissenting).

It seems to me that the phrase "other matter" lends itself as plausibly to a construction that

> favors the defendants as it does to the opposite construction. The view of the Seventh Circuit, and of the court today, that "other matter" means "anything containing a visual depiction" is a reasonable one, but the view of the Ninth Circuit that "other matter" includes only physical objects like those enumerated in the statute is equally reasonable.
>
> Both parties to the case maintain that the other's interpretation leads to absurdity. These arguments are unhelpful because neither interpretation can avoid absurd results. The court points out that interpreting "other matter" to mean a hard drive rather than a file would be absurd because someone who possessed three books containing one proscribed image each would be in violation of the statute, while someone who possessed a hard drive containing hundreds of such images would not be. But the court's interpretation also leads to an absurd result: Under the court's holding, someone who possessed three books containing one proscribed image each would be in violation of the statute, while someone who possessed a computer file containing hundreds of such images would not be. There is in fact no interpretation that can prevent evident incongruities: There is no question that a person who possessed a thousand-page book filled with images of child pornography would not be in violation of the statute. Congress ensured such anomalies when it wrote the statute as it did.
>
> The other arguments that the parties advance on the meaning of "other matter" create an equally unresolvable battle of analogies. Is a hard drive like a book or a library? Is it significant that computer files can be made into tangible objects by printing, or is printing from files just like tearing pages from a book? These kinds of inquiries can only give rise to speculation about congressional intent, and to guesswork about which of two reasonable alternative constructions is the right one.

Id. (Arnold, J., dissenting)(citations omitted).

Judge Arnold's arguments seem compelling. Obviously, Congress (for whatever reasons) did not criminalize every conceivable form of possession of child pornography when it enacted § 2252(a)(4). Though child pornography opponents might characterize those gaps in the statute as absurd, certainly this is a different form of absurdity than the sort of absurdity one usually associates with an erroneous interpretation of some statutory provision. Moreover, it seems that, for the reasons advanced by Judge Arnold, the analogy between a book and a computer disk, though not perfect, is a far better fit than is the analogy between a book and a computer file.

And there are other difficulties with the *Vig* court's decision. For one thing, the court (apparently) failed to consider the meaning of the term "visual depiction" – i.e., the thing contained in the "other matter" *See* 18 U.S.C. § 2252(a)(4)(B). "Visual depiction" is statutorily defined as including "undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image." *Id.* § 2256(5). A computer image file seems to fit this definition much more closely than it does any reasonable definition of "other matter." Regarding the use of the legislative history accompanying the enactment of § 2252A(a)(5)(B), though I share the *Vig* court's skepticism as to the utility of this sort of authority generally, I do not believe that it can be dismissed for the reason that does not relate directly to the statute in question. For certainly the Senate Judiciary Committee's comments with respect to § 2252A(a)(5) have some relevance with respect to any determination of the purpose of that statute, and surely that purpose bears some relation to a proper interpretation of § 2252(a)(4). Finally, I would add that, strictly speaking, neither of the cases relied upon by the *Vig* court as supporting its conclusion involved § 2252(a)(4); rather, both involved United States Sentencing Guidelines Manual § 2G2.4(b)(2) (which relates not to "matters," but to "items" containing visual depictions involving the sexual exploitation of minors) and (in the case of *Hall*) § 2G2.4(b)(1) (which relates to "material" involving a prepubescent minor or a minor under the age of twelve). *See Fellows*, 157 F.3d at 1200-02;

Section 2260(b) (which again relates only to acts occurring outside the United States) likewise prohibits the receipt, transport, shipment, distribution, and sale of child pornography, as well as the possession of child pornography with intent to sell. But, unlike §§ 2252 and 2252A, § 2260(b) also expressly prohibits the possession of child pornography with intent to transport, ship, or distribute. Also, unlike §§ 2252 and 2252A, § 2260(b) does not expressly prohibit either the reproduction of child pornography for distribution or the simple possession of child pornography.

Hall, 142 F.3d at 997-99. Indeed, neither the *Fellows* court nor the *Hall* court even mentions *Lacy*. In any event, even if "items" and "material" as used in these Guidelines provisions have meanings similar to "matter" as used in § 2252(a)(4)(B), the reasoning set forth above would seem to apply to those cases as well.

One last observation: At least with respect to the elements at issue, Vigs'-conduct appears to fit squarely under § 2252A(a)(5)(B), as that statute (as then in force) required but a single computer disk containing three or more images of child pornography. Why these crimes were not charged under that statute is unknown. But had these crimes been charged under § 2252A(a)(5)(B), this whole problem could have been avoided.

There are other ambiguities with respect to these statistics. For example, is unclear whether the affirmative defenses described in §§ 2252(c) and 2252A(d) would be available in those situations where more than three matters or images were possessed, but where only one or two *different* visual depictions or images were involved. As to ambiguities of this nature, the better interpretation of these statutes seems to suggest that there is significance in the number of different types of pornography possessed, as opposed to the number of copies of any particular image.

It also is unclear why the "3 or more" language was included with respect to §§ 2252(a)(4) and 2252A(a)(5) in the first instance. The Fifth Circuit Court of Appeals opined (with respect to § 2252(a)(4)(B)) that "the statute's requirement that a defendant possess 'three or more' items indicates that the legislature did not intend for this statute to be used to charge multiple offenses." United States v. Kimbrough, 69 F.3d 723, 730 (5th Cir. 1995). The *Kimbrough* dissent, though, disagreed:

> [I]t is more reasonable to assume that Congress simply wanted to heighten the evidentiary burden for convictions based on the mere possession of child pornography by requiring the Government to prove at least three items, but that Congress did not intend to eliminate the prosecutor's discretion to bring additional counts where there were *more* than three items, as long as each count is supported by three different and distinct items.

Id. at 736 (Garza, J., concurring in part and dissenting in part). The dissent further observed that "[t]he legislative history contains no reference whatsoever to the language and purpose of § 2252(a)(4)(B)[,]" and that "[i]f Congress intended to remove prosecutorial discretion under this particular section of the statute, one would expect to find some reference to this limitation." *Id.* at 736 n.4 (Garza, J., concurring in part and dissenting in part). More recent remarks made by Senator Patrick Leahy in connection with legislation aimed at amending §§ 2252 and 2252A seem to support Judge Garza's assumption. *See* 144 CONG. REC. S10518-02 (1998), *available in* 1998 WL 636904. With the recent reduction in the number of items required for a conviction under either statute, the answer to this question could take on even greater significance in future cases.

B. *Jurisdictional Elements of §§ 2252, 2252A, and 2260(b)*

Section 2252(a)(1), (2) (relating to the transport, shipment, receipt, distribution, or reproduction for distribution of child pornography), as well as § 2252A(a)(1)-(3) (relating to the same), expressly require that the child pornography itself move in interstate or foreign commerce.[39] The remaining crimes described in §§ 2252 and 2252A — those relating to the sale, possession with intent to sell, and simple possession of child pornography — likewise contain a similar Commerce Clause-type jurisdictional element.[40] But with respect to these latter crimes, the jurisdictional element may be proved either by evidence that the child pornography itself moved in interstate or foreign commerce, or by evidence that the child pornography was "produced" using materials that so moved.[41] Sections 2252 and 2252A both

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[39] For purposes of §§ 2252 and 2252A, the term "interstate commerce" "includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia," and the term "foreign commerce" "includes commerce with a foreign country." 18 U.S.C. § 10 (1994). The Supreme Court has raised, but not definitively answered, the question whether the definitions of these terms as provided in § 10 are coextensive with Congress' Commerce Clause authority. *See* McElroy v. United States, 455 U.S. 642, 653 (1982).

There appears to be one, and perhaps two, minor exceptions to the requirement that, for purposes of §§ 2252(a)(1), (2) and 2252A(a)(1)-(3), the child pornography itself must so move. The first exception is found in §§ 2252(a)(2) and 2252A(a)(3), each of which apparently require only that child pornography be reproduced with an intent to distribute those reproductions via interstate or foreign commerce.

The second possible exception is found in § 2252(a)(2), which prohibits the receipt or distribution of "any visual depiction . . . which contains materials which have been mailed or so shipped or transported . . . ." It is somewhat difficult to comprehend what might constitute materials contained within some particular item of child pornography; perhaps the paper used to print such an item might qualify. *Cf.* § 2252(a)(4)(B) (prohibiting the possession of child pornography "produced using materials" that have moved in interstate or foreign commerce); § 2252A(a)(5)(B) (prohibiting the same). I suspect, though, that what was actually intended in § 2252(a)(2) is something more like that which is found in § 2252A(a)(2)(B), which prohibits the receipt or distribution of "any material that contains child pornography" that, in turn, has moved in interstate or foreign commerce — meaning that the material itself (such as a computer disk) that contains the child pornography does not have to so move. Of course, such an interpretation of § 2252(a)(2) again would require that the child pornography itself move in interstate or foreign commerce. It seems doubtful, though, that the text of § 2252(a)(2) as written could support such an interpretation.

[40] *See* 18 U.S.C. § 2252(a)(3)(B), (4)(B); 18 U.S.C. § 2252A(a)(4)(B), (5)(B). For the remainder of this Article, I shall refer generally to this assertion of federal criminal jurisdiction based on the movement of the child pornography or child pornography-related materials in interstate or foreign commerce as Commerce Clause jurisdiction.

[41] *See* 18 U.S.C. § 2252(a)(3)(B), (4)(B); 18 U.S.C. § 2252A(a)(4)(B), (5)(B). Actually, based solely on the language of these statutes, it is somewhat unclear whether, with respect to

generally provide that the movement of either the child pornography itself or the materials used to produce the child pornography may be accomplished "by any means," including by computer.[42] Thus, the interstate transmission of child pornography via the Internet satisfies this element.[43]

Alternatively, the jurisdictional element of the crimes described in §§ 2252 and 2252A relating to the sale, possession with intent to sell, and simple possession of child pornography may be proved by evidence that the crimes occurred "in the special maritime and territorial jurisdiction of the United States, on any land or building owned by, leased to, or otherwise used by or under the control of" the United States government, or in the Indian country.[44]

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§ 2252(a)(4)(B), it is the materials used to produce the child pornography itself or the "matter" that contains the child pornography (or, with respect to § 2252A(a)(5)(B), the child pornography or the "material" that contains the child pornography) that must move in interstate or foreign commerce. But the Court of Appeals for the Ninth Circuit has held, with respect to § 2252(a)(4)(B), that it is the materials used to produce the child pornography itself that must so move. *See Lacy*, 119 F.3d at 748-50. Presumably, the same applies with respect to § 2252A(a)(5)(B).

At this juncture, it is interesting to observe the statutory presumption found in 18 U.S.C.A. § 1469 (Supp. 1999) that applies to the crimes described in chapter 71 ("Obscenity"), 18 U.S.C.A. §§ 1460-69 (West 1984 & Supp. 1999):

> (a) In any prosecution under this chapter in which an element of the offense is that the matter in question was transported, shipped, or carried in interstate commerce, proof, by either circumstantial or direct evidence, that such matter was produced or manufactured in one State and is subsequently located in another State shall raise a rebuttable presumption that such matter was transported, shipped, or carried in interstate commerce.
> (b) In any prosecution under this chapter in which an element of the offense is that the matter in question was transported, shipped, or carried in foreign commerce, proof, by either circumstantial or direct evidence, that such matter was produced or manufactured outside of the United States and is subsequently located in the United States shall raise a rebuttable presumption that such matter was transported, shipped, or carried in foreign commerce.

I have not been able to determine why similar presumptions were not also included in chapter 110 (the chapter embracing §§ 2252, 2252A, and 2260(b)), particularly considering that the obscenity statutes to which the § 1469 presumptions relate contain nearly identical Commerce Clause-type jurisdictional elements.

[42] *See* 18 U.S.C. § 2252(a)(1), (2), (3)(B), (4)(B); 18 U.S.C. § 2252A(a)(1)-(3), (4)(B), (5)(B).

[43] *See* United States v. Smith, 47 M.J. 588, 591-92 (1997), *review denied*, 49 M.J. 167 (1998). The *Smith* court opined that, given the global nature of the Internet, this conclusion applies "regardless of the location of the computer from which the pornographic images were sent to the [defendant's] computer (e.g., even if the 'sending' computer were located in the same state as the 'receiving' computer)." *Id.* at 592. The child pornography at issue in *Smith*, though, was transmitted from Virginia to North Carolina. *See id.* at 591-92.

[44] 18 U.S.C. § 2252(a)(3)(A), (4)(A); 18 U.S.C. § 2252A(a)(4)(A), (5)(A). For purposes of these statutes, "special maritime and territorial jurisdiction of the United States" is defined as including:

By contrast, the jurisdictional element found in § 2260(b), though obviously based on the Commerce Clause, is unlike either of the jurisdictional elements found in §§ 2252 and 2252A. Rather than requiring some movement of the child pornography or child pornography-related materials in interstate or foreign commerce (or basing jurisdiction on the location of the child pornography or of activities involving child pornography), § 2260(b) only requires an intent "that the visual depiction will be imported into the United

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(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(6) Any vehicle used or designed for flight or navigation in space and on the registry of the United States pursuant to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies and the Convention on Registration of Objects Launched into Outer Space, while that vehicle is in flight, which is from the moment when all external doors are closed on Earth following embarkation until the moment when one such door is opened on Earth for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the vehicle and for persons and property aboard.

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

18 U.S.C. § 7 (1994).

I have only been able to locate one reported case, United States v. Pullen, 41 M.J. 886 (1995), in which the alternative jurisdictional element described in § 2252(a)(3)(A), (4)(A) and § 2252A(a)(4)(A), (5)(A) was interpreted or applied. *See infra* notes 123-25 and accompanying text.

States or into waters within a distance of 12 miles of the coast of the United States."[45]

From a jurisdictional standpoint, perhaps the most interesting (and far-reaching) issue concerns the meaning of the term "produced" for purposes of § 2252(a)(3)(B), (4)(B) and § 2252A(a)(4)(B), (5)(B). Though "produced" is not statutorily defined, 18 U.S.C.A. § 2256(3) defines "producing" for purposes of "this chapter" (chapter 110 of title 18 (§§ 2251-2260)) as meaning "producing, directing, manufacturing, issuing, publishing, or advertising."[46] Setting aside (for the moment) the latter half of this definition, it appears that the first half — that "producing" means "producing, directing, [or] manufacturing" — most likely refers only to those events surrounding the original creation or actual making of the subject visual depictions. Certainly, such an interpretation of "producing" is "in accord with [the] ordinary and natural meaning"[47] of this term.[48]

An interpretation of the term "producing" as referring to the original creation of the visual depictions at issue also squares with the meaning of this term as it appears elsewhere in § 2252(a)(3)(B), (4)(B) and (through the statutory definition of "child pornography") § 2252A(a)(4)(B), (5)(B).[49] Again, in order to be convicted of the crimes described in § 2252(a)(3)(B), (4)(B) (or of any of the other crimes described in § 2252(a)), the government also must prove that the "producing" of each visual depiction "involves the use of a minor engaging in sexually explicit conduct." Similarly, for purposes of § 2252A(a)(4)(B), (5)(B) (as well as the remaining crimes described in § 2252A(a)), "child pornography" is alternatively defined as including any visual depiction of sexually explicit conduct where "the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct."[50] Obviously, as used in these phrases, the term "produce" and its

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[45] *See* 18 U.S.C. § 2260(b) (Supp. III 1997).

[46] 18 U.S.C. § 2256(3) (Supp. III 1997).

[47] Smith v. United States, 508 U.S. 223, 228 (1993).

[48] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1810 (1963)(defining "produce" as "to cause to have existence or to happen: bring about: ORIGINATE").

[49] *Cf.* National Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 501 (1998)(recognizing the "established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning").

[50] Section 2256(8)(A); *see also* § 2252A(c) (providing an affirmative defense to the crimes described in § 2252A(a)(1)-(4) if, *inter alia*, "the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct" and "each such person was an adult at the time the material was produced"); *cf.* Deal v. United States, 508 U.S. 129, 132 (1993)(recognizing the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used").

Though § 2260(b) does not contain a jurisdictional element such as that found in §§

variants can only refer to the original creation or "manufacturing" of the depictions. And the same is true of the way this term is used throughout Chapter 110.[51] But for two easily distinguishable and inconsequential exceptions,[52] each use of every variation of the term "produce" as it appears in §§ 2251-2260 is consistent with an original creation interpretation.[53]

The same is true of every federal case I have been able to locate (save one recent case from the Court of Appeals for the Ninth Circuit)[54] in which variations of the term "produce" have been interpreted for purposes of these statutes. Most directly on point is *United States v. Robinson*.[55] In *Robinson*, the Court of Appeals for the First Circuit upheld the constitutionality of § 2252(a)(4)(B) on the ground that it "contains an explicit jurisdictional element

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2252(a)(3)(B), (4)(B) and 2252A(a)(4)(B), (5)(B), § 2260(b) similarly provides that it only prohibits acts involving visual depictions in which "the production of the visual depiction involved the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2260(b).

[51] *Cf.* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992)(recognizing the "basic canon of statutory construction that identical terms within an Act bear the same meaning").

[52] One such exception is found in § 2253(l), the provision governing the use of depositions during the course of a criminal forfeiture proceeding, which provides that "any designated book, paper, document, record, recording, or other material not privileged" within the possession or control of the witness may be ordered "*produced* at the same time and place [as the taking of the testimony of the witness] in the same manner as provided for . . . under rule 15 of the Federal Rules of Criminal Procedure." 18 U.S.C. § 2253(l) (emphasis added). Obviously, the term "produced" as used in this subsection (which does not necessarily even relate to visual depictions of minors engaging in sexually explicit conduct) has a well-recognized meaning that is somewhat akin to the dissemination interpretation of "produced" described in the text accompanying *infra* notes 71-73.

A second exception appears in § 2257(a), (f)(4), provisions relating to certain record keeping requirements, which (unlike § 2252) use variations of the term "produce" to refer to the books, etc. that contain the visual depictions themselves. But for purposes of § 2257, § 2257(h)(3) expressly redefines "produces" as including "the duplication, reproduction, or reissuing of any such matter . . . ." Significantly, though, § 2257(h)(3) further provides that, even for purposes of that section, the term "produces" "does not include mere distribution *or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted* . . . ." (emphasis added); *see also* 28 C.F.R. § 75.1(c) (1997)(similarly defining "producer" for purposes of the regulations promulgated pursuant to 18 U.S.C. § 2257).

[53] *See* § 2251(a)-(c); § 2251A(a)-(b); § 2260(a); *see also* § 2252(b)(1) (using the term "production" in a similar sense); § 2252A(b)(1) (likewise so using this term); § 2253(a)(1) (referring to §§ 2251, 2251A and 2252); § 2254(a)(1) (referring to the same); *cf.* § 1469 (using "produced" in conjunction with "manufactured"); U.S. SENTENCING GUIDELINES MANUAL § 2G2.4 (1992)("Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct," the guideline applicable to violations of § 2252(a)(4)), paragraph (c)(1) (using variations of the term "produce" in a manner similar to the way this term is used in § 2251).

[54] *See Lacy*, 119 F.3d at 742.

[55] 137 F.3d 652 (1st Cir. 1998).

requiring that the visual depictions in question, *or the materials used to create such depictions*," move in interstate or foreign commerce.[56] The *Robinson* court held that this second means of proving the jurisdictional element of this statute was proved in that case by evidence that the visual depictions at issue (photographs of nude boys) were "taken using a Kodak instant camera and Kodak instant film, both of which were manufactured . . . outside of Massachusetts," the state where the defendant resided.[57]

Federal courts interpreting this term as it is used in 18 U.S.C. § 2251(a)[58] have reached a similar interpretation of "produce." One such case is *United States v. Petrov*,[59] a case involving a commercial film processor convicted of violating several federal obscenity statutes. Petrov challenged his conviction of conspiracy to violate § 2251(a)[60] on the ground that, as a mere processor,

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[56] *Id.* at 656 (emphasis added).

[57] *Id.* at 653; *accord* United States v. Kimbrough, 69 F.3d 723, 733 (5th Cir. 1995)(holding jury instruction requiring proof of knowledge as to the age of the performers adequately required jury to consider whether the defendant "knew the producing of the depiction involved the actual use of a minor engaging in sexually explicit conduct"); United States v. Thoma, 726 F.2d 1191, 1201 (7th Cir. 1984)("Section 2252 requires that the production of the obscene material involve minors, but does not require that the person mailing the material be the person who produced it. Section 2252 punishes those who knowingly ship this material for the purpose of sale regardless of who originally produced it."); *see also* United States v. Nolan, 818 F.2d 1015, 1016-18 (1st Cir. 1987); United States v. Bateman, 805 F. Supp. 1053, 1057-58 (D.N.H. 1992); United States v. Porter, 709 F. Supp. 770, 773-74 (E.D. Mich. 1989), *aff'd*, 895 F.2d 1415 (6th Cir. 1990).

[58] As recently amended, 18 U.S.C.A. § 2251(a) (West Supp. 1999) provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (d), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate foreign commerce or mailed.

[59] 747 F.2d 824 (2d Cir. 1984).

[60] The version of § 2251(a) at issue in *Petrov* differs somewhat from the current version of § 2251(a) (*see supra* note 58). In *Petrov*, § 2251(a) provided:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, shall be punished as provided under subsection (c), if such person knows or has reason to know that such visual or print medium will be transported in interstate or foreign commerce or mailed, or if such visual or print medium has actually been transported in interstate foreign commerce or mailed.

Petrov, 747 F.2d at 827.

he "had no direct involvement in using, employing, or persuading minors to engage in any explicit sexual conduct depicted in any of the photographs [his company] developed."[61] In response, the government argued that Petrov's conviction should be upheld "because processing film is an integral part of the *production* of child pornography . . . ."[62] The Court of Appeals for the Second Circuit rejected the government's interpretation:

> The plain language of § 2251(a) defeats the government's argument. Its proscribed acts are those of someone who "employs, uses, persuades, induces, entices or coerces" a minor to engage in sexually explicit conduct, and even those acts are not covered unless done "for the purpose of producing any visual or print medium depicting such conduct". Section 2251(a) does not purport to proscribe the entire process that creates child pornography; instead, it is narrowly drawn to reach only those people who deal with children directly. Absent some indication that Petrov's conduct aided his customers in procuring the participation of children, we cannot sustain the government's theory.[63]

A similar interpretation of § 2251(a) was reached by the same court in *United States v. Sirois*.[64] In *Sirois*, the court of appeals (through Judge Calabresi) held that a person "uses" a minor to "produce" child pornography if the minor "is photographed in order to *create* pornography" — that is, if the minor "*serves as the subject* of the photography."[65]

One of the primary differences between this version of § 2251(a) and current § 2251(a) is the additional jurisdictional basis added as part of the 1998 Act ("if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer"), a jurisdictional basis whose language appears to have come from § 2252(a). Indeed, the Committee Report that accompanies the 1998 Act explains the purpose of this amendment as follows:

> This section allows for the prosecution of child pornography production cases where materials used to *make* the child pornography were transported in interstate or foreign commerce. While current law regarding the possession of child pornography proscribes the possession of child pornography that was produced with materials that had been mailed, shipped or transported in interstate or foreign commerce, the child pornography production statute only allows for prosecution if the defendant knows or has reason to know that the visual depictions themselves will be transported in interstate or foreign commerce. Federal law enforcement officials confront numerous cases where the defendant produced the child pornography but did not intend to transport the images in interstate commerce. This section will allow for such prosecutions.

H.R. REP. NO. 105-557, at 20 (1998) (emphasis added), *reprinted in* 1999 U.S.C.C.A.N. 684, 694. Thus, the amendments to § 2251(a) since *Petrov* was decided only seem to strengthen the arguments in favor of the interpretation of "produce" suggested in this Article.

[61] Petrov, 747 F.2d at 827.

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

[63] *Id.*

[64] 87 F.3d 34 (2d Cir.), *cert. denied*, 519 U.S. 942 (1996).

[65] Sirois, 87 F.3d at 41-42 (emphasis added); *see also* United States v. Esch, 832 F.2d 531,

The legislative history that accompanies the Protection of Children Against Sexual Exploitation Act of 1977, though sparse, also seems to be in accord with an original creation interpretation.[66] Perhaps most telling is a June 14, 1977 letter from Patricia M. Wald, Assistant Attorney General, United States Department of Justice, to James O. Eastland, Chairman, Committee on the Judiciary, United States Senate.[67] In that letter, Ms. Wald cautioned:

> We share the concern of Congress with regard to the production of films and photographs portraying sexual abuse of children. However, we think that the proposed legislation needs to be modified in certain ways in order to deal with the problem.
>
> In the first place, the bill is, in our opinion, jurisdictionally deficient. It is well settled that Congress may bar articles it deems undesirable from interstate or foreign commerce or from the mails. . . .
>
> It is also settled that Congress may prohibit the manufacture of an article within a state if the article will enter or affect interstate or foreign commerce. . . .
>
> . . .
>
> [But t]he words "affect interstate commerce or foreign commerce" should . . . be deleted from the bill. Without this change the bill would cover a purely intrastate photographing and distributing operation on the theory that commerce is "affected" in that the processing of the film or photographs utilize materials that moved in interstate commerce. In our opinion, the investigation or prosecution of purely local acts of child abuse should be left to local authorities with Federal involvement confined to those instances in which the mails or facilities of interstate commerce are actually used or intended to be used for distribution of the film or photographs in question.
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> . . . .

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536 (10th Cir. 1987); United States v. Smith, 795 F.2d 841, 846 (9th Cir. 1986) (recognizing that although a conviction under § 2251(a) does not necessarily require "the actual production of a visual depiction," it does require "the enticement of minors 'for the purpose of producing' a visual depiction of sexually explicit conduct," and thus "[w]hether the [undeveloped] film involved had actually reached the point of 'visual depiction' or not, Smith's use of the girls was clearly 'for the purpose of producing' such visual depictions"); United States v. Fenton, 654 F. Supp. 379, 380 (E.D. Pa. 1987); United States v. Meyer, 602 F. Supp. 1476, 1479 (S.D. Cal. 1984) ("MEYER'S act of producing the child pornography, the act which § 2251 now prohibits, ceased when he stopped creating the visual depictions and using a minor to do so.").

[66] *See, e.g.*, S. REP. NO. 95-438 at 3 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 40-41 (describing the first purpose of this legislation as "prohibit[ing] the use of children in the production of materials that depict explicit sexual conduct"); *id.* at 6, *reprinted in* 1978 U.S.C.C.A.N. at 44 (distinguishing the term "produced" from the term "reproduced"); *id.* at 16, *reprinted in* 1978 U.S.C.C.A.N. at 53 (discussing the "production" of child pornography in relation to the "jurisdictional element" of the crimes described in § 2251).

[67] *Id.* at 24, *reprinted in* 1978 U.S.C.C.A.N. at 59.

> Fourthly, the bill should be expanded . . . . [S]ince we view the bill as an attempt to deal with the commercial exploitation of sexual activity involving children, subsection 2252(a)(2) should be amended to include any individual who manufactures, reproduces or duplicates the subject films or photographs with the requisite intent as well as those who receive or sell such films or photographs. This will enable the bill to cover film processing laboratories and others who are instrumental in the distribution process and who are aware of the nature of the material and the use of the mails or facilities of interstate or foreign commerce.
>
> . . . .
>
> As noted above, we have concerns about the bill, as to both its constitutionality and the problems of proof it creates. We also believe its utility would be limited. Nevertheless, if the changes we recommend are incorporated, the Department of Justice would not object to this legislation.
>
> It is our understanding that many of the photographs and films the legislation would attempt to cover are in fact produced abroad; the legislation would not apply to such materials except for that portion of subsection 2252(a)(2) which punishes receipt from foreign commerce. Moreover, with regard to material which is produced in the United States, recent newspaper accounts have indicated that law enforcement agencies who have investigated in this area for years have had little if any success in ascertaining where and how the films and photographs are made and in discovering the persons responsible for making them. Finally, to the extent that such investigations may prove fruitful, there are appropriate local statutes and ordinances, such as child abuse laws and laws prohibiting contributing to the delinquency of a minor, which would apply to the conduct made criminal in section 2251 of the proposed bill; and we do not think it likely that local prosecutors would hesitate to bring charges. The principal advantage to be gained from enactment of this legislation would be to provide the Federal Bureau of Investigation and the Postal Service with investigative jurisdiction in an area that is basically a local law enforcement problem.[68]

Of course, § 2252 eventually was amended to include the reproduction of child pornography for distribution,[69] as well as the possession of child pornography produced using materials that moved in interstate or foreign commerce.[70] Nevertheless, it is clear that the Department of Justice took "produce" to mean originally create. Moreover, there is no indication that anyone, including the Department of Justice, envisioned § 2252 as having a jurisdictional reach farther than that associated with the movement of those materials used to originally create the child pornography at issue.

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[68] *Id.* at 25-30, *reprinted in* 1978 U.S.C.C.A.N. at 60-65 (citations omitted).

[69] *See* 18 U.S.C.A. § 2252(a)(2) (West Supp. 1999).

[70] *See* 18 U.S.C.A. § 2252(a)(4)(B) (West Supp. 1999).

There is one other conceivable interpretation of the term "produce" as used in Chapter 110 that (though also failing to support the Ninth Circuit's interpretation) deserves some discussion. As mentioned previously, the statutory definition of "producing" provided in § 2256(3) includes the terms "issuing," "publishing" and "advertising." At least with respect to certain statutes found in Chapter 110, such an interpretation of "producing" and its variants seems plausible.[71] But the difficulty with an argument that the jurisdictional element of the crimes described in § 2252(a)(3)(B), (4)(B) and in § 2252A(a)(4)(B), (5)(B) could be satisfied upon proof that the visual depictions at issue were (shall we say) *disseminated* using materials which had been mailed, or had been shipped or transported in interstate or foreign commerce, relates to the use of the term "producing" as described above. For if "producing" also can mean disseminating, then the government also would have to prove that the dissemination of the visual depictions at issue somehow involved the use of a minor engaging in sexually explicit conduct.[72] Obviously, this would be absurd.[73]

In stark contrast to an original creation interpretation of the term "produced" is the interpretation arrived at by the Court of Appeals for the Ninth Circuit in *United States v. Lacy*.[74] In *Lacy*, the defendant was charged with possession of child pornography in violation of § 2252(a)(4)(B).[75] The child pornography at issue was contained on a computer hard drive and on computer

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[71] *See, e.g.*, 18 U.S.C. § 2251(a). Of course, such an interpretation (even with respect to § 2251(a)) would be inconsistent with the interpretations reached by the courts in *Petrov* and *Sirois*. *See* text accompanying *supra* notes 59-65.

[72] *See* 18 U.S.C. § 2252(a)(3)(B)(i), (4)(B)(i); § 2256(8)(A).

[73] Besides being absurd (or even if not), I know of no case involving evidence that the dissemination of the visual depictions at issue involved the use of minors engaging in sexually explicit conduct.

At this point, some readers might be concerned that the interpretation of the term "produce" suggested here might severely limit the scope of §§ 2252(a)(4)(B) and 2252A(a)(5)(B). For example, in order to prove that child pornography was produced using materials that have moved in interstate or foreign commerce, the government must have some knowledge as to the circumstances surrounding that production. Admittedly, with respect to child pornography produced many years ago and/or produced in a foreign country, this might be difficult. But this does not mean that these statutes are applicable only to persons directly involved in that production. Moreover, it must be recalled that the jurisdictional element of these statutes alternatively may be proved through evidence that the child pornography itself moved in interstate or foreign commerce (and if published case law is any indication, this is by far the more common means of proving this element). Additionally, proof that the child pornography itself moved in interstate or foreign commerce requires no evidence whatsoever as to how that child pornography was produced. It should now be apparent, though, that there is no indication that either of these statutes was intended to apply to every possession of child pornography.

[74] 119 F.3d 742 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1571 (1998). I assisted in the representation of the defendant in that case.

[75] *See* Lacy, 119 F.3d at 745.

diskettes found in Lacy's apartment.[76] At trial, no evidence was proffered by the government concerning the movement, in interstate or foreign commerce, of either the child pornography itself or of the materials used to originally create that child pornography.[77] Nonetheless, the court of appeals held that the jurisdictional term "produced," as used in § 2252(a)(4)(B), can include the *reproducing or subsequent copying* of visual depictions of minors engaging in sexually explicit conduct.[78] Specifically, the court of appeals concluded that when Lacy "used his computer to download the data" — apparently meaning when the visual depictions were copied onto his computer disks — he "produced" the visual depictions for purposes of this statute.[79] Because the government had proffered evidence at trial that, prior to the purported downloading, Lacy's computer hard drive and computer diskettes had moved in interstate commerce, the court of appeals found that the jurisdictional element of § 2252(a)(4)(B) had been proved.[80]

The *Lacy* court's interpretation of the jurisdictional term "produce" seems incorrect. As used in § 2252(a)(4)(B) (or anywhere else in §§ 2252, 2252A, and 2260(b)), "produce" simply cannot be interpreted as including the reproducing or copying of pre-existing visual depictions onto a computer disk or any other medium. As explained above, the statutory definition of this term as found in § 2256(3) fails to support such an interpretation.[81] The ordinary and natural meaning of the term "produce" likewise fails to embrace a "reproduce" interpretation.[82] But perhaps the strongest argument against the *Lacy* court's "reproduce" interpretation relates to the way in which the term "produced" is used elsewhere in § 2252(a)(4)(B). For if "produced" can include the downloading of pre-existing visual depictions onto a computer disk, then the government also must prove that the *act of transferring this data* involved the use of a minor engaging in sexually explicit conduct.[83] This

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[76] *See id.*

[77] *See* Appellant's Petition for Writ of Certiorari at 5, Lacy v. United States, filed Mar. 23, 1998 (No. 97-8454).

[78] *See* Lacy, 119 F.3d at 750.

[79] *Id.*

[80] *See id.*

Though a recent decision by the Court of Appeals for the Tenth Circuit arguably utilized a definition of "produced" similar to that used in *Lacy*, that court reversed the defendant's conviction based on strikingly similar facts. *See* United States v. Wilson, 182 F.3d 737 (10th Cir. 1999).

[81] *See supra* note 46 and accompanying text.

[82] *See supra* notes 48-49 and accompanying text. *Compare* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1927 (1963)(defining "reproduce" as "to produce again: as . . . to make an image, copy, or other representation of: copy by a different process or method than that orig. employed").

[83] *See* 18 U.S.C. § 2252(a)(4)(B)(i) (requiring that "the *producing* of such visual depiction

interpretation of "produced" is even more absurd than a "disseminated" interpretation[84] (and like the "disseminated" interpretation, was not proved by the evidence in this case).

Moreover, in reaching its interpretation, the *Lacy* court seemed to presume that the phrase "by any means including by computer," as used in § 2252(a)(4)(B), modifies the term "produced."[85] But a careful reading of § 2252(a)(4)(B) reveals that the phrase "by any means including by computer" cannot be interpreted as modifying any terms other than "mailed," "shipped," or "transported."[86] Indeed, were § 2252 interpreted otherwise, the mailing, shipping or transporting of visual depictions by computer would not fall within its ambit — a result that clearly would be contrary to the purpose of this statute.

Finally, there is ample evidence throughout Chapter 110 that when Congress wanted to refer to the *reproduction* (as opposed to the *production*) of visual depictions of minors engaging in sexually explicit conduct, Congress not only knew how to do exactly that, but did so clearly and through the use of other terms.[87] Most notably, § 2252 itself criminalizes not only the distribution of visual depictions of minors engaging in sexually explicit conduct, but also the *reproduction* of such visual depictions for distribution (though only if the "producing" of those visual depictions involves the use of a minor engaging in sexually explicit conduct).[88] Similarly, § 2252A

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involves the use of a minor engaging in sexually explicit conduct")(emphasis added).

[84] *See supra* notes 71-73 and accompanying text.

[85] *See Lacy*, 119 F.3d at 750.

[86] *See also* 18 U.S.C.A. § 2252(a)(1) (West Supp. 1999)(prohibiting (without reference to the term "produce") the knowing transport or shipping of visual depictions "by any means including by computer or mails"); § 2252(a)(2) (prohibiting (also without any reference to the term "produce") the knowing receipt or distribution of visual depictions that have been mailed, shipped or transported (or "which contain materials which have been mailed or so shipped or transported") "by any means including by computer," as well as prohibiting the knowing reproduction of visual depictions for distribution "by any means including by computer or through the mails").

[87] *Cf.* Smith v. United States, 508 U.S. 223, 235 (1993)("The evident care with which Congress chose the language of [this statute] reinforces our conclusion in this regard.").

[88] *See* § 2252(a)(2). The legislative history accompanying the 1984 amendments to § 2252 that added the reproduction language to paragraph (a)(2) is in accord.

> H.R. 3298 [the Child Protection Act of 1984] would add a "reproduction" offense in 18 U.S.C. 2252. This amendment was designed to insure that a person who is a producer of child pornography but who does not have a direct role in inducing a child's participation (for example, a person who buys photos from another, or who pirates them from other publications) cannot escape prosecution simply because he did not have direct contact with the child. Section 2251, the present production offense, seems to require such direct contact, and this amendment was designed to close that possible loophole.

H.R. REP. NO. 98-536, at 5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 492, 496.

criminalizes not only the distribution of "child pornography,"[89] but also the *reproduction* of "child pornography" for distribution.[90] And § 2251(c)(1) makes it a crime to create or disseminate advertisements offering to *reproduce* any visual depiction (if (again) the "*production* of such visual depiction involves the use of a minor engaging in sexually explicit conduct" (emphasis supplied)).[91] Indeed, in *Petrov*, the Court of Appeals for the Second Circuit used this very argument to buttress its conclusion that "producers" of such visual depictions cannot include mere "reproducers."[92]

Such a statute also would be inconsistent with the statutory scheme currently in place. When one views Chapter 110 of Title 18 in its entirety, it is apparent that Congress, in attempting to deal with the problem of child pornography, was careful to require, in almost every instance, some movement of the depictions in interstate or foreign commerce. In those few instances where Congress did not require some movement of the depictions, it at least required that the materials used to actually create the depictions in the first instance move in interstate or foreign commerce.[93] A statute that requires neither certainly would be anomalous.[94]

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[89] *See* 18 U.S.C.A. § 2252A(a)(2) (West Supp. 1999).

[90] *See* 18 U.S.C.A, § 2252A(a)(3).

[91] *See also supra* note 52 (discussing § 2257(h)(3)). *Cf.* § 2252(c)(2) (referring to "any visual depiction *or copy thereof*" (emphasis added)); § 2252A(d)(2) (similarly referring to "any image *or copy thereof*" (emphasis added)).

[92] *See* United States v. Petrov, 747 F.2d 824, 828-29 (2nd Cir. 1984).

[93] *See, e.g.*, 18 U.S.C. §§ 2251(c); 2251A, 2252(a)(3), (4); 2252A(a)(4), (5); *see also* United States v. Wislon, 182 F.3d 737, 743-44 (10th Cir. 1999):

> In our view, the language of § 2252(a)(4)(B) makes it abundantly clear that either the visual depictions (in this case the graphics files) or the materials used to produce the visual depictions must have traveled in interstate commerce. If Congress had wanted the focus of the jurisdictional element to be on the "matters" containing the visual depictions, it would have said so.

[94] At a minimum, the proper meaning of the term "produce" seems debatable. The rule of lenity traditionally demands that "any doubt" as to the meaning of a federal criminal statute be resolved in favor of the defendant. *See* Ratzlaf v. United States, 510 U.S. 135, 148 (1994). Yet, the rule of lenity was not applied (nor even mentioned) in Lacy.

Following the rendering of the court of appeal's decision, Lacy filed a petition for rehearing and suggestion for rehearing en banc. Shortly thereafter, the court ordered the government to file a response thereto, and specifically ordered that the response "should address Appellant's contentions concerning the jurisdictional term 'produce.'" United States v. Lacy, No. 95-30370 (9th Cir. Aug. 29, 1997). Though the government complied, Lacy's petition for rehearing was denied, and his suggestion for rehearing en banc was rejected, without further opinion. *See* United States v. Lacy, No. 95-30370 (Dec. 23, 1997). Lacy's Petition for Writ of Certiorari, in which these same arguments were made, also was denied. *See* Lacy v. United States, 118 S. Ct. 1571 (1998).

C. Mens Rea Requirements of §§ 2252, 2252A, and 2260(b)

A brief word about the mens rea requirements of these statutes: Each activity prohibited in §§ 2252, 2252A, and 2260(b) is prefaced by the term "knowingly." In *X-Citement Video*, the Supreme Court held, with respect to § 2252, that this term applies not only to those activities themselves,[95] but also to the "sexually explicit nature of the material and to the age of the performers."[96] Thus, with respect to the simple possession of child pornography as proscribed in § 2252(a)(4), the government must prove not only that the defendant knowingly possessed one or more "matters," but also that the defendant knew that those matters contained child pornography.[97] Presumably, the Court's holding in *X-Citement Video* applies as well to those parallel elements described in §§ 2252A and 2260(b).

D. Extraterritorial Application of §§ 2252, 2252A, and 2260(b)

The final issue for discussion in this Part concerns the extraterritorial reach of these statutes.[98] By their express terms, the crimes described in §§ 2252

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[95] By "activities themselves," I mean only knowledge as to the mail, transport, shipment, etc. of the child pornography itself (or, where appropriate, of the materials used to produce the child pornography), and not knowledge that the movement of the child pornography occurred in interstate or foreign commerce. *See* United States v. Hilton, 167 F.3d 61, 76 n.9 (1st Cir. 1999) (holding § 2252A(a)(5)(B) does not require knowledge as to jurisdictional element); *cert. denied* United States v. Robinson, 137 F.3d 652, 654-55 (1st Cir. 1998)(holding § 2252(a)(4)(B) does not require knowledge as to jurisdictional element); *cert. denied*, No. 98-9647, 1999 WL386695 (U.S. Oct. 4, 1999) United States v. X-Citement Video, 513 U.S. 64, 73 n.3 (1994) (distinguishing, for mens rea purposes, jurisdictional elements from elements that criminalize otherwise innocent conduct). *Compare* 18 U.S.C. § 2251(a) (requiring, at least in the alternative, actual or constructive knowledge "that such visual depiction will be transported in interstate or foreign commerce or mailed"); § 2251(b) (requiring the same).

Though I am not aware of any case law on point, it seems reasonable to presume that the term "knowingly" also does not apply to the alternative forms of jurisdiction described in § 2252(a)(3)(A), (4)(A), and in § 2252A(a)(4)(A), (5)(A). *See supra* note 44 and accompanying text.

[96] *X-Citement Video*, 513 U.S. at 78.

[97] *See Lacy*, 119 F.3d at 747.

[98] There are actually two issues here: whether Congress is constitutionally empowered to make criminal child pornography laws applicable to foreign persons and activities, and whether, in this instance, Congress has in fact asserted that power. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993)(Scalia, J., dissenting). Generally speaking, the answer to the first question is yes.

> There is no doubt, of course, that Congress possesses legislative jurisdiction over [foreign persons and activities]: Congress has broad power under Article I, § 8, cl. 3, "to regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United

and 2252A apply to child pornography (and, with respect to the sale, possession with intent to sell, and simple possession of child pornography, the materials used to produce that pornography) that moves in "foreign commerce." Alternatively, §§ 2252(a)(3)(A), (4)(A) and 2252A(a)(4)(A), (5)(A) (which also relate to the sale, possession with intent to sell, and simple possession of child pornography) apply to child pornography located "on any land or building owned by, leased to, or otherwise used by or under the control of" the United States government — implying that such land or buildings might include property located outside of the United States. But §§ 2252 and 2252A are otherwise silent as to whether (or to what extent) they apply to acts that occur in whole or in part outside of the United States, or to persons who are not citizens of the United States and/or are not located within the United States.[99]

The general rules for determining the extraterritorial reach of these (and related) federal criminal statutes are well set forth by the United States Court of Appeals for the Seventh Circuit in *United States v. Dawn*[100]:

> Generally speaking, Congress has the authority to apply its laws, including criminal statutes, beyond the territorial boundaries of the United States, to the extent the extraterritorial application is consistent with the principles of international law.[[101]] Notwithstanding that power, "it is a longstanding

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States interests are affected.

Id. at 813-14 (Scalia, J., dissenting). That is not to say, though, that the Commerce Clause does not limit the jurisdictional reach of such statutes. *See infra* Part III.

The second issue which is whether, and to what extent, Congress has exercised undoubted legislative jurisdiction in enacting these statutes, is a matter of statutory construction. *See id.* at 814 (Scalia, J., dissenting)(emphasis added). *See* EEOC v. Arabian American Oil, 499 U.S. 244, 248 (1991); *accord* United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990) (characterizing the question of the extraterritorial application of a federal criminal statute as "a question of statutory interpretation"); Bret A. Sumner, Comment, *Due Process and True Conflicts: The Constitutional Limits on Extraterritorial Federal Legislation and The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996*, 46 CATH. U. L. REV. 907, 924-25 (1997)(stating that "[t]o determine whether a United States court has jurisdiction over foreign, nonresident extraterritorial conduct, . . . a court must consider whether Congress intended the law to have an extraterritorial application"). This second issue, as it relates to federal criminal child pornography laws, is the subject of this subpart.

[99] *See* United States v. Kolly, 48 M.J. 795, 796 (1998)(recognizing silence with respect to § 2252(a)(2)); *see also* United States v. Harvey, 2 F.3d 1318, 1327 (3d Cir. 1993)(recognizing same as to §§ 2251-2257 generally); *Thomas*, 893 F.2d at 1068 (recognizing same as to § 2251(a)); *cf. Arabian American Oil*, 499 U.S. at 251 (rejecting the notion that "boilerplate" foreign commerce language, by itself, constitutes sufficient evidence of an intent that a statute is to apply abroad).

[100] 129 F.3d 878 (7th Cir. 1997)(interpreting the U.S. Sentencing Guideline Manual provision applicable to violations of § 2252(a)(4)(B)).

[101] The limitations on the extraterritorial application of federal criminal law imposed by international law are discussed *infra* in Part IV. The extraterritorial application of federal

principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Indeed, . . . a statute will be applied to conduct occurring abroad only when to do so comports with "the affirmative intention of the Congress clearly expressed." [102]

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criminal law also might be limited by Fifth Amendment due process principles. *See infra* Part V.

[102] *Id.* at 882 (quoting *Arabian American Oil*, 499 U.S. at 248)(internal quotation marks omitted); *accord Harvey*, 2 F.3d at 1327 (observing similarly that "there is a presumption against extraterritoriality" in connection with the interpretation of the U.S. Sentencing Guideline provision applicable to violations of § 2252(a)(4)(B)); *Kolly*, 48 M.J. at 796 (stating that "[f]ederal criminal statutes are generally presumed not to apply extraterritorially"); United States v. Pullen, 41 M.J. 886, 887 (A.F.C.M.R. 1995)(explaining that "federal statutes do not apply extraterritorially unless Congress intends otherwise or the statutory scheme necessarily requires it").

The *Dawn* court also observed that the Supreme Court has long recognized

> an exception to the presumption against extraterritorial intent for criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents.

129 F.3d at 882 n.7 (quoting United States v. Bowman, 260 U.S. 94, 98 (1922)). Actually, the passage from which this portion of *Bowman* is found reads as follows:

> The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations. Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement and frauds of all kinds, which affect the peace and good order of the community, must of course be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. . . .
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> But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents. Some such offenses can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute and leave open a large immunity for frauds as easily committed by citizens on the high seas and in foreign countries as at home. In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense.

260 U.S. at 97-98; *see also Harvey*, 2 F.3d at 1327 (likewise quoting *Bowman*); *Kolly*, 48 M.J. at 797 (recognizing the "well-established principle[] behind extraterritorial application of statutes" of the "inherent right of a sovereign to protect its Governmental functions and to

The question thus becomes whether, with respect to §§ 2252 and 2252A, there exist sufficient indicia of congressional intent to apply these statutes extraterritorially.[103]

United States v. Kolly[104] appears to be the lone reported case addressing the extraterritorial application of either § 2252 or § 2252A in relation to a Commerce Clause-type jurisdictional element. In *Kolly*, the court affirmed the application of § 2252(a)(2) to a United States citizen and member of the United States military stationed in Japan who had used the United States postal service to receive child pornography originating in Ecuador.[105] Though the *Kolly* court was unable to cite any authority speaking specifically to the

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regulate the conduct of its own citizens regardless of their location"). The *Dawn* court further noted that "[t]he Ninth Circuit has concluded that this exception survives *Arabian American Oil* and permits the application of certain statutes beyond U.S. boundaries even in the absence of an affirmative statement of congressional intent for these statutes to apply extraterritorially." 129 F.3d at 882 (citing United States v. Felix-Guitierrez, 940 F.2d 1200, 1205 n.3 (9th Cir. 1991)). But the *Dawn* court ultimately resolved the issue relating to this exception on other grounds. *See id.* at 883-85. The *Harvey* court relied on United States v. Wright-Barker, 784 F.2d 161 (3d Cir. 1986), which was decided prior to *Arabian American Oil*. *See Harvey*, 2 F.3d at 1327. Moreover, the Ninth Circuit case cited by the *Dawn* court (*Felix-Gutierrez*) did not involve child pornography, and I am aware of no other circuit that has held that this *Bowman* exception (if it is an exception), as it relates to a criminal statute, survives *Arabian American Oil*. In any event, it does not appear that, by its terms, this exception should have much bearing on the questions whether §§ 2252 or 2252A applies to persons or activities located outside of the United States.

[103] There is some reason to question whether (and to what extent) the standard articulated in *Arabian American Oil* might have been impacted by the Court's more recent holding in *Hartford*. In *Hartford*, a thin majority held that the Sherman Act was applicable to foreign conduct "that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford*, 509 U.S. at 796. This holding has led one scholar to observe that "it is difficult for courts and lawyers to know after *Arabian American Oil* and *Hartford* how to approach a statute that is silent with regard to its extraterritorial scope." William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 134-35 (1998). But the *Hartford* majority seemed to regard the extraterritorial application of the Sherman Act as having already been established by precedent, *see* 509 U.S. at 795-96, and coupled with the fact that the Court does not even mention *Arabian American Oil*, it appears that the general rule set forth in *Arabian American Oil* still applies outside of the Sherman Act context. This seems to be how Justice Scalia rationalized the Court's failure to address *Arabian American Oil*. *See id.* at 814 (Scalia, J., dissenting). For a more in-depth attempt to reconcile these cases, see Larry Kramer, *Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750 (1995); *see also* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289 (1994); John A. Trenor, Comment, *Jurisdiction and the Extraterritorial Application of Antitrust Laws after Hartford Fire*, 62 U. CHI. L. REV. 1583 (1995).

[104] 48 M.J. 795 (1998).

[105] *See id.* at 796.

issue, the court held that "Congress intended 18 U.S.C. § 2252(a)(2) to apply extraterritorially."[106] The court opined that "to allow a U.S. citizen in the United States who ordered child pornography through the United States postal service to escape prosecution simply because he is overseas when he finally receives it would 'greatly curtail the scope and usefulness of the Protection of Children Against Sexual Exploitation Act.'"[107]

In reaching its decision, the *Kolly* court primarily relied upon the court of appeals' decisions in *Thomas* and *Harvey*.[108] In *Thomas*, the court of appeals upheld the application of § 2251(a)[109] to an American national with respect to photographs taken in Mexico but developed in the United States.[110] The *Thomas* court recognized (as did the *Kolly* court with respect to § 2252(a)(2)) that § 2251(a) "does not explicitly state that it applies to conduct outside the United States."[111] Nonetheless, the *Thomas* court concluded that "'the exercise of extraterritorial power may be inferred from the nature of the offenses and Congress' other legislative efforts to eliminate the type of crime involved.'"[112]

> [I]n this case, Congress has created a comprehensive statutory scheme to eradicate sexual exploitation of children. As part of that scheme, Congress has proscribed the transportation, mailing, and receipt of child pornography. Punishing the creation of child pornography outside the United States that is actually, and is intended to be, or may reasonably be expected to be transported in interstate or foreign commerce is an important enforcement tool. We, therefore, believe it likely that under section 2251(a) Congress intended to reach extraterritorial acts that otherwise satisfy the statutory elements.[113]

Though the *Harvey* court also found that § 2251(a) applies extraterritorially, the ultimate issue in *Harvey* was whether a "closely analogous" United States Sentencing Guidelines Manual provision applicable to a violation of § 2252(a)(4)(B)[114] "applies when a defendant sexually

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[106] *Id.* at 797.

[107] *Id.* (quoting *Harvey*, 2 F.3d at 1327).

[108] *See Kolly*, 48 M.J. at 796-97.

[109] Section 2251(a) prohibits the use of a minor with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct. *See supra* note 58.

[110] *See* United States v. Thomas, 893 F.2d 1066, 1067-69 (9th Cir. 1990).

[111] *Id.* at 1068.

[112] *Id.* (quoting United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980)). *Thomas*, though, like *Baker*, was decided prior to *Arabian American Oil*.

[113] *Id.* at 1068-69 (citation and footnote omitted).

[114] The U.S. Sentencing Guidelines Manual provision at issue in *Harvey* was § 2G2.4(c)(1), which in turn cross-references the sentencing guideline provision ordinarily applicable to violations of § 2251(a) (§ 2G2.1). *See* United States v. Harvey, 2 F.3d 1318, 1326-28 (3d Cir. 1993).

exploits children abroad, photographs the conduct, and possesses the photographs in the United States."[115] The *Harvey* court upheld the application of the Guideline in this context, at least as to defendants who are United States citizens.[116] In reaching its decision, the *Harvey* court quoted extensively from the legislative history accompanying the original 1977 Protection of Children Against Sexual Exploitation Act.[117] But like the court in *Thomas* (the decision upon which the *Harvey* court heavily relied[118]), the Third Circuit Court of Appeals was not able to cite any authority specifically indicating that the extraterritorial application of these statutes is an integral part of their enforcement. The *Harvey* court instead simply observed that it could "think of few more important efforts than eradicating sexual exploitation of children."[119]

In a sense, it is difficult to argue with the results reached in *Harvey* and *Kolly*. But to the extent these courts truly applied these statutes and Guidelines provisions extraterritorially, their holdings (as well as the holding in *Thomas*) seem somewhat questionable after *Arabian American Oil*.[120] The language of §§ 2252 and 2252A themselves do not clearly express an intent that these statutes are to apply extraterritorially.[121] Moreover, "[t]he legislative histories of the child pornography statutes make no mention of extraterritorial application beyond transporting or receiving films from abroad for the purpose of inexpensive reproduction."[122]

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[115] *Id.* at 1326-28.

[116] *See id.* at 1329.

[117] *See id.* at 1327.

[118] *See id.* at 1328-29.

[119] *Id.* at 1327. Precisely the same issue raised in *Harvey* (the interpretation of the United States Sentencing Guideline applicable to violations of § 2252(a)(4)(B)) was presented to the Court of Appeals for the Seventh Circuit in *Dawn*. Citing (though not necessarily relying upon) *Harvey* and *Thomas*, the *Dawn* court reached more or less the same result. *See* United States v. Dawn, 129 F.3d 878, 881-86 (7th Cir. 1997).

[120] Indeed, the conclusion as to the extraterritorial application of § 2251(a) reached in Thomas has been criticized. *See, e.g.*, Sandra W. Magliozzi, Comment, 14 SUFFOLK TRANSNAT'L L.J. 605, 613-14 (1991).

[121] *See id.* at 613 ("While the [Thomas] court correctly found no violation of international law in the extraterritorial application of the [Child Protection and Obscenity Enforcement] Act, nothing in the Act indicates that Congress intended the Act to reach conduct outside the United States."); *cf.* EEOC v. Arabian American Oil, 499 U.S. 244, 256 (1991)(further observing that, with respect to Title VII, Congress "failed to provide any mechanism for overseas enforcement" or to "address[] the subject of conflicts with foreign laws and procedures").

[122] *See* Magliozzi, *supra* note 120, at 608 n.16. Thus, "[w]hile the[se] court[s'] holding[s] may reduce the sexual exploitation of children, the legislative history does not reveal any congressional intent that the[se statutes] have extraterritorial application." *Id.* at 613. Of course, in *Kolly*, *Thomas*, and *Harvey*, the defendants were United States citizens, and I am not aware of any published cases in which §§ 2252 or 2252A (or even § 2260(b)) have been applied extraterritorially to a non-citizen. But according to one newspaper account, at least one foreign

As stated previously, though the alternative jurisdictional element found in §§ 2252(a)(3)(A), (4)(A) and 2252A(a)(4)(A), (5)(A) expressly extends the reach of these statutes to "any land or building owned by, leased to, or otherwise used by or under the control of" the United States government, these statutes likewise are otherwise silent as to their extraterritorial application. Nonetheless, in what appears to be the only reported case addressing the extraterritorial application of this alternative form of jurisdiction, *United States v. Pullen*,[123] the court found § 2252(a)(4)(A) applicable with respect to child pornography possessed by a member of the United States military stationed at a United States military base located in the Philippines.[124] The *Pullen* court found the "owned by, leased to, or otherwise used by" language of § 2252(a)(4)(A) to clearly express Congress' intent that this statute was to apply to property, such as military installations, located outside the territorial boundaries of the United States.[125]

In contrast to §§ 2252 and 2252A, § 2260(b) expressly applies to persons located, and to activities relating to child pornography conducted, outside the United States, though only so long as there is an intent by such persons that the child pornography at issue "will be imported into the United States or into waters within a distance of 12 miles of the coast of the United States."[126] Whether § 2260(b) applies to persons who are not citizens of the United States has yet to be judicially determined.

E. Summary

Taken together, §§ 2252, 2252A, and 2260(b) criminalize virtually every activity relating to child pornography. But the language of these statutes themselves limits their reach in several important respects. Most significantly:

1. Setting aside the (apparently) rarely invoked alternative basis for jurisdiction described in §§ 2252(a)(3)(A), (4)(A) and 2252A(a)(4)(A), (5)(A), each of the crimes described in §§ 2252 and 2252A (other than those relating to the reproduction of child pornography) require that the child pornography itself move in interstate or foreign commerce. In addition, §§ 2252(a)(3)(B), (4)(B) and 2252A(a)(4)(B), (5)(B) provide that the jurisdictional element of the crimes of the sale, possession with intent to sell, and simple possession of child pornography may be proved by evidence that the materials used to "produce" the child pornography moved in interstate or

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national has been charged and convicted (presumably under one of these statutes) for distributing child pornography via the Internet. *See* Wallace, *supra* note 1.

[123] 41 M.J. 886 (1995).

[124] *See id.* at 887-88.

[125] *See id.* at 888.

[126] 18 U.S.C. § 2260(b) (Supp. III 1997).

foreign commerce. Similarly, § 2252(a)(2) (relating to the receipt or distribution of child pornography) alternatively may be proved by evidence that the child pornography "contains materials" that have moved in interstate or foreign commerce. Finally, §§ 2252(a)(2) and 2252A(a)(3) require only an intent that the child pornography reproduced be distributed in interstate or foreign commerce, and § 2260(b) requires only an intent that the child pornography is to be imported into the United States.

2. The crimes found in §§ 2252 and 2252A relating to the simple possession of child pornography now require either the possession of one or more "matters" that contain child pornography,[127] or the possession of any "material" that contains one or more images of child pornography.[128] Similarly, the other crimes described in §§ 2252, 2252A, and 2260(b) require the involvement of only one item of child pornography.

3. Each of the activities prohibited in §§ 2252, 2252A, and 2260(b) must be done "knowingly," a term that has been interpreted as applying not only to the transportation, shipment, receipt, distribution, sale, reproduction, or possession of the prohibited images, but also to the "sexually explicit" nature of those images and the minority of the persons depicted.

4. Section 2252 (and presumably also § 2252A) apparently applies to at least some activities conducted outside of the United States, and § 2260(b) expressly applies to such activities (as well as to persons located outside of the United States). But the extent to which §§ 2252 and 2252A apply to foreign activities bearing little relationship with the United States is unclear. It also is unclear whether any of these statutes apply to persons who are not United States nationals.

III. COMMERCE CLAUSE LIMITS TO FEDERAL CRIMINAL CHILD PORNOGRAPHY LAW

The Constitution potentially imposes several limits on the federal criminalization of activities relating to child pornography. The first such limit to be explored in some detail is that imposed by the Commerce Clause.

The Commerce Clause empowers Congress "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[129] The Commerce Clause was most recently interpreted by the Supreme Court in connection with a federal criminal statute in *United States v. Lopez*.[130] In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990[131] (and

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[127] 18 U.S.C.A. § 2252(a)(4) (West Supp. 1999).

[128] 18 U.S.C.A. § 2252A(a)(5) (West Supp. 1999).

[129] U.S. CONST. art. I, § 8, cl. 3.

[130] 514 U.S. 549 (1995).

[131] Pub. L. No. 101-647, § 1702(b)(1), 104 Stat. 4789, 4844 (1990).

specifically 18 U.S.C. § 922(q)(1)(A)[132]) exceeded Congress' Commerce Clause authority in that the Act "neither regulates a commercial activity nor contains a requirement that the possession [of a firearm in a school zone] be connected in any way to interstate commerce."[133]

In reaching its holding, the *Lopez* Court, following a survey of Supreme Court precedent in this area, "identified three broad categories of activity that Congress may regulate under its commerce power."[134]

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[135]

The Court determined that "if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce."[136] The Court then embarked on an analysis of whether § 922(q) so affected interstate commerce.

The Court began its analysis by observing that it has "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce."[137] But:

> Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.[138]

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[132] (Supp. V 1988). As originally enacted, § 922(q)(1)(A) made it a federal crime "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Following *Lopez*, § 922(q)(1)(A) was amended extensively. *See* 18 U.S.C.A. § 922(q)(1)(A) (West Supp. 1999).

[133] 514 U.S. at 551.

[134] *Id.* at 558.

[135] *Id.* at 558-59 (citations omitted).

[136] *Id.* at 559.

[137] *Id.* The inclusion of the word "economic" appears to be significant. *See, e.g. id.*, at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

[138] *Id.* at 561 (footnote omitted).

In rejecting the argument (admirably made by Justice Breyer in dissent) that the intrastate activity proscribed by § 922(q) was economic or commercial, rather than non-commercial, in nature, the Court observed that the Constitution "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."[139] The Court then concluded:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.[140]

The Court also observed that § 922(q) "contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[141] Thus, unlike certain other federal criminal statutes (such as §§ 2252, 2252A, and 2260(b)), § 922(q) "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce."[142]

Finally, though the Court observed that, "as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce," it concluded that neither § 922(q) nor its legislative history contained any such findings.[143] The Court acknowledged that "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[144] "But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."[145]

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[139] *Id.* at 566; *see also id.* at 564 ("Although Justice BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not.").

[140] *Id.* at 567.

[141] *Id.* at 561.

[142] *Id.* at 562.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 563. Though the government attempted to rely on findings made in connection with earlier firearms statutes, the Court considered such reliance "especially inappropriate here because the 'prior federal enactments or Congressional findings do not speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, § 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal

To date, only the Court of Appeals for the First and Eighth Circuits appear to have addressed the issue whether either §§ 2252, 2252A, or 2260(b) are consistent with Congress' Commerce Clause authority as interpreted by the Court in *Lopez*. In both *United States v. Bausch*[146] and *United States v. Robinson*,[147] the court of appeals held that § 2252(a)(4)(B) was a proper exercise of Congress' commerce power under the third *Lopez* category.[148]

In finding § 2252(a)(4)(B) constitutional, the *Bausch* and *Robinson* courts each observed that, unlike the statute at issue in *Lopez*, § 2252(a)(4)(B) contains an express jurisdictional element requiring that the child pornography at issue, or the materials used to produce it, move in interstate or foreign commerce.[149] "Thus, [§ 2252(a)(4)(B)] ensures, through a case-by-case inquiry, that each defendant's pornography possession affected interstate [or foreign] commerce."[150] The *Robinson* court further found that (again unlike the statute at issue in *Lopez*) the legislative history of § 2252 included congressional findings regarding the effects of child pornography on interstate and foreign commerce:

> Congress enacted § 2252 based, in large part, upon its "finding that 'child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale,' and 'that such prostitution and the sale and distribution of such pornographic materials are carried on to a

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firearms legislation.'" *Id.* (quoting Lopez v. United States, 2 F.3d 1342, 1366 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995)).

[146] 140 F.3d 739 (8th Cir. 1998). *cert. denied*, 119 S. Ct. 806 (1999).

[147] 137 F.3d 652 (1st Cir. 1998).

[148] *See Bausch*, 140 F.3d at 741; *Robinson*, 137 F.3d at 656. This same issue (again with respect to § 2252(a)(4)(B)) also was addressed at length by the United States District Court for the District of Minnesota in United States v. Winningham, 953 F. Supp. 1068, 1073-77 (D. Minn. 1996). Though the *Winningham* court also found § 2252(a)(4)(B) constitutional, it found that this statute fell under the second *Lopez* category. *See Winningham*, 953 F. Supp. at 1074-75. The reasoning of the *Winningham* court has some force. But because the Eighth Circuit encompasses the District of Minnesota, and *Bausch* was decided more recently, the precedential value of *Winningham* probably has been diminished in some respects.

It seems conceivable that § 2252 (as well as §§ 2252A and 2260(b)) also could be considered as falling under the first *Lopez* category. *See Lopez*, 514 U.S. at 558 (describing this category as including the "'"authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses"'") (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)(quoting, in turn, Caminetti v. United States, 242 U.S. 470, 491 (1917)).

In any event, assuming the assessments of the Bausch and Robinson courts are correct, §§ 2252A and 2260(b) also would fall under the third *Lopez* category.

[149] *See Bausch*, 140 F.3d at 741; *Robinson*, 137 F.3d at 656.

[150] *Bausch*, 140 F.3d at 741 (citing *Robinson*, 137 F.3d at 655-56).

substantial extent through mails and other instrumentalities of interstate or foreign commerce.'"[151]

As interpreted by the *Bausch* and *Robinson* courts, the conclusion that § 2252 is consistent with the Commerce Clause is probably sound.[152] Even assuming this statute is properly considered as falling under the third *Lopez* category, it seems reasonable to conclude that the transportation, shipment, receipt, distribution, sale, and perhaps even the reproduction and possession, of child pornography constitutes an economic or commercial enterprise. It also seems reasonable to conclude that each of these activities, at least when viewed in the aggregate, substantially affect interstate or foreign commerce, as each of these statutes expressly require either the movement of (or the intent to move) the child pornography itself, or of the materials used to

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[151] *Robinson*, 137 F.3d at 656 (quoting *Winningham*, 953 F. Supp. at 1074 n.13 (quoting, in turn, S. REP. NO. 95-438, at 3-5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 40, 42-43)). The *Winningham* court went on to observe, though, that there is no legislative history relating to the 1990 amendment of § 2252 that led to the enactment of § 2252(a)(3) and (a)(4). *See Winningham*, 953 F. Supp. at 1074 n.13. In any event, the *Robinson* court also found: "By outlawing the purely intrastate possession of child pornography in § 2252(a)(4)(B), Congress can curb the nationwide demand for these materials. We believe that such possession, 'through repetition elsewhere,' helps to create and sustain a market for sexually explicit materials depicting minors." *Robinson*, 137 F.3d at 656 (citations omitted)(quoting *Lopez*, 514 U.S. at 567).

At this juncture, it is observed that although the Child Pornography Prevention Act of 1996, the Act through which § 2252A was enacted, includes some express congressional findings concerning the evils of child pornography generally (*see* Pub. L. No. 104-208, 110 Stat. 3009-26, 3009-26 to -27), those findings do not address the Commerce Clause aspects of this statute. And I have not been able to locate any specific legislative Commerce Clause-type findings whatsoever in connection with the enactment of § 2260(b).

[152] Though the *Bausch* and *Robinson* courts (as well as the *Winningham* court) did not directly address the meaning of the term "produce" as used in § 2252(a)(4)(B), each of those cases in fact involved the movement of materials used to originally create the child pornography at issue. *See Bausch*, 140 F.3d at 741 (holding the jurisdictional element proved by evidence that a Japanese camera was used to take nude photographs of teenage girls); *Robinson*, 137 F.3d at 653 (holding the jurisdictional element proved by evidence that photographs of nude boys were "taken using a Kodak instant camera and Kodak instant film, both of which were manufactured . . . outside of Massachusetts," the state where the defendant resided); *Winningham*, 953 F. Supp. at 1075 (holding the jurisdictional element proved by evidence that photographs of nude children, though possessed entirely intrastate, were "produced using Polaroid film that was manufactured in Massachusetts and traveled interstate to Minnesota"); *see also Robinson*, 137 F.3d at 656 (observing that § 2252(a)(4)(B) "contains an explicit jurisdictional element requiring that the visual depictions in question, *or the materials used to create such depictions*," move in interstate or foreign commerce (emphasis supplied)). Though the *Bausch* court, in reaching its interpretation of the jurisdictional element of § 2252(a)(4)(B), actually purported to rely on the Ninth Circuit Court of Appeals' decision in *Lacy* (*see Bausch*, 140 F.3d at 741), the manner in which the *Bausch* and *Lacy* courts apply the term "produce" is, of course, quite different. *See supra* notes 74-80 and accompanying text.

produce the child pornography. And if this same reasoning were to be applied to §§ 2252A and 2260(b), there is little doubt that those statutes would be found to be consistent with the Commerce Clause as well.

But this conclusion is not nearly so certain when one considers the interpretation of the term "produce" adopted by the *Lacy* court. In other words, what if §§ 2252 and 2252A are interpreted as applying to child pornography that neither moves in interstate or foreign commerce, nor was originally created using materials that so moved?

Suppose, for example, that Congress were to enact a statute criminalizing the simple possession of child pornography, but without any express jurisdictional element. Would such a statute be constitutional? Absent evidence that the child pornography moved in interstate or foreign commerce (or at least was produced using materials that moved in interstate or foreign commerce), the answer is probably no. In such a case, there would be no regulation of the use of the channels of interstate or foreign commerce, nor would there be regulation or protection of the instrumentalities of interstate or foreign commerce, or of persons or things in interstate or foreign commerce. Moreover, absent evidence of an intent to sell, distribute, transport, or ship the child pornography, its possession probably could not be considered as having a substantial relation to interstate or foreign commerce. Indeed, it could not be said with certainty that such possessions, even in the aggregate, would constitute an economic or commercial enterprise substantially affecting interstate or foreign commerce.[153]

What if Congress instead were to criminalize the copying or reproducing of the child pornography? Assuming those copies never leave the copier's possession; that there is still no evidence of any intent to sell, distribute, transport, or ship the child pornography; and that there is no express requirement that the copied materials move in interstate or foreign commerce, it is difficult to imagine how the making of one, two, or even a hundred copies of the same item could result in a crime that meets the standards articulated in *Lopez*.

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[153] *See* Gregory Loken, *The Federal Battle Against Child Sexual Exploitation: Proposals for Reform*, 9 HARV. WOMEN'S L.J. 105, 134 (1986)(observing that "the Commerce Clause gives Congress power to regulate acts related to child . . . pornography whenever those acts are intertwined with interstate commerce" (footnote omitted)); Smith, *supra* note 4, at 1021 ("Although Congress heavily revised [§ 2252 through] the 1984 Act, it did not criminalize the private possession of child pornography because the federal subject matter jurisdictional rules require that the materials be transported interstate or through the mails." (footnote omitted)); *cf.* Louis H. Pollak, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533, 549 (1995) ("Bass [United States v. Bass, 404 U.S. 336, 339 n.4 (1971)] reserved 'the question whether, upon appropriate findings, Congress can constitutionally punish the "mere possession" of firearms.' *Lopez* may be thought to stand for the proposition that the answer to that question is 'no.'" (footnote omitted)).

As a final example, what if Congress were to enact a statute that not only criminalized the copying or reproducing of child pornography, but also expressly required that the "materials" used to copy or reproduce that child pornography move in interstate or foreign commerce? In a sense, such a statute would satisfy at least one of the concerns of the *Lopez* Court, in that we would then know in each case whether those materials so moved.[154] But would that be sufficient? If the child pornography copied was originally created entirely intrastate, without the use of materials that moved in interstate or foreign commerce; if that child pornography subsequently never moved in interstate or foreign commerce; and if those copies were simply possessed, the fact that the materials used to copy the child pornography moved in interstate or foreign commerce would seem to bear little relevance to the question whether the prohibition of the possession of that child pornography is consistent with Congress' Commerce Clause authority.[155]

Yet, if the *Lacy* court is correct in its interpretation of the term "produce," this is, in essence, the question we are confronted with. In *Lacy*, no evidence was presented regarding how the child pornography was originally created.[156] Instead, the court held that the jurisdictional element of § 2252(a)(4)(B) was satisfied because the child pornography was copied using a computer and computer diskettes that had traveled in interstate commerce.[157] Though the *Lacy* court failed even to acknowledge the possible constitutional implications of its holding, it seems that under that holding, §§ 2252(a)(3)(B), (4)(B) and 2252A(a)(4)(B), (5)(B) represent an improper exercise of Congress' Commerce Clause authority.[158]

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[154] *See supra* notes 141-42 and accompanying text.

[155] *Cf.* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 569 (1995)("a statutory requirement that a particular gun have moved in commerce does not suffice by itself, under a sensible Commerce Clause theory, to justify a prohibition on possession of that gun").
It seems that this result should not depend on the category of activity Congress chooses to regulate. *See* Andrew Weis, Note, *Commerce Clause in the Cross-Hairs: The Use of* Lopez-*Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431, 1448 (1996)(observing (with respect to the first two *Lopez* categories) that even if a federal statute contains an express jurisdictional element, one still must ask "how close a nexus between the regulating activity and interstate commerce should be required?" as: "Without a limiting principle for statutes in the first or second categories, nothing prevents the federal government from regulating every single item, good, and activity."); *see also* Andrew St. Laurent, Note, *Reconstituting* United States v. Lopez*: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 105-07 (1997).

[156] *See supra* note 77 and accompanying text.

[157] *See* United States v. Lacy, 119 F.3d 742, 750 (9th Cir. 1997).

[158] Judge Pollak's response to the *Lopez* Court's invalidation of the Gun-Free School Zones Act of 1990 could apply equally to any future invalidation of federal criminal child pornography laws:

IV. INTERNATIONAL LAW AS A LIMIT TO FEDERAL CRIMINAL CHILD PORNOGRAPHY LAW

As stated previously, even if a federal criminal statute is found to apply extraterritorially as a matter of statutory interpretation, that application also should be consistent with principles of international law.[159] Indeed, absent a contrary expression of Congressional intent,[160] international law serves as a

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> [S]uch casualties will be attributable not to a restless activism on the part of the Justices but to irresponsibility on the part of a Congress that has failed to make out even a minimally plausible case for utilizing the commerce power to undergird a new regulatory scheme, especially one that deals with problems historically regarded as chiefly of state and local concern. . . .
>
> Certainly the Gun-Free School Zones Act of 1990 presented itself as an inviting target for Justices who felt it appropriate to remind Congress that even the commerce power has limits and that judicial scrutiny is not to be warded off by the simple process of passing a law and then relying on the Solicitor General to incant the word "commerce." The Gun-Free School Zones Act of 1990 was neither requested nor welcomed by those with responsibility for federal law enforcement. It was enacted, it seems reasonable to suppose, because most members of Congress have never met a crime-creating or sentence-enhancing bill that they didn't like. The Act, as President Bush said, was an enactment that "inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law." Presumably President Bush would have vetoed the statute had Congress not arranged to wedge it into a comprehensive crime control package that the administration deemed of value. So, in lieu of the President, five of the Justices vetoed an "unnecessary" statute that for no demonstrated reason intruded substantially on areas of traditional and cherished local concern.

Pollak, *supra* note 153, at 552 (footnote omitted).

[159] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting)("'An act of congress ought never to be construed to violate the law of nations if any other possible construction remains.'")(quoting Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804)); United States v. Dawn, 129 F.3d 878, 882 (7th Cir. 1997) ("Generally speaking, Congress has the authority to apply its laws, including criminal statutes, beyond the territorial boundaries of the United States, to the extent that extraterritorial application is consistent with the principles of international law."); *see also* United States v. Harvey, 2 F.3d 1318, 1328 (3rd Cir. 1993); United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990).

[160] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. i (1987)("when the intent of Congress to apply United States law in particular circumstances is clear, courts and agencies will apply that law notwithstanding any inconsistency with the rules in this section and § 403") [hereinafter RESTATEMENT (THIRD)]; Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 (1992)(likewise observing that when "congressional intent is clear, . . . current doctrine allows Congress to override international law as long as it is sufficiently specific."); Sumner, *supra* note 98, at 909 ("Congress may ignore or violate principles of international law, provided it articulates a specific intent to do so.").

limit to the extraterritorial application of federal criminal statutes.[161]

The Supreme Court has not yet definitively addressed how international law might limit the reach of a federal criminal statute, and no federal appellate court has dealt with the question whether the extraterritorial application of §§ 2252, 2252A, or 2260(b) violates international law in any detail. But according to Professor Brilmayer and Mr. Norchi, "International law recognizes five traditional bases for the exercise of legislative jurisdiction: territorial, national, protective, passive personality, and universal jurisdiction."[162]

> The territorial theory of jurisdiction allows a state to exercise jurisdiction over a wrong committed, in whole or in part, within its borders. This category includes actions taken outside the territory that have a local impact, a theory sometimes referred to as impact territoriality or the "effects principle" of jurisdiction. According to the nationality theory, a state may exercise jurisdiction respecting any actions committed beyond its territory by one of its own nationals. The protective theory relates more directly to national security, and allows the state to exercise jurisdiction over an offense committed outside its territory. Jurisdiction may be asserted over an alien if the offense is directed against the security, territorial integrity, or political independence of that state. According to the passive personality theory, a state may exercise jurisdiction over a defendant accused of harming a national of the state claiming jurisdiction.
>
> The principle of universal jurisdiction, finally, allows the assertion of jurisdiction for certain offenses considered particularly heinous, regardless of whether the accused has any nexus with the forum. The category of crimes recognized for the purposes of universal jurisdiction has traditionally been limited to offenses that all states condemn and thus that all states possess a universal interest in suppressing.[163]

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[161] *See Hartford*, 509 U.S. at 815 (Scalia, J., dissenting)("this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law"); Thomas, 893 F.2d at 1069 ("Although Congress is not bound by international law in enacting statutes, out of respect for other nations, courts should not unnecessarily construe a congressional statute in a way that violates international law." (citations omitted)); *see also* RESTATEMENT (THIRD) § 402 introductory note ("International law has long recognized limitations on the authority of states to exercise jurisdiction to prescribe in circumstances affecting the interests of other states.").

[162] Brilmayer & Norchi, *supra* note 160, at 1244 (footnote omitted); *see also* Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 40-41 (1990); Mason H. Drake, Note, United States v. Yunis: *The D.C. Circuit's Dubious Approval of United States Long-Arm Jurisdiction Over Extraterritorial Crimes*, 87 NW. U. L. REV. 697, 703-05 (1993).

[163] Brilmayer & Norchi, *supra* note 160, at 1245 (footnotes omitted). These same theories are reflected in RESTATEMENT (THIRD) §§ 402 and 404. Section 402 ("Bases of Jurisdiction to Prescribe") provides:

Save perhaps the protective theory, the extraterritorial application of §§ 2252, 2252A, and 2260(b) potentially can be justified under any of these bases. For example, to the extent the child pornography itself moves in foreign commerce,[164] or there is at least an intent that the child pornography so move,[165] an assertion of jurisdiction could be justified under the territorial theory. An assertion of jurisdiction with respect to each of the crimes described in §§ 2252, 2252A, and 260(b) (save perhaps those relating to the simple possession of child pornography) arguably could be based as well on impact territoriality.[166]

To the extent the activities prohibited by these statutes are conducted extraterritorially by Americans, jurisdiction could be founded on the nationality basis.[167] Similarly, to the extent the child pornography at issue involves the use of American minors, jurisdiction perhaps could be justified

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Subject to § 403, a state has jurisdiction to prescribe law with respect to
(1)
(a) conduct that, wholly or in substantial part, takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory that has or is intended to have substantial effect within its territory;
(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other interests.

Section 404 ("Universal Jurisdiction to Define and Punish Certain Offenses") provides:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

[164] *See* 18 U.S.C.A. § 2252(a)(1), (2), (3)(B) (West Supp. 1999), (4)(B); 18 U.S.C.A. § 2252A(a)(1)-(3), (4)(B), (5)(B) (West Supp. 1999).

[165] *See* § 2252(a)(2); § 2252A(a)(3); 18 U.S.C. § 2260(b) (Supp. III 1997).

[166] One difficulty with a territorial-based exercise of jurisdiction under §§ 2252 and 2252A, though, is the lack of a requirement that the defendant know that anything moved in foreign commerce. *See supra* note 95.

[167] *See* United States v. Harvey, 2 F.3d 1318, 1329 (3rd Cir. 1993)("No tenet of international law prohibits Congress from punishing the wrongful conduct of its citizens, even if some of that conduct occurs abroad."); United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990) ("International law permits a country to apply its statutes to extraterritorial acts of its nationals."); United States v. Kolly, 48 M.J. 795, 797 (N-M.C.M.R. 1998)(recognizing the "inherent right of a sovereign . . . to regulate the conduct of its own citizens regardless of their location"); United States v. Pullen, 41 M.J. 886, 888 (A.F.C.M.R. 1995)("International law recognizes the right of a country to apply its statutes to the extraterritorial acts of its citizens and nationals."). In fact, every reported case I have been able to locate that has addressed the extraterritorial application of §§ 2252, 2252A, or 2260(b) involved an American national, and in each case, the court found the statute consistent with international law on this basis. *See supra* section II.D.

under the passive personality basis.[168] Finally, though not all countries criminalize the same types of activities as are criminalized under §§ 2252, 2252A, and 2260(b),[169] jurisdiction of any of these crimes perhaps could be based on universal jurisdiction.[170]

Those portions of §§ 2252, 2252A, and 2260(b) most suspect as a matter of international law (and perhaps the only portions that are) are those portions of §§ 2252(a)(4)(B) and 2252A(a)(5)(B) that permit the jurisdictional element of the crime of possession of child pornography to be proved by evidence that the child pornography was "produced" using materials that moved in foreign commerce. Assume, for example, that the child pornography at issue is simply possessed by a foreign national outside of the United States (and outside the jurisdictional scope of §§ 2252(a)(4)(A) and 2252A(a)(5)(A)). Assume further that the production of the child pornography did not involve the use of American minors. In this situation, the primary "wrong" — the possession of the child pornography — could not be said to have occurred in the United States. Moreover, to the extent the child pornography was procured from foreign sources, it would be difficult to argue that the possession had any substantial effect on the American child pornography market. Thus, an assertion of jurisdiction under the territorial basis seems unlikely. The nationality, protective, and passive personality theories likewise would be inapplicable. This leaves only the principle of universal jurisdiction. But

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[168] A problem similar to the problem relating to the territorial theory (*see supra* note 166) potentially relates to an assertion of jurisdiction under the passive personality theory, though, in that none of these statutes appear to require that the defendant know the minor depicted is an American.

[169] Stewart explains:

> [Child pornography l]aws in Europe are far from uniform and efforts to tighten or change them have met with mixed success. The possession of child pornography is a crime in Britain, the United States, and Germany, but not in at least twenty-six other nations, including Ireland, Hungary, South Africa, and France. Many victims of child pornography come from Asian nations, which generally have fewer restrictions on the production, distribution, or possession of child pornography than many European countries, Australia, or the United States.

Stewart, *supra* note 2, at 239 (footnotes omitted). Moreover: "While many nations have laws prohibiting either the possession, distribution, or exchange of child pornography, only a handful have gone on the counter-offensive against child pornography on the Internet." *Id.* at 219.

[170] There is little question that, despite some international inconsistency in the criminalization of child pornography (*see supra* note 169), child pornography is nearly universally condemned. For example, the United Nations 1989 Convention on the Rights of the Child (G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989)), "which as of April 15, 1996, was ratified by 187 countries, provides basic international guidelines for the protection of children from sexual exploitation via child pornography." Stewart, *supra* note 2, at 208 (footnote omitted); *see also* Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 55-58 (1996).

what if the child pornography is possessed in a country where the possession of such materials is permitted? An assertion of jurisdiction based even on universal jurisdiction might be suspect, particularly if the production of the pornography at issue in fact did not involve minors, or even actual people.[171]

Finally, there is the matter of reasonableness. "[A] nation having some 'basis' for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction 'with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.'"[172] In the Restatement (Third) of Foreign Relations Law of the United States, reasonableness in the prescriptive context is articulated through § 403 ("Limitations on Jurisdiction to Prescribe"):

> (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
>
> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and

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[171] *See supra* note 14 (describing the definition of "child pornography" provided in § 2256(8) and incorporated in § 2252A(a)(5)(B)).

[172] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818 (1993)(Scalia, J., dissenting) (quoting RESTATEMENT (THIRD) § 403(1)).

(h) the likelihood of conflict with regulation by another state.

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2); a state should defer to the other state if that state's interest is clearly greater.[173]

Though several factors (principally (c), (d), (e), (g), and (h)) likely support a finding of reasonableness in the child pornography context, other, significant factors (principally (a) and (b)), depending upon the circumstances, might not.[174]

V. DUE PROCESS LIMITS TO FEDERAL CRIMINAL CHILD PORNOGRAPHY LAW

Another constitutional concept to consider is due process. "Congress may apply its penal statutes to extra-territorial acts unless such application would violate due process."[175] As a matter of federal choice of law, the Fifth Amendment[176] potentially limits the application of federal criminal child pornography law to persons and activities located outside of the United States.[177]

Few courts have yet considered the extent to which the Fifth Amendment Due Process Clause limits Congress' power to mandate the extraterritorial

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[173] RESTATEMENT (THIRD) § 403 (1987 & Supp. 1998).

[174] *See id.* reporters' note 8 ("It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification.").

[175] United States v. Thomas, 893 F.2d 1066, 1068 (9th Cir. 1990); *accord* Sumner, *supra* note 98, at 909-10 ("Congressional extraterritorial legislation, however, cannot disregard the due process constraints of the United States Constitution." (citing, *inter alia*, Thomas)); *see also* United States v. Pullen, 41 M.J. 886, 888 (A.F.C.M.R. 1995)("Congress possesses undoubted power, subject only to the constraints of the Constitution, to define criminal offenses against the United States and prescribe the punishments therefor . . . .").

[176] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[177] *See* Brilmayer & Norchi, *supra* note 160, at 1223; *see also* RESTATEMENT (THIRD) § 402 cmt. j ("Apart from the constraints of international law, the jurisdiction of the United States to prescribe is governed by the Constitution, and is limited by the Bill of Rights and other constitutional provisions."). *But see* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT'L L. 379 (1997)(rejecting the notion that the Fifth Amendment Due Process Clause imposes limitations on the extraterritorial reach of federal legislation).

application of federal criminal law.[178] Nonetheless, Brilmayer and Norchi (borrowing largely from Fourteenth Amendment choice of law jurisprudence) argue forcefully that a constitutional assertion of federal law extraterritorially requires three things: contacts by the defendant with the United States, federal governmental interests arising out of those contacts, and some level of fairness.[179] Brilmayer and Norchi explain these three due process requirements as follows:

> The requirement of contacts seems straightforward: something about the controversy or the defendant must touch the forum. Some of these contacts may be related to the controversy. The events leading up to the litigation, for instance, may have occurred in the forum, or perhaps one or more of the parties to the litigation are United States residents. Other contacts may be completely unrelated to the controversy. For example, if a defendant in securities litigation conducts other business in the United States, or travels there frequently on unrelated business, this might be taken into account even if insufficient to establish jurisdiction.
>
> The insistence that the contacts "create interests" is somewhat less clear. Even in the state context, courts have offered no satisfactory formulation for what kinds of interests suffice. In the federal context, we suggest that the notion of interests can best be understood in terms of the limited power of the federal government. The federal government must generally demonstrate an affirmative basis for regulating — such as the Commerce Clause or national defense powers — when it adopts a statute. The international context is not distinguishable in this regard, and the affirmative bases authorizing Congress to regulate internationally can give content to the notion of "interests." Because the Constitution permits Congress to regulate commerce with foreign nations, for example, the assertion of American law over incidents arising from commercial contacts with the United States may be considered further legitimate interests within the meaning of the *Hague* test. On this view, other exercises of the foreign affairs power create similar interests. A showing that the application of Untied States law to a particular case will further the exercise of the commerce or foreign affairs power demonstrates that the requisite regulatory interest exists.

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[178] Brilmayer and Norchi explain:

> Federal extraterritoriality cases sometimes mention the Constitution as an aside, seemingly indicating that the Constitution limits federal legislative power. Few cases seriously discuss the constitutional question, and none invalidate application of federal law on these grounds.

Brilmayer & Norchi, *supra* note 160, at 1219 n.12 (citations omitted); *cf. Thomas*, 893 F.2d at 1068 ("*Thomas* does not contend that application of section 2251(a) to him denies him due process and there is no indication that it does."); *Pullen*, 41 M.J. at 888 (recognizing possible due process constraints to the extraterritorial application of federal criminal law, but failing to consider the question further).

[179] *See* Brilmayer & Norchi, *supra* note 160, at 1242.

> Most cases that proceed in United States courts are likely to exhibit some contacts with the United States, if only because of the requirement that the court have personal jurisdiction over every defendant. Additionally, most statutes reflect interests supportive of federal regulation — otherwise, they would be invalid as a domestic matter. The third requirement is therefore probably the most demanding one for Fifth Amendment purposes. Contacts and interests in themselves do not demonstrate the fundamental fairness of holding a defendant to legislative standards. Fairness has been an elusive concept in conflict of laws jurisprudence, both in contexts such as personal jurisdiction as well as in choice of law specifically. Sometimes it is argued that the key requirement of due process is avoidance of unfair surprise. This approach is problematic, however, because states can avoid surprise simply by making it clear that they will subject all litigants in their courts to local law. If mere notice would suffice, the fairness requirement would be empty, for such notice could always be provided.
>
> Another approach to fairness requires that the defendant, by his or her own actions, must have voluntarily affiliated him or herself with the United States. By entering the country and engaging in business activities there, a defendant subjects himself to United States regulation of these activities. By purposefully bringing about harm within the United States, the defendant submits to United States law. On this view, although the requirements of contacts and fairness must each be satisfied, they are interrelated — the defendant's voluntary contacts are precisely what makes the assertion of jurisdiction fair. Numerous difficulties are posed by this consent-based or "voluntarist" notion of jurisdiction. Yet there is no doubt that it captures some deeply held intuitions of Anglo-American political thought about fair subjection to sovereign power.[180]

As with the application of international law, the Fifth Amendment seems to impose few impediments to the extraterritorial application of §§ 2252, 2252A, and 2260(b). Perhaps the greatest potential difficulties again occur in connection with the simple possession crimes described in §§ 2252(a)(4)(B) and 2252A(a)(5)(B). Consider the hypothetical situation described in Part IV. In that situation, the only contact between the defendant and the United States would be that the child pornography possessed by the foreign defendant was produced using materials that moved in commerce between the United States and some foreign country. Moreover, though conceivably there could be some federal interest in criminalizing such conduct, the unfairness of enforcing these statutes against a foreign national in this context seems manifest. Such an assertion of federal criminal child pornography law would not seem to be consistent with federal constitutional principles of due process. [181]

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[180] *Id.* at 1242-44 (footnotes omitted).

[181] Careful statutory construction can avoid conflicts with due process requirements:

> Hopefully, few cases will present these difficulties. Congress has typically been silent on the extraterritorial reach of federal legislation. Consequently, potential problems of

VI. FEDERALISM AS A LIMIT TO FEDERAL CRIMINAL CHILD PORNOGRAPHY LAW

State legislatures, of course, are every bit as competent as Congress to enact statutes criminalizing child pornography. Indeed, virtually every state has now criminalized even the possession of child pornography.[182] The question

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> unfairness can be avoided entirely through deft interpretation. When Congress does specify territorial reach, it rarely tries to make statutes universally applicable, and when it spells out the range of cases to which one of its statute[s] does apply, it will likely require the types of connections that would satisfy the Fifth Amendment (as well as international law). However, courts and litigants should keep constitutional limitations in mind. A court should consider potential constitutional limits when it interprets a statute that is silent on territorial reach, for courts typically construe statutes to avoid raising constitutional difficulties. With due awareness of potential constitutional considerations, Fifth Amendment due process problems of federal extraterritoriality will be rare. If Congress ever does force the issue, however, courts must stand prepared to enforce the Fifth Amendment's limits on international choice of law.

Brilmayer & Norchi, *supra* note 160, at 1262-63 (footnote omitted).

[182] The vast majority of states have statutes criminalizing the simple possession of child pornography. *See* ALA. CODE § 13A-12-192 (1997); ALASKA STAT. § 11.61.127 (Michie 1996); ARIZ. REV. STAT. § 13-3553 (West 1989); ARK. CODE ANN. § 5-27-304 (Michie 1997); CAL. PENAL CODE § 311.11 (West Supp. 1998); COLO. REV. STAT. § 18-6-403 (1993); CONN. GEN. STAT. § 53a-196d (1994); DEL. CODE ANN. tit. 11, § 1111 (1995); FLA. STAT. § 827.071 (West 1994); GA. CODE ANN. § 16-12-100 (1996); HAW. REV. STAT. § 707-751 (Michie 1997); IDAHO CODE § 18-1507A (1987); 720 ILL. COMP. STAT. 5/11-20.1 (West 1996); IND. CODE § 35-42-4-4 (1996); IOWA CODE § 728.12 (West 1993); KAN. STAT. ANN. § 21-3516 (1995); KY. REV. STAT. ANN. § 531.335 (Michie 1997); LA. REV. STAT. ANN. § 14:81.1 (West 1995); ME. REV. STAT. ANN. tit. 17, § 2924 (West 1997); MD. CODE ANN. art. 27, § 419B (1996); MICH. COMP. LAWS § 750.145c (West 1998); MINN. STAT. § 617.247 (West 1987); MISS. CODE ANN. § 97-5-33 (1997); MO. REV. STAT. § 573.037 (West 1997); MONT. CODE ANN. § 45-5-625 (1997); NEV. REV. STAT. § 200.730 (Michie 1997); N.H. REV. STAT. ANN. § 649-A:3 (1996); N.Y. PENAL LAW §§ 263.11, 263.16 (McKinney Supp. 1998); N.C. GEN. STAT. § 14-190.17A (1997); N.D. CENT. CODE § 12.1-27.2-04.1 (1997); OHIO REV. CODE ANN. § 2907.323 (Anderson 1996); OKLA. STAT. tit. 21, § 1021.2 (West 1997); OR. REV. STAT. § 163.687 (1998); 18 PA. CONS. STAT. § 6312 (West 1998); S.C. CODE ANN. § 16-15-410 (Law. Co-op. 1996); S.D. CODIFIED LAWS § 22-22-23.1 (Michie 1998); TENN. CODE ANN. § 39-17-1003 (1997); TEX. PENAL CODE § 43.26 (West 1994); UTAH CODE ANN. § 76-5a-3 (1995); VA. CODE ANN. § 18.2-374.1:1 (Michie 1996); WASH. REV. CODE § 9.68A.070 (West Supp. 1998); W. VA. CODE § 61-8C-3 (1997); WIS. STAT. § 948.12 (West 1996).

A handful of states criminalize the possession of child pornography only if there is an intent to disseminate. *See* MASS. ANN. LAWS ch. 272, § 29B (Law. Co-op. 1996); NEB. REV. STAT. § 28-1463.03 (1996); N.M. STAT. ANN. § 30-6A-3 (Michie 1997); WYO. STAT. ANN. § 6-4-302 (Michie 1997). Thus, only the District of Columbia, New Jersey, Rhode Island, and Vermont have not yet enacted statutes criminalizing the possession of child pornography. State criminalization of the possession of child pornography appears to be a growing trend, though. *Cf.* Johnson, *supra* note 12, at 319 n.69 (observing that, "[a]s of 1994, at least half of the states have passed laws to prohibit the possession of child pornography")(listing statutes).

thus arises whether there are any federalism-based reasons why the criminalization of child pornography should be limited at the federal level. As one legal scholar recently noted:

> In theory, what is of federal interest is appropriate for federal legislation, assuming there exists a proper constitutional base for the legislation. What is of national interest is a different matter. Undoubtedly, public concern about crime is of national interest, but it does not necessarily follow that all possible federal criminal legislative proposals in response to a national interest are an appropriate source of federal action.[183]

The number of state criminal child pornography laws grows much larger when one considers all such statutes. *See* Friel, *supra* note 1, at 216 n.58 (observing that "numerous states have enacted criminal statutes prohibiting the production, promotion, sale, exhibition, or distribution of photographs of children engaged in sexual activity")(listing statutes); *see also* 50 AM. JUR. 2d *Lewdness* § 27, at 299-300 (1995)("statutes making the creation and pro-motion of child pornography a criminal offense have been enacted in almost all jurisdictions.").

[183] Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 3 n.7 (1996). *See also* RESTATEMENT (THIRD) § 402 cmt. j ("The powers of Congress are also limited by principles of federalism, and some of the jurisdiction that the United States has under international law may be exercised under the Constitution only by the States.").

Laurence Tribe states that:

> The doctrinal rules courts currently employ to determine whether federal legislation is affirmatively authorized under the commerce clause do not themselves effectively limit the power of Congress .... Congressional power under the commerce clause is nonetheless limited. All congressional exercises of legislative authority are, of course, subject to judicially enforceable external restrictions such as those of the Bill of Rights. But Congress is also subject to internal political restraints — restraints reinforced by the federal structure which the Constitution created and by the practices of courts called upon to interpret congressional action.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5.7, at 313 (2d ed. 1988). Donald Regan adds:

> The Tenth Amendment imposes no limitation on the scope of federal power that is not otherwise inferable from the history, text, and structure of the Constitution .... On the other hand, the Tenth Amendment is a reminder of what those other sources reveal: that the federal government was not endowed with all the powers of the government of a unitary nation. This is a reminder we obviously still need because our present approach to the Commerce Clause pays this fact no more than lip service.

Regan, *supra* note 155, at 592-93. *See also* Rachel Elizabeth Smith, Note, United States v. Lopez: *Reaffirming the Federal Commerce Power and Remembering Federalism*, 45 CATH. U. L. REV. 1459, 1460-61 (1996)("When federal regulation of commerce among the several states, or interstate commerce, results in regulation of intrastate activities, the Supreme Court must adhere to principles inherent in the concept of Federalism and the Tenth Amendment." (footnote omitted)). *See generally* Ann Althouse, *Enforcing Federalism After* United States v. Lopez, 38 ARIZ. L. REV. 793 (1996); Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 756-90 (1995); Rory K. Little, *Myths and Principles of Federalization*, 46 HASTINGS L.J. 1029, 1061-63 (1995).

Though federal forays into areas traditionally regulated by the states are not without precedent, the *Lopez* Court discussed the improvidence of such legislation:

> Under our federal system, the States possess primary authority for defining and enforcing the criminal law. Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States. When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction. [Federal criminal legislation also] displaces state policy choices in that its prohibitions apply even in States that have chosen not to outlaw the conduct in question.[184]

Many legal scholars agree with the *Lopez* Court's assessment.

> Today, crime ranks as the most serious issue facing Americans. Congress, responding to these concerns, has enacted waves of new federal criminal legislation, effectively "federalizing" a wide variety of conduct that was already criminal under state law and that traditionally had been the responsibility of state criminal law enforcement.
>
> This "federalization" of crime leads to a variety of consequences for the administration of criminal justice. For example, by dramatically increasing the categories of criminal conduct that are subject to criminal prosecution under both state and federal law, the circumstances in which an individual may be prosecuted by both sovereigns for essentially the same act correspondingly increase. In addition, the enlargement of federal criminal jurisdiction significantly strains the federal court and prison systems. Lastly, the expansion of federal criminal law into areas long thought to be more appropriately within the domain of the states has blurred, if not obliterated, any meaningful constitutional limitation on federal criminal law authority.[185]

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[184] United States v. Lopez, 514 U.S. 549, 561 n.3 (1995)(citations and internal quotation marks omitted); *see also* United States v. Bass, 404 U.S. 336, 349 (1971)("Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States.").

[185] Kurland, *supra* note 183, at 2 (footnotes omitted). Henry Hart and Albert Sacks state that:

> Congress has consistently been hesitant about defining as a federal crime conduct which is already denounced as criminal by the states, and has done so only when for some exceptional reason the machinery of state law enforcement needed to be supplemented and reenforced by federal action. This policy, inexact though it is, is obviously rooted deeply and soundly in the theory and practice of American federalism.

HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994); *see also* Kurland, *supra* note 183, at 3 n.6 ("The contemporary concern over 'overfederalization' is driven not only by a concern that the federal

Concerns as to the federalization of state crime apply as well to the area of child pornography. Certainly, there seems to be a place for some federal legislation in this area.[186] But as the United States Attorney General's own Commission on Pornography observed:

> [I]n our federal system primary responsibility for law enforcement has always been with the states. The police power of the states has commonly been taken to include primary responsibility for dealing with the very types of harms at which the obscenity laws are addressed. And the constitutional commitment to a federal system assumes that state involvement is preferable to federal in areas, such as most of the criminal law, in which local decisions may vary. We see no reason not to make, in general, the same assumptions with respect to the enforcement of obscenity laws.[187]

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government has overstepped its constitutional bounds, but also by the companion belief, grounded in fundamental Antifederalist principles, that governmental decision-making is best exercised at the local level."); Note, *Mens Rea in Federal Criminal Law*, 111 HARV. L. REV. 2402, 2416-19 (1998)(arguing that the federalization of criminal law "contravenes the traditional presumption that states are better at regulating crime," "subjects criminal suspects to the danger of selective federal prosecution," and "floods the dockets of the federal courts," and concluding that the "ongoing federalization of criminal law presents one of the most serious long-term threats to the balance of power between the federal government and the states") [hereinafter *Mens Rea*].

Without question, the federalization (some would say overfederalization) of state crimes is a growing trend. *See* Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 803-04 n.20 (1996)(observing that though there were only 17 federal crimes in 1790, there are now over 3000, approximately one half of which were enacted over the last 20 years); Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674, 707 (1995)("Criminal cases now account for almost one-half of all federal trials . . . ."); Weis, *supra* note 155, at 1431 ("Since the early 1970s, Congress has increasingly relied upon commerce-based statutes to regulate intrastate criminal activities."). *See generally* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Victoria Davis, Note, *A Landmark Lost: The Anemic Impact of* United States v. Lopez, *115 S. Ct. 1624 (1995), on the Federalization of Criminal Law*, 75 NEB. L. REV. 117, 140-45 (1996); Weis, *supra* note 155, at 1434-40.

[186] *See* Loken, *supra* note 153, at 122 ("The importance of a federal role in the area seems equally unquestioned: the traffic in children knows neither state nor national boundaries.")

[187] UNITED STATES DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 374 (1986) [hereinafter ATTORNEY GENERAL'S REPORT]; *see also* UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-75.320 (1997)("The Federal role in prosecuting obscenity cases is to focus upon the major producers and interstate distributors of pornography while leaving to local jurisdictions the responsibility of dealing with local exhibitions and sales."). Kent and Truesdell state that:

> even if Congress were to criminalize the mere possession of child pornography, there would still be a compelling need for states to pass comparable statutes. Limited federal law enforcement resources are available to combat this problem and the protection of children against criminal sexual abuse remains primarily a local law enforcement matter.

Some of the concern regarding the federalization of child pornography-related crimes relates to the limitations imposed on Congress by the Commerce Clause. To the extent that federal criminal statutes find their constitutional basis in the Commerce Clause, some conduct related to child pornography is going to be beyond the reach of those statutes. The same is not true of the States. As stated in the *Final Report* of the Attorney General's Commission on Pornography:

> The federal interest in protecting children, of course, is secondary to that of the states, which act as principal guardians against the abuse or neglect of the young. . . . States are not limited, as is the federal government, to regulation of child pornography in or affecting interstate commerce; they have the power to prohibit *all* production and trafficking in such materials.[188]

Jeffrey J. Kent & Scott D. Truesdell, *Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography*, 68 OR. L. REV. 363, 368-69 n.22 (1989); *see also* David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 546, 547 (1981)("The most effective way to prevent actual or potential sexual exploitation of children is through the promulgation of strong legislation at the state level."); Robert J. Clinton, Note, *Child Protection Act of 1984 — Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 OKLA. CITY U. L. REV. 121, 149 n.127 (1985)(suggesting that criminal prohibition of the possession of child pornography "is a matter probably best left to the individual states").

A complete discussion of the reasons why Congress has nonetheless decided to criminalize virtually every aspect of child pornography is beyond the scope of this Article. Without question, though, considerable political pressure has been exerted on all branches of government to deal with this "national" problem, and the electorate probably cares little about the structural ramifications of any attempt to impose a federal remedy. Another reason for Congress' eagerness in this area seems to stem from federal dissatisfaction with the severity of state penalties. For example, in a recent letter from Ann M. Harkins of the Justice Department to the Honorable Bill McCollum, Chairman of the House Judiciary Committee's Subcommittee on Crime, in calling for a jurisdictional broadening of federal criminal child pornography laws, the Justice Department complained that "[t]here have been a number of cases where . . . the federal government cannot prosecute the . . . charge, but, instead, must turn the . . . case over to state prosecutors," and argued that "[t]he suggested amendment will enable the case to be prosecuted federally, which will ensure that an appropriately severe sentence is available." H.R. REP. NO. 105-557, at 27, *reprinted in* 1999 U.S.C.C.A.N. 684, 701.

[188] ATTORNEY GENERAL'S REPORT 607. The Commission goes on to observe that, even as of 1986, "[t]o a substantial extent the states have exercised that power. Nearly all ban the production of child pornography, and an overwhelming majority prohibit distribution as well. . . . Some have prohibited as well the *possession* of child pornography . . . ." *Id.*; *see also* Smith, *supra* note 4, at 1011 ("Due to federal jurisdictional requirements, the [Child Protection Act of 1984] reaches only child pornography which has been transported in interstate commerce or through the mails. States are not so constrained." (footnote omitted)); Kent & Truesdell, *supra* note 187, at 368 (observing that "a serious void remains in the [federal] statutory framework" with respect to activities relating to child pornography that occur "without interstate movement and without use of the mails"); Susan G. Caughlin, Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. &

Turning, then, to that federal criminal child pornography legislation currently in force: in order to combat the movement of child pornography to and from foreign sources, some federalization of criminal child pornography law seems defensible, if not necessary.[189] Section 2260(b), and to some extent even §§ 2252 and 2252A, are consistent with this purpose. Sections 2252 and 2252A also might be defensible to the extent they are directed toward large, interstate producers and distributors of child pornography.[190] But to the extent §§ 2252 and 2252A are otherwise duplicative of state child pornography statutes, and in light of the above concerns, the federalization of what are essentially state crimes appears to be less defensible.[191] This seems particularly true with respect to the possessory crimes described in §§ 2252(a)(4)(B) and 2252A(a)(5)(B), which are jurisdictionally more difficult to defend under the Commerce Clause. At a minimum, it seems that Congress, when considering federal criminal legislation, might endeavor to avoid enacting statutes likely to lead to needless *Lopez*-type challenges. A narrowing of federal criminal jurisdiction also might help federal courts avoid the compulsion to interpret such statutes so as to make them applicable to every conceivable form of conduct, even conduct clearly inappropriate for federal regulation.

MARY L. REV. 187, 200 (1987)("Whereas federal legislation must rest its authority on the movement of child pornography in interstate commerce, the states are free to exercise their police power to prohibit all production and distribution of child pornography.").

Kent & Truesdell further observe that "[e]ven if these events [(relating to interstate movement)] do occur within the statute of limitations, they are often difficult to prove." Kent & Truesdell, *supra* note 187, at 368 n.21. "State legislatures can fill the void by criminalizing the mere possession of child pornography." *Id.* at 368.

[189] Though it is relatively easy to identify the pros and cons resulting from the federalization of criminal law, establishing normative guidelines for determining whether and to what extent Congress should step into any particular area has proven more difficult. *See Mens Rea*, *supra* note 185, at 2416 (observing that "wide disagreement exists on which factors should serve as bases for federalization"). Moreover, even if agreement were to be reached as to those guidelines, disagreement still might exist as to their scope. *See id.* ("all of the prongs of [Kathleen] Sullivan's test, particularly the determination whether states are 'unable or unwilling' to address the problem at issue, are somewhat ambiguous and thus potentially manipulable"). Nonetheless, there is some agreement that crimes occurring outside the United States (at least in part) might be an appropriate basis for federalization. *See, e.g.*, Sam J. Ervin, III, *The Federalization of State Crimes: Some Observations and Reflections*, 98 W. VA. L. REV. 761, 764-68 (1996) (discussing possible justifications for the federalization of international crimes).

[190] *See, e.g.*, Ervin, *supra* note 189, at 764-68 (discussing possible justifications for the federalization of crimes based on their economic and/or interstate scope).

[191] *See Mens Rea*, *supra* note 185, at 2416 (justifying the Supreme Court's narrow interpretation of § 2252 in *X-Citement Video* (*see supra* notes 95-96 and accompanying text) on the ground that child pornography statutes generally fail to fit within recognized federalization guidelines).

VII. CONCLUSION

Though limited in some respects, the jurisdictional reach of federal criminal child pornography law is broad. And because crime (particularly as it relates to child pornography) and computers continue to be a favorite targets of Congress, further federal legislation in these areas appears likely. But perhaps it is time to consider whether the war on child pornography can be won without infringing on the abilities of the States and other nations to prescribe legislation in this area, and without engaging in needless statutory and constitutional debates.[192] For Congress is simply not empowered to criminalize all activities relating to child pornography.

From a jurisdictional standpoint, federal criminal statutes directed towards the mere possession or reproduction of child pornography with no distributive purpose are most suspect. As a matter of congressional authority, such statutes are difficult to justify under current Commerce Clause jurisprudence. Statutes criminalizing the simple possession of child pornography also are the most difficult to defend when applied extraterritorially. And within the United States, the simple possession of child pornography already has been largely criminalized by the States. Though it might be impossible politically, Congress perhaps ought to consider decriminalizing the simple possession of child pornography.

It also would be helpful if Congress could be a little more explicit in defining the jurisdictional reach of statutes like §§ 2252, 2252A, and 2260(b). In particular, Congress should provide a more concrete definition of "producing" than that currently found in § 2256(3), and should specify that, as to §§ 2252, 2252A, and 2260(b), "producing" (and its variants) refers only to the original creation (and not the mere copying) of the child pornography at issue. Congress also should expressly and precisely set forth whether, and to what

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[192] As Senator Joseph Biden cautioned in connection with the enactment of the Child Pornography Prevention Act of 1996:

> Even if the expansion of current law created by [this Act] is ultimately upheld by the Supreme Court, litigation over the question of its constitutionality will hinder enforcement of the new law until that ultimate decision is issued. Enacting a statute of questionable constitutionality is counterproductive to the strict enforcement of laws against pedophiles and child molesters. Resources that would otherwise be used in prosecutions must be diverted to years of litigation on the constitutionality of the statute as it works its way through the lower courts. And during that time the statute's enforcement might be completely blocked by injunctions or other motions. In the meantime, the promise of protection is empty and the public understandably becomes disillusioned by the solutions offered by the Congress.

S. REP. NO. 104-358 (1996).

extent, these statutes apply to persons and activities located outside of the United States.[193]

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[193] As a part of the Protection of Children From Sexual Predators Act of 1998, Congress enacted § 901 ("STUDY ON LIMITING THE AVAILABILITY OF PORNOGRAPHY ON THE INTERNET"), which provides:

> (a) IN GENERAL – Not later than 90 days after the enactment of this Act, the Attorney General shall request that the National Academy of Sciences, acting through its National Research Council, enter into a contract to conduct a study of computer-based technologies and other approaches to the problem of the availability of pornographic material to children on the Internet, in order to develop possible amendments to Federal criminal law and other law enforcement techniques to respond to the problem.
>
> (b) CONTENTS OF STUDY – The study under this section shall address each of the following:
>
> (1) The capabilities of present-day computer-based control technologies for controlling electronic transmission of pornographic images.
>
> (2) Research needed to develop computer-based control technologies to the point of practical utility for controlling the electronic transmission of pornographic images.
>
> (3) Any inherent limitations of computer-based control technologies for controlling electronic transmission of pornographic images.
>
> (4) Operational policies or management techniques needed to ensure the effectiveness of these control technologies for controlling electronic transmission of pornographic images.
>
> (c) FINAL REPORT – Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a final report of the study under this section, which report shall–
>
> (1) set forth the findings, conclusions, and recommendations of the Council; and
>
> (2) be submitted by the Committees on the Judiciary of the House of Representatives and the Senate to relevant Government agencies and committees of Congress.

Pub. L. No. 105-314, 112 Stat. 2974, 2991. I hope that Congress, as it considers further amendments to federal criminal law to address the problem of child pornography as might be prompted as a result of this study, also considers some of the problems raised in this Article.

Tired of Your Masses: A History of and Judicial Responses to Early 20th Century Anti-Immigrant Legislation

Irene Scharf*

A story with eerie reminiscences of times past appeared in the National Law Journal this past October. The story, about the case of *Soko Bukai v. YWCA of San Francisco*, can serve to remind us all of a not-too-distant past that reverberates even today around this nation. *Soko Bukai* was brought on behalf of 700 members of the Japanese-American community in San Francisco, and accuses the YWCA of trying to profit from the *de jure* discrimination to which they were subjected by the 1913 Alien Land law, which barred them from owning land in the United States.[1] According to the complaint, in an apparent attempt to assist the community, "the San Francisco Y agreed to hold the . . . property in trust for decades for the Japanese community." Therefore, the Y's attempt in 1996 to sell the property that breached that promise.[2]

The Alien Land Laws are emblematic of the nativism movement that prevailed here during the early years of the twentieth century. The movement, a reaction to the wave of immigrants moving to this country during those years, was characterized by intense distrust of and opposition to the foreign connections of the immigrants. The movement caused a "zeal to destroy the enemies of a distinctly American way of life,"[3] and sparked anti-immigrant legislation at both the state and national levels that far surpassed any responses to immigration that had occurred before that time. Some of this

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[1] *See* Peter Aronson, *Stirring Memories of Racism*, NAT'L L.J., Oct. 4, 1999, at A-1.

[2] *See id.*

[3] JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (1955) (hereinafter HIGHAM); *see also* MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900 - 1933 (1994). I have used these two histories as my primary sources for the background of this period, as they are particularly well-regarded and also representative. For classic works on the period, see MARCUS LEE HANSEN, THE IMMIGRANT IN AMERICAN HISTORY (1948) and MALDWYN ALLEN JONES, AMERICAN IMMIGRATION (1960). On the origins of the movement from the perspective of the Catholic academy, see Colman J. Barry, *Some Roots of American Nativism, XLIV:2* THE CATHOLIC HISTORICAL REVIEW 137 (1958). On xenophobia and immigration, see THOMAS J. CURRAN, XENOPHOBIA AND IMMIGRATION, 1820-1930 (1975).

legislation was anti-immigrant on its face, while other enactments were facially neutral, yet aimed at immigrants nonetheless.[4]

The judicial responses to legal challenges raised in opposition to this legislation, from all levels of courts and from an array of jurisdictions, were often creative. A common consequence of these challenges was an amelioration, either by outright declarations of unconstitutionality or by specific limits on their applicability; thus, the harsh results originally intended by the legislators, in response to the public outcry against the immigrants, would be avoided.[5] Notably, a number of the rulings from this era remain significant today for their well-settled propositions, but become invigorated anew when viewed in the context of the nativism movement out of which they arose.

My interest in this topic derives from an overall curiosity about the more recent nativist movement that has generally resulted from expanded immigration opportunities created in the mid-1960s.[6] In the way that the public outcry against immigration culminated in the legislation at the outset of this century, a similar outcry against recent immigrants has sparked several new changes in the law.[7] To that extent, history has repeated itself.

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[4] *See* Parts I-II, *infra*. Many of the enactments were anything but neutral, but rather expressly contained restrictions based on race that applied to both immigrants and candidates for naturalization. For a survey of these laws, see IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, ch. 2, "Racial Restrictions in the Law of Citizenship," (1996).

[5] As someone who teaches torts as well as immigration law, in this phrase "ameliorate the harsh effects" I am reminded of the multiple areas of tort law in which courts have done just that with respect to otherwise settled principles. For example, courts have ameliorated the harsh effects of contributory negligence, of the common law protections afforded landlords against tenants, of the traditional family immunity doctrines, and even of the aged denial of actions for emotional distress, and so on.

[6] *See* Stephen H. Legomsky, *E Pluribus Unum: Immigration, Race, and Other Deep Divides*, 21 S. ILL. U. L.J. 101, 105-11 (1996). The reasons for the recent hostility against immigrants can be seen as multi-faceted. For several suggested explanations that go beyond the simple numbers, and proposes economic, racial, fear of crime, anger against illegal immigrants, ignorance of immigration laws, and others. For a more historic perspective on the causes of nativism generally, see Barry, *supra* note 3, at 150-54.

[7] Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 [hereinafter INA]. These amendments started a wave of immigration in the mid-1960s which fueled a new fear of "outsiders," who alight from countries in Asia, Latin America, and Africa rather than from Greece, Italy, Russia, and Poland as they did earlier in this century. This wave has again ignited new cries, many successful, for restrictive legislation at all governmental levels. The resulting restrictions range from two broad spectrum federal bills to various state laws denying non-English speaking children bilingual education, declaring English as the "official language" of some states, forbidding languages other than English to be used in the workplace, and limiting employment options of those who succeed in emigrating here. These provisions, while essential to these "new nativists," seem xenophobic and anathema to many of the principles claimed to be inherent in this nation's founding principles.

In this study, I trace the origins and describe the history and social context of the nativism movement that burgeoned during the early part of this century. The various anti-immigrant enactments and judicial approaches developed when these laws were challenged are studied in Part II, with an eye towards understanding the ways in which judges ruling upon those challenges succeeded in diminishing their intended effects. I hope to explore, in a subsequent article, the recent legislative responses to the new wave of immigration sparked by Congressional changes to immigration policy during the 1960s. In that study, I will examine the current anti-immigrant legislation in light of the courts' approaches at the turn of the century to determine whether they may be employed today in challenges to recent legislation.

I. ORIGINS AND CHARACTER OF EARLIER NATIVISM MOVEMENT

Many commonly believe that the United States was open to outsiders until the early years of the twentieth century. This is not the case.[8] It is true that, except as to African slaves,[9] prior to the late nineteenth century, entry

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The successful federal legislative campaigns have resulted in vast changes governing first, the conditions under which new immigrants arrive, second, the rules applicable while living here, and third, the relevant procedures necessary to evict them from this country if they are found to have violated the immigration laws. These new rules are codified in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified at various titles and sections of the United States Code). For detailed summaries of these Acts, *see* Juan P. Osuna, ed., UNDERSTANDING THE 1996 IMMIGRATION ACT (Juan P. Osuna ed. 1997); *see also* 73 *Interpreter Releases* 1529 - 74 *Interpreter Releases* 453 (Nov. 4, 1996 - Mar. 17, 1997).

[8] For a thorough history supporting this theory, see Gerald L. Neuman, *The Lost Century of American Immigration Law, 1776-1876*, 93 COLUM. L. REV. 1833 (1993).

[9] African slaves were subject to many legislative restrictions. *See, e.g.*, JIM & LOIS HORTON, FREE PEOPLE OF COLOR: INSIDE THE AFRICAN AMERICAN COMMUNITY (1993) (documenting examples of restrictions during slavery); *see also* LEON LITWAK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860 (1965). For examples of these following slavery, see JOEL WILLIAMSON, THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION (1984); HOWARD RABINOWITZ, RACE RELATIONS IN THE URBAN SOUTH: 1865-1890 (1982); WILLIAM H. HARRIS, THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR (1982).

While much of the nativism movement was clearly race-based (see discussion *infra* Part I), and much of the movement was a reaction to non-Anglo Saxon people arriving here in large numbers in the early twentieth century, this country's monument to racism, slavery, was already well-established. No xenophobia can compare to that. But, as the primary purpose of this study is to analyze the legislative and judicial responses to the new immigrants during this period, legislation enacted during this period that was aimed at blacks and judicial responses to those enactments will be incorporated only to the extent that it reflects the xenophobic nature of these times and will enlighten the primary study undertaken here.

restrictions commonly focused on specific economic conditions (i.e., poverty) or specific physical or mental conditions (i.e., lunacy) of the intending immigrant.[10] The first effort to restrict immigration by creating obstacles to naturalization arose in 1798, when the Naturalization Act[11] extended the required residence period from five to fourteen years; but this law went largely unenforced and was repealed shortly thereafter.[12]

During the course of the nineteenth century, and peaking in the early years of the twentieth century, the first nationally-organized movement developed against immigrants. "Nativism" is a difficult word to define. It "is distinctively American, a product of a specific chain of events in eastern American cities in the late 1830s and early 1840s."[13] Although the word was coined around 1840,[14] the "spirit" of American nativism surfaced long before that.[15] For, by the middle to the end of the century, even if from different ethnic and religious backgrounds, nativists believed "that some influence originating abroad threatened the very life of the nation from within."[16]

From where did this powerful anti-foreigner tradition arise? Perhaps surprisingly, it can be traced as far back as the Protestant Reformation.[17] Because Protestant antagonism against Rome played such a large role in pre-Civil War nativists' thinking, "historians have sometimes regarded nativism and anti-Catholicism as more or less synonymous."[18] This anti-Catholic

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[10] *See* KELLER, *supra* note 3, at 22. Depending on the era and forces operating in the nation, restrictions focused on criminal background, poverty (1880s) and later contract laborers (1885) and anarchists and prostitutes (1903). *See id.*

[11] Naturalization Act of June 25, 1798, 1 Stat. 570.

[12] *See* Neuman, *supra* note 8, at 1883. Under Article I, Sec. 8 of the Constitution, Congress has exclusive authority over the admission, exclusion, and deportation of "aliens." The states are restricted from interfering with this federal authority under the Supremacy Clause of Article VI. The term "aliens" is in quotations here because, even though it is the word defined in the INA at 8 U.S.C. sec. 1101(a)(3) and is thus technically accurate, it seems to portray those not born in the United States as coming, literally, from outer space. These feelings are shared by other immigration academics, as evidenced by an array of e-mail correspondence between some immigration casebook authors during the fall of 1997 (on file with author). So, when the term is not technically required, I will use the word immigrant or legal immigrant and, where relevant, undocumented person to indicate someone who is in the United States in some way in contravention of the INA.

[13] HIGHAM, *supra* note 3, at 3.

[14] *See id.* at 4.

[15] *See id.* Aware that it is often considered offensive to use the word "American" to refer to United States citizens, as America encompasses the continent that is home to Mexico and Canada as well, in this paper I will be as specific as is possible in referring to the various groups being discussed.

[16] *Id.* at 4.

[17] *See id.* at 5.

[18] *Id.*

tradition was important to the colonial identity.[19] In the New World, the "colonies were wedged between twin hostile Catholic empires, France and Spain. Consequently a militant Protestantism deeply colored the early American national feeling . . . ."[20]

The persistence of "an undercurrent of Protestant nativism,"[21] revived between 1825 and 1850, had two principal causes. One can be found in comparing the character of American institutions with those of the Catholic Church. Catholic traditions did not seem "American," but rather in conflict with the American concept of individual freedom imbedded in the national culture. "Observing the authoritarian organization of the Catholic Church and its customary association with feudal or monarchical governments, they [Americans] were tempted to view American liberty and European popery as irreconcilable."[22]

Secondly, when Catholic immigrants flooded into the country during the nineteenth century, nativists, reflecting the Protestant evangelicalism of the day, "considered the immigrants minions of the Roman despot, dispatched here to subvert American institutions."[23]

Besides the anti-Catholic nature of the early movement, an additional manifestation of nativism dated back to the 1790s, in the wake of the French Revolution: a fear of foreign radicals.[24] To be sure, "America's most uncompromising radicals have in fact come from abroad,"[25] "foster[ing] the belief that violent . . . opposition to the status quo is characteristically European and profoundly un-American."[26]

Fear of radicalism from abroad may have been borne of the notion that "[p]erhaps a man discontented in his own country will have no settled principles or loyalty at all."[27] In fact, the influx of the German Forty-Eighters, some of whom came to found the Marxist movement here, did import numerous unorthodox ideas.[28] In the Midwest, this kindled xenophobia[29] over

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[19] *See id.* at 6. For insight into how Catholics view the anti-Catholicism of the colonials, see *Catholic Encyclopedia* 245-50 (1996)(entry by O.D. Edwards).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *See id.* at 7. See CURRAN, *supra* note 3, especially chapters VIII and IX, for a discussion on the fear of foreign radicals.

[25] *Id.* (examples include Emma Goldman and Alexander Berkman).

[26] *Id.* at 8.

[27] *Id.*

[28] *See id.* at 9.

[29] *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED, 2644 (3d ed. 1966)(defining "Xenophobia" as the "fear and hatred of strangers or foreigners or of anything that is strange or foreign"). Many here distrusted foreigners, and

the threat immigrant radicals might pose to American institutions.[30] Around this time, the Know Nothing Party, anti-Catholic and anti-immigrant in nature, had some legislative successes.[31]

But the traditions against both radicals and Catholics differed from a third trend in nativist thinking, that of racial nativism, "the concept that the United States belongs in some special sense to the Anglo-Saxon 'race.'"[32] The first overt effects of this sentiment resulted in efforts to exclude Chinese immigration, following decades of using them as cheap labor to build the nation's railroads. While anti-Asian sentiment culminated in enactment of the Chinese Exclusion Act in 1882,[33] the notion of race as a factor in immigration became a strong sub-text of nativism around the turn of the century.[34]

What can account for these racial attitudes? First, the century's turn followed a devastating depression of 1893-1897, which did not help assuage fears of outsiders that intruded into politics.[35] During these years, business failures abounded, accompanied by growing unemployment[36] that resulted in strikes and frequent clashes between bosses and workers. In some states, the National Guard was even called out.[37] Finally, evidence that foreigners

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about one-third joined nativist groups. *See* CURRAN, *supra* note 3, at 21.

[30] *See* HIGHAM, *supra* note 3, at 9.

[31] *See generally*, TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850S (1992)(explaining about the Know Nothings).

[32] HIGHAM, *supra* note 3, at 9. *See also In re* Rodriguez, 81 F. 337 (W.D. Tex. 1897). *Rodriguez* was an early interpretation of the meaning of the Chinese Exclusion Act. Rodriguez was an immigrant, native of Mexico, caught in the web of the Act when he attempted to naturalize. *See* discussion *infra* pp. 147-49. *See also* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE (1989)(discussing the history of Chinese immigration).

[33] *See* Chinese Exclusion Act, 22 Stat. 58 (1882)(repealed 1943). While the first enactment suspended the immigration of Chinese laborers for ten years, in 1884 it was expanded to exclude all Chinese. *See* Act of 1884, 23 Stat. 115. It has been proffered that the aggressive anti-Asian sentiment of this era can be likened to the current anti-immigrant movement, in that the two groups are viewed by the white majority as "other" and that they were both affirmatively encouraged to emigrate here when the need for their cheap labor was great. *See* Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, *in* IMMIGRANTS OUT! 165, 165-89 (Juan F. Perea ed. 1997).

[34] *See* HIGHAM, *supra* note 3, at 131. The notion that the "race" of Chinese was not fit to be citizens was often justified in the argument that the Chinese refused to assimilate once here. *See* discussion of In re *Rodriguez*, *infra* p. 147-49. *But see* Qingsong Zhang, *Dragon in the Land of the Eagle: The Exclusion of Chinese from U.S. Citizenship, 1848-1943*, UMI Dissertation Services 1998 (Diss. 1994, Univ. of Va.)(refuting this notion and revealing criticism that was made of the mistreatment of Chinese immigrants).

[35] *See* HIGHAM, *supra* note 3, at 68.

[36] *See id.* at 69.

[37] *See id.*

participated in fomenting worker unrest did little to help the plight of these new immigrants.[38]

Not only did business leaders attack the newcomers, but so also did organized labor, jealous of competition for jobs from the immigrants.[39] Subject to particular enmity were the darker-skinned Jewish and Italian immigrants, clearly distinguishable from the rest;[40] as a consequence, they suffered the most overt expressions of resentment and stereotyping.[41] The states acceded swiftly. In New York, for example, laws were enacted forbidding employers from hiring more than a certain number of non-citizens,[42] and forbidding contractors from hiring any non-citizens for public projects.[43]

Whereas the unions' role in the earlier movements to restrict immigration had been relatively minor, in the unsuccessful 1902 campaign to enact a literacy test, labor's goal was identifiable, to restrict the numbers of new Americans arriving.[44] By then, the American Federation of Labor was recruiting native-born artisans and ignoring unskilled workers.[45] Naturally, then, the Federation gradually lost touch with its immigrant roots.

Life for immigrants during this age was surely not easy. With over one million emigrating each year, mostly from southern and eastern Europe,[46] they awoke in a new and hostile land, encountering laws that limited their right to vote over matters in which they had previously been franchised,[47] deprived them of holding certain public jobs,[48] and even denied them the ability to work

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[38] *See id.*; *see also* A. Piatt Andrew, *The Crux of the Immigration Question*, 199 NORTH AM. REV. 866-67 ( ).

[39] *See* HIGHAM, *supra* note 3, at 69.

[40] *See id.* at 160.

[41] *See* Andrew, *supra* note 38, at 866-67.

[42] *See* Truax v. Raich, 239 U.S. 33 (1915); *see also* 1909 N.Y. Laws c. 36; N.Y. Consol. Laws, c. 31; for discussion, *see infra* section II.B.

[43] *See* Crane v. New York, 239 U.S. 195 (1915)(upholding the statute); *see also* Heim v. McCall, 239 U.S. 175 (1915).

[44] *See* IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 3 (6th ed. 1998)(noting that the literacy test was eventually enacted in the 1917 amendment to the INA).

[45] *See* HIGHAM, *supra* note 3, at 163. It is true that many of the labor radicals from this era were immigrants. In fact, several left-wing journals, advocating radical action by workers, were written in the native languages of immigrants — Yiddish (*Daily Forward*), Bohemian (*Obrana*), and Hungarian (*Robitnyk*). *See* ROBERT K. MURRAY, RED SCARE: A STUDY OF NATIONAL HYSTERIA, 1919-1920, 38 (1955).

[46] *See generally*, KURZBAN, *supra* note 44.

[47] *See* KELLER, *supra* note 3, at 237-38.

[48] After the Supreme Court upheld a New York labor law that forbid non-citizens from working on public works construction projects (*Heim v. McCall*, 239 U.S. 175) the state amended the statute to allow for this employment if citizens were unavailable.

Throughout this paper, references to "citizen" or "USC" mean United States citizens,

for private employers who had to abide by rules limiting the allowable percentage of non-citizen employees.[49] But soon immigrants confronted still greater obstacles. The ultimate sanction, deportation, was made easier to achieve. For example, a ground for excluding immigrants from emigrating here, the likelihood that they would fall into poverty or become a "public charge," was expanded.[50] The adverse effects of this change were evidenced in the experience of a 15-year immigrant from Italy who had six children. He returned to Italy to visit his mother and was deported upon returning to the United States under the claim that he was likely to become a public charge.[51]

The panoply of restrictions on immigration culminated in the movement described by the expression "One Hundred Percent Americanism."[52] Those ascribing to this phrase demanded "universal conformity organized through total national loyalty. . . ."[53] Hundred Percenters "regarded the maintenance of the existing social pattern as dependent on the individual's sense of complete identification with the nation."[54]

What resulted was a fad-like craze wherein people competed for the moniker "most patriotic." Schoolteachers in New York City used immigrants' children to "circulate loyalty pledges" for their parents' signatures.[55] The Cincinnati City Council shut-down poolrooms operated by non-citizens to

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unless stated otherwise.

[49] *See* Traux v. Raich, 239 U.S. 33 (1915)(striking state law limiting non-citizen workers to 20%).

[50] *See* KELLER, *supra* note 3, at 237 (citations omitted).

[51] *See id.* Pauperism, or its modern term, "likely to become a public charge," remains a potent deportation (and exclusion) ground. *Id.*

[52] *See* HIGHAM, *supra* note 3 at 204.

[53] *Id.* at 205.

[54] *Id.* The notion of the necessity of unity of Americans through ideology, culture, and ultimately race, has been challenged in recent scholarship. *See, e.g.*, Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493 (1998). The work of Professor Vargas cannot be summarized simply; its relevance to the present study is that she "explains and then deconstructs the cultural ideology that has made homogeneity an unexpressed assumption and mandate in law." *Id.* at 1495. But, according to Vargas, this mandate communicates to the general populace that those who are different, even if only through their physical appearance (through religious garb, or race), are akin to those made unwelcome during the heyday of the One Hundred Percenters, as they did not completely identify with the nation and were therefore not welcome to become a part of it. *See id.*

Others, such as Peter D. Salins, has praised the benefits of assimilation. *See Assimilation, American Style* (1997).

To be sure, there were defenders of the immigrants. They alighted from a diverse group, including the National Association of Manufacturers, interested in cheap labor, liberals such as the President of Harvard University, and the black intellectual W.E.B. DuBois, who defended cultural pluralism and diversity. *See* KELLER, *supra* note 3, at 222.

[55] *See* HIGHAM, *supra* note 3, at 248.

keep foreigners apart from American influences.[56] The Governor of Iowa banned any language except English to be taught in all schools, church services, conversations in public places, or over the telephone.[57] And Congress, in its Revenue Act of 1918, "imposed on 'non-resident' aliens an income tax rate twice that for citizens and 'resident' aliens."[58]

This period also coincided with the burgeoning Progressive movement. Progressives believed it beneficial to pursue unification of divergent social groups rather than promote distinctions among them. Accordingly, they sought to discourage diversity among the populace and may have unwittingly fostered support for nativist thinking. While they remained committed to public policies that in principle transcended class, religion, ethnicity, and region,[59] in the climate of the nineteen-teens, the Progressive agenda at least partially fed into the nativist one.[60]

President Wilson did little to stem the growing tide of xenophobia. "In 1915 he attacked foreign-born critics for 'pouring the poison of disloyalty into the very arteries of our national life. . . .'"[61] Soon, to stifle dissent against World War I, the Espionage and Sedition Acts were enacted.[62] They succeeded, particularly in quieting those who were opposed to the selective service law of 1917.[63] The acts charged serious fines and imprisonment for those convicted of interfering with enlistment or industrial production.[64] They contained a voluntary censorship section, actually invoked to make it difficult for some publications, including the *Christian Science Monitor* and others, to

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[56] *See id.*

[57] *See id.*

[58] *Id.*

[59] *See* KELLER, *supra* note 3, at 40, 95, 223-225. To fairly represent the Progressive Movement in these pages would marginalize the questions of most concern. For further understanding of the Progressive Movement and its impact on nativism, see Daniel Rodgers, *In Search of Progressivism*, 10 REVIEWS IN AMERICAN HISTORY 113-132 (1982), and JAMES KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920 (1986).

[60] The influence of the Progressives may be judged by the fact that the weekly *New Republic*, first published in late 1914 near the middle of President Wilson's first term, remains in publication today. "The *New Republic* marked the ideological culmination of political progressivism in the period before the United States formally entered the war in Europe." CHARLES C. ALEXANDER, HERE THE COUNTRY LIES: NATIONALISM AND THE ARTS IN TWENTIETH-CENTURY AMERICA 72 (1980). On Progressivism and Restrictionism, *see* OSCAR HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE, ch. 5 (1957).

[61] KELLER, *supra* note 3, at 94.

[62] Espionage Act, ch. 30, 40 Stat. 217 (*repealed by* Act of June 25, 1948, ch. 645, sec. 21, 62 Stat.862, [except Title XII, 40 Stat. 230-31, *codified* at 18 U.S.C. § 1717 (1984)]); Section Act, ch. 75, 40 Stat. 553 (1918), (*repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862).

[63] *See* KELLER, *supra* note 3, at 95-96; HIGHAM, *supra* note 1, at 214.

[64] *See* KELLER, *supra* note 3, at 96.

distribute their publications.[65] In the end, the Sedition and Espionage Acts were responsible for more than two thousand arrests, over a thousand imprisoned, and 2537 loyalty investigations of federal workers in 1918, compared with 135 in the year prior to the act.[66]

Attempts to "Americanize" as many foreigners as possible became the priority. "The public schools of Rochester, New York became an Americanization factory,' dedicated to rapidly turning immigrants into English-speaking citizens."[67] And, while the Hundred Percenters tried to put the federal imperative behind Americanization, they failed; they supported a bill that would provide substantial federal aid through the Bureau of Naturalization to the states to finance the teaching of English to immigrants and native illiterates.[68] After the effort failed, though, the states rushed in,[69] with several passing laws supporting English night school classes for foreigners. Idaho and Utah even "requir[ed] non-English-speaking aliens to attend Americanization classes."[70]

Other states were not satisfied, and went further. By 1919, several had enacted laws mandating that English be the only language used in both public and private schools.[71] "Several . . . insist[ed] that all public school teachers be citizens. Nebraska extended the same requirement to private school and also stipulated that all meetings except religious or lodge meetings must be conducted in English."[72] In Nebraska, Iowa, and Ohio in particular, the targets of the English-only laws were apparently new German-Americans, who suffered from xenophobic fear following World War I, perhaps exacerbated by the fact that Germans often continued to speak their native language in social and religious life.[73] Oregon nearly outlawed "the foreign-language

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[65] *See id.* at 96-97. The stifling of civil liberties in the postwar era created a cynicism that F. Scott Fitzgerald captured when he declared that his was "'a new generation ... grown up to find all gods dead, all wars fought, all faiths in man shaken.' 'You are a lost generation' was Gertrude Stein's observation, quoted and immortalized at the front of Ernest Hemingway's first novel." ALEXANDER, *supra* note 60, at 85.

[66] *See* KELLER, *supra* note 3, at 97.

[67] HIGHAM, *supra* note 3, at 242.

[68] *See* HIGHAM, *supra* note 3, at 259.

[69] *See id.* Promoting "Americanism" was even an explicit purpose of this legislation. *See, e.g.*, 1920 Special Session Laws of Hawai'i Act 30 (*as amended* 1923 Session Laws of Hawai'i Act 171 and 1925 Session Laws of Hawai'i Act 152), discussed in Farrington v. Tokushige, 273 U.S. 284 (1927)(declaring the act unconstitutional as a violation of the due process clause). *See infra* pp. 47-48.

[70] HIGHAM, *supra* note 3, at 260.

[71] William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 133-34 (1988).

[72] *Id.*

[73] *See* Ross, *supra* note 71, at 132-33. For a thorough discussion of the evolution of the statutes enacted against German-Americans, and of the anti-German tone in the United States

press by requiring that all foreign-language publications display prominently a literal English translation of their entire contents."[74] All told, twenty-three states enacted statutes imposing restrictions upon instruction in foreign languages, especially German.[75] Surprisingly, though, in only a few states, Nebraska, Iowa, and Ohio, was the validity of these statutes challenged.[76] In 1922, Oregon passed the last but surely most severe of the Americanization laws, when it mandated all children to be educated in public rather than private elementary schools. This law was eventually declared to be unconstitutional.[77]

Some states enacted laws hindering the immigrants' lives in yet other aspects. For example, in 1920, California ordered every adult male immigrant to register and pay a $10 poll tax.[78] This was later declared unconstitutional.[79] States such as California and Washington enacted statutes, titled Alien Land Laws, forbidding certain racial groups from holding land title in their names; when they placed such title in the names of their minor American citizen children instead, additional measures were enacted to prohibit them from acting as guardians over their children's land.[80] The laws were also eventually declared to be unconstitutional.[81]

Schools and students suffered particularly during this era. In New York City, where nearly two thirds of high school students were either foreign-born or children of the foreign-born, classes in German were forbidden, teachers were suspended for having subversive views, and several were transferred.[82] At institutions of higher education, such as the prestigious University of Pennsylvania, alumni groups spent several years advocating even a physical move of the campus from its urban, immigrant-friendly campus to more

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during these years, *see* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM EDUCATION AND THE CONSTITUTION, 1917-1927 (1994) [hereinafter FORGING NEW FREEDOMS].

[74] HIGHAM, *supra* note 3, at 260.

[75] *See* Ross, *supra* note 71, at 133 (citations omitted).

[76] *See id.* at 134. For a detailed discussion of the cases challenging these proscriptions, see *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See also* Bartels v. Iowa, 262 U.S. 404 (1923); discussion section II.C.

[77] *See* Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce, 268 U.S. 510 (1925). *See* discussion, *infra* pp. 34-35.

[78] *See* HIGHAM, *supra* note 3, at 260.

[79] *See Ex parte* Kotta, 200 P. 957 (Cal. 1921).

[80] *See* Washington v. Ishikawa, 247 P. 730 (Wash. 1926); *see also In re* Tetsubumi Yano's Estate, 206 P. 995 (Cal. 1922). *See* discussion of these cases *infra*, pp. 57-60. A dramatic portrayal of the toll this policy took on Japanese-American families is presented in the recent film "Snow Falling on Cedars," based on the novel of the same name by David Guterson (1995).

[81] *See Yano's Estate*, 206 P. at 1000.

[82] *See* KELLER, *supra* note 3, at 52.

remote locations that would be inaccessible to those in the "lower class and immigrant backgrounds . . . ."[83]

While these restrictions brought notoriety to the movement, after the World War I, and certainly by 1920-1921, it suffered a great decline in momentum.[84] The economic depression of these years desiccated financial support for English language classes and dampened the fervor over Americanization.[85] Soon, Hundred Percenters found themselves on the defensive.[86]

But, regardless of this retrenchment, anti-foreign sentiment continued into the early 1920s, "sway[ing] the policies of the American Legion and rumbl[ing] in the Ku Klux Klan."[87] This led to a second wave of legislation culminating in the exclusion of foreigners from numerous occupations.[88]

Also affected by continuing anti-foreign sentiment were attitudes towards racial minorities. The racist tendencies of the Americanization movement, from the semi-scientific racism experienced prior to the War, to the disillusion experienced following the War, helped the Ku Klux Klan burgeon.[89] Its mission, creating national solidarity by protecting "the interest of those whose forefathers established the nation,"[90] did little to cultivate a peaceful and productive society. Race-based immigration restrictions were already firmly established in the 1790 Naturalization Law that called for only "free white persons" to be eligible for citizenship.[91] This wording, removed in 1870, was re-inserted shortly thereafter in order to exclude Asians.[92] First the Chinese and later all other Asians, including the Japanese, were subject to restrictions on both entry and naturalization.[93] By 1923, nearly 225,000 United States residents were to become racially ineligible for naturalization.[94] Calling for immigration restriction as the highest priority, the Klan asserted that only Anglo-Saxons or Nordics had an inherent capacity for American citizenship,

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[83] Richard A. Farnus, Jr., *The Road Not Taken*, PA. GAZETTE, Nov. 1996, at 17, 18.

[84] *See* HIGHAM, *supra* note 3, at 260.

[85] *See id.* at 261.

[86] *See id.* at 270.

[87] *Id.* at 270-271, 301.

[88] *See id.* at 271. *See infra* p. 150-51, for examples of excluded occupations.

[89] *See* HIGHAM, *supra* note 3, at 271.

[90] *Id.* at 291.

[91] Naturalization Act, ch.3, 1 Stat. 103 (1790).

[92] *See* discussion of In re *Rodriguez*, *supra* note 32.

[93] The Chinese, in the Chinese Exclusion Act, 22 Stat. 61, (1882)(repealed 1943). The Act of Feb. 5, 1917, 39 Stat. 874, created the Asiatic Barred Zone, excluding all aliens except the Japanese. The affront to the Japanese came in the 1924 Act, which barred *all* aliens from citizenship. *See* Act of May 26, 1924, 43 Stat. 153 (1924); *see also* KELLER, *supra* note 3, at 244-248.

[94] *See* KELLER, *supra* note 3, at 250. *See also infra* section II.D., for a discussion of Alien Land Laws and various challenges thereto.

and "trembled lest the 'real whites' fail to keep the nation 'free from all mongrelizing taints.'"[95]

The Klan's other key campaign, against Catholics, maintained its long-standing tradition in the organization, along with racism and anti-Semitism; by opposing these three groups, the Klan encompassed and expressed the entire range of late nineteen-teens nativism. But in the organization, anti-Catholicism "grew to surpass every other nativistic attitude."[96]

Anti-Catholicism, not new to the Klan, was closely related to the growth of militant Protestant fundamentalism following World War I.[97] And its success was visible. States cooperated by legislating rules that adversely affected Catholics, including the requirement of daily Bible readings in the public schools in Alabama, creating a campaign in Georgia implying that President Wilson had become a tool of the Pope, debating in Michigan and Nebraska whether to ban parochial schools altogether, and reviving an anti-Catholic weekly in Missouri; all of this led to a journalist reporting that anti-Catholicism had become "second only to the hatred on the Negro as the moving passion of entire Southern Communities."[98]

In spite of its newly developed popularity, the Klan hit its zenith by 1923, embracing close to three million members, with the most conspicuous populations in Arkansas, Oklahoma, Indiana, Ohio, Colorado, Pennsylvania, upstate New York, and Texas.[99] But by then, it and the Hundred Percenters were not the only groups organizing against immigrants. Big business as well as the labor movement maintained their earlier attitudes towards the newcomers,[100] which perhaps were exacerbated by the large influx of Jewish immigrants from central and eastern Europe during 1920-21.

While the literacy test enacted just prior to the declaration of War in 1917 effected a certain restriction on the numbers of immigrants, the War had a global effect on the American consciousness, "virtually swe[eping] from the American consciousness the old belief in unrestricted immigration . . . ."[101]

The ultimate threat to immigrants, however, swift deportation, proved the most potent weapon in the arsenal of the nativists. This was fueled by the confluence of several events: the Bolshevik Revolution of 1917, the end of World War I in 1918, the establishment of revolutionary governments in Germany and Hungary during 1918 and 1919, the labor strikes of 1919, and

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[95] HIGHAM, *supra* note 3, at 291.
[96] *Id.*
[97] *See id.* at 293.
[98] *Id.* at 291.
[99] *See id.* at 297.
[100] *See id.* at 309.
[101] *Id.* at 301.

the resulting Red Scare.[102] In 1919, foreign-born radicals and so-called anarchists such as Emma Goldman and her lover Alexander Berkman were being deported by the hundreds in what came to be known as the Palmer raids.[103] Anti-radicalism, even anti-liberalism, combined with xenophobia, were used more and more to target the foreign-born.[104]

All of this eventually resulted, by the early 1920s, in the most significant and, to immigrants, devastating legislation enacted in this arena either before or since. The numbers of entering immigrants were restricted, as were their economic aspirations once here. With the 1921 Immigration Act Congress established a quota system limiting immigration to 3% of the number of foreign-born of each nationality recorded in the 1910 census, with an annual maximum of 355,000. This meant that 55% of new immigrants would be from northern Europe and only 45% would be from southern and eastern Europe.[105] Deportations rose, at times being accomplished as much as 10 to 25 years after entry.[106] Congress effectively erected "a human blockade sufficiently drastic to be considered at the time a permanent solution of the immigration question."[107] Not surprisingly, the number of illegal entrants increased drastically.[108] Once here, life became almost unbearable. Many, already highly educated, were excluded from all types of white-collar jobs; licensing

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[102] The anti-communist wave in the United States that followed World War I, the Bolshevik victory in Russia, and the founding of the U.S. Communist Party. *See* MURRAY, *supra* note 45, at 12-17, 29, 38-39.

[103] *See* KELLER, *supra* note 3, at 101, 238. The raids were named after Attorney General A. Mitchell Palmer. On December 21, two hundred and forty nine were deported from New York on the Buford, a ship characterized by the press then as the "Soviet Ark." *See* MURRAY, *supra* note 45, at 207. While it was thought that they were all communist radicals, it is unclear whether even a majority of them had participated in any "terrorist" action. *See id.*

[104] *See* KELLER, *supra* note 3, at 229. Without placing undue emphasis on xenophobia as the root cause of this movement, one should nonetheless note that there is considerable disagreement as to the correct way to characterize these adverse feelings. For example, some have articulated that it is more accurate to attribute this legislation to the populists and progressives of this period, who, in demanding political and social reforms, sought to equalize the populace. One way of doing this, besides enabling women to vote and labor unions to form, was to use education to "level differences of class, race, and alienage." Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 892 (1996)(citing Barbara Bennet Woodhouse, *"Who Owns the Child?: Meyer and Pierce and The Child As Property"*, 33 WM. & MARY L. REV. 995, 1017 (1992)).

[105] *See* The Quota Law of 1921, Act of May 19, 1921, 42 Stat. 5 (1921); *see also* KURZBAN, *supra* note 42, at 3.

[106] *See* KELLER, *supra* note 3, at 240.

[107] HIGHAM, *supra* note 3, at 301. One illustration of the hardships visited on intending immigrants is the tale of 17 Armenian women and children who were turned back and were later massacred by the Turks. *See* KELLER, *supra* note 3, at 229.

[108] *See* KELLER, *supra* note 3, at 229.

laws barred them from engaging in medicine, surgery, chiropracty, pharmacy, architecture, engineering, surveying, bus driving, and even will execution.

Shortly thereafter, in 1923 and 1924, new Immigration Acts passed by overwhelming majorities,[109] offering permanent implementation of racial nationalism through a quota system based on national origin. Together with the provisions of the 1917 law that remained in effect, the wall the laws built prohibited Japanese immigration, "thereby perfecting the structure of Oriental exclusion."[110] Until 1927 quotas were limited to two per cent of the number of foreign-born residents of each nationality in the United States in 1890; after 1927, a total quota of merely 150,000 was divided in proportion to the distribution of the national origins of the white population of the nation in 1920.[111]

Of course, the nativists were pleased, if still not wholly sated. When the national origins quota had been in operation for a little over a year, the Commissioner of Immigration at Ellis Island reported that "virtually all immigrants now looked exactly like Americans."[112] By 1925 relatively few immigrants came through Ellis Island.[113] But the nativists did not rest, hoping to extend the quota system to Western Hemisphere countries.[114] However, few new efforts were successful, and by 1925, Will Rogers and others were poking fun at those calling themselves One Hundred Percenters.[115] In fact, by 1925 the Klan had nearly disintegrated.[116] And while anti-Catholicism flared up again during the 1928 election of Catholic candidate Al Smith, it did not revive an organized nativist movement.[117]

What can be learned from this story? Maybe that "[h]istory may move partly in cycles but never in circles."[118] For, while some general characteristics of this nativism movement have been carried forward in more recent

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[109] *See* HIGHAM, *supra* note 3, at 309; KELLER, *supra* note 2, at 231.

[110] HIGHAM, *supra* note 3, at 309.

[111] *See* KURZBAN, *supra* note 44, at 3.

[112] HIGHAM, *supra* note 3, at 325; the *New Republic* reported in 1924 that the law had worked relatively well to prevent "a deluge of inassimilable peoples." KELLER, *supra* note 3, at 231 (citation omitted).

[113] *See* HIGHAM, *supra* note 3, at 326. Of those who were prevented from emigrating as a result of the 1924 Act were about six million "from southern and eastern Europe, including many who would die in Adolf Hitler's concentration camps . . . ." Joe R. Feagin, *Old Poison in New Bottles: The Deep Roots of Modern Nativism*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 24 (Juan F. Perea ed. 1997)(citing CHASE, THE LEGACY OF MALTHUS, 270-90, 300-301).

[114] *See* HIGHAM, *supra* note 3, at 325.

[115] *See id.* at 326.

[116] *See id.* at 327.

[117] *See id.* at 329.

[118] *Id.* at 330.

manifestations, the particularities have changed. And, while it can be said that it has been reinvented at least twice since the 1920s, with the anti-communist movement of the 1950s and with the present anti-immigrant activities, the movement has not quite been duplicated. To be sure, though, the movement of the nineteen-teens stands "alone in its persistence, in its complexity, and in the massiveness of its institutional deposit... . The old belief in America as a promised land for all who yearn for freedom had lost its operative significance" by the end of this period of the early twentieth century.[119]

II. JUDICIAL RESPONSES TO EARLIER NATIVISM MOVEMENT

A. The Early Period—Racial and Other Oppression

With the social and political map of this era now drawn, the task is to analyze the legal arena engendered by the nativism movement. The courts' responses to various legislative measures adversely affecting immigrants during these years fall into certain patterns. If one assumes the validity of the Legal Realists's views, which perhaps not fortuitously blossomed during these years,[120] the decisions may be viewed as products of judicially-construed will. Thus, where a court thought a nativist-friendly law to be unfair, it might find in favor of the immigrant, even if only on procedural grounds.[121] Or a court would scrutinize the intent of a piece of legislation in order to determine that

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[119] *Id.* at 330.

[120] While in the 1920s the Realists' critique of classical legal theory abounded, it was really in the 1930s that this movement experienced its greatest impact. The movement may be defined as an "effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence. *See* WM. W. FISHER III ET AL. AMERICAN LEGAL REALISM xiii-xiv (1993). For reading of the early realists, *see* Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), and JEROME FRANK, LAW AND THE MODERN MIND (1936).

Recently, scholars have used the term "legal indeterminacy" to reflect the notion that the law often is ambiguous and can be manipulated, lending itself to multiple outcomes. *See* Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1384-93 (1997) (exposing that this indeterminacy has caused the Ninth Circuit Court of Appeals to issue three "mildly inconsistent" decisions in cases challenging workplace English-only rules); *see also* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983)(questioning the power of precedent because a good lawyer can come up with any number of results). Even the recent Law and Economics theorists, or "Pragmatist" movement, can be said to support the theory of indeterminacy. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

[121] *See* Washington v. Ishikawa, 247 P. 730 (Wash. 1926).

the immigrant was not subsumed within the confines of the act.[122] Courts could be creative. And were.

During the early years of this period, the first intending immigrants to face legislative efforts at exclusion on account of their race were the Chinese. Having come here in record numbers to build the railroads, when that work was nearing completion they found the nascent labor movement eager for them to return to their native lands, hence the Chinese Exclusion Act of 1882.[123] But in In re *Rodriguez*,[124] an applicant for naturalization who was not Chinese found himself enmeshed in the effects of anti-Chinese nativism when he was initially denied naturalization because he was not "white."[125] In Mr. Rodriguez's case, the Court went to great lengths to find him eligible, notwithstanding the fact that he "apparently belong[ed] to the Indian or red race."[126] The court found that Congress intended to deny naturalization privileges to the Chinese, and justified this racial discrimination on the grounds that they were not only alien in color, but the very antipodes of the

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[122] *See In re* Rodriguez, 81 F. 337 (W.D. Tex. 1897). While one can only speculate as to the judges' motivation in these cases, the many decisions interpreting anti-immigrant statutes that nonetheless ruled in favor of immigrants can fairly lead to the conclusion that reasoning other than traditional rule-based formulations governed.

[123] 22 Stat. 61 (repealed 1943)(as China had become an ally). Actions against the Chinese went further, of course, than enactments that would exclude them from entering the United States. For example, the ordinance regulating laundries in San Francisco that was administered discriminatorily against Chinese, subject of the landmark case of *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886). In that case, the Supreme Court held that the Fourteenth Amendment's Equal Protection and Due Process Clauses apply to all persons, regardless of race, color, or nationality. *See id.* at 369. It is noteworthy that, regardless of the liberalizing nature of *Yick Wo*, it has been recently argued that the decision was made not necessarily because the justices believed in the evils of that discrimination, but "because the interests of Chinese aliens in fighting state discrimination converged with the interests of the federal judiciary in extending the Fourteenth Amendment to protect economic interests from state interference." Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 355 (Winter 1995).

[124] 81 F. 337 (W.D. Tex. 1897).

[125] I place the word "white" here in quotations to indicate my discomfort with the construction of race-consciousness, and its expression, by use of words such as white and black and brown and yellow; these words have helped foster ideas of distinctions and relative superiority and inferiority, and have left diminished all of us. *See* DAVID ROEDIGER, TOWARD THE ABOLITION OF WHITENESS (1994)(arguing in his labor history that, rather than it being a biological fact, race has been given meaning through people acting in historical and social contexts). *See also* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995)(surveying Catholic Irish workers who, once in this country and oppressed themselves, "joined" the race of the oppressor). For a comprehensive study, including the *Rodriguez* case, of how the legal system constructed a "White racial identity," see IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996)(*Rodriguez* discussed in ch. 3).

[126] *Rodriguez*, 81 F. at 340.

Anglo-Saxon or even native American races. His total inability to assimilate with our people in their laws customs, institutions, or religion, or even to suffer his acquisitions to go into the general store of national prosperity; his idol worship; his mode of living; his very vices; and, lastly, the countless myriads who stood hovering on the shores of the Chinese waters, ready and anxious to swarm upon us, like the Goths and Huns upon ancient Rome,—were a menace that it would have been unpatriotic and unwise to the extreme to have disregarded.[127]

In addition, the court explained that the word "white" was initially inserted in the immigration laws to exclude the negro[sic] from citizenship, was omitted when that 'danger' passed, and was re-inserted when Chinese immigrants rose as the new threat.[128] Hence the court found that those of Mexican descent were not intended to be included in the exclusion of non-whites.

Once eliminating race as the basis for excluding Mr. Rodriguez, the court aimed to minimize the threat posed by Mexicans when it noted the comparatively few Mexicans seeking to naturalize during those years.

But it had yet another hurdle to overcome before being comfortable justifying Mr. Rodriguez's naturalization. The law required that he demonstrate his attachment to the principles of the Constitution,[129] but he was illiterate and not familiar with those principles. Nonetheless, the court found him eligible because testimony had disclosed that he was a "good man, peaceable and industrious, of good moral character, and law abiding to a remarkable degree... that by his daily walk, during a residence of 10 years in the city of San Antonio, he has illustrated and emphasized his attachment to the principles of the [C]onstitution."[130] Pointing out that Congress had not

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[127] *See id.* The court must have felt at least somewhat uncomfortable participating in this discussion as to who was white; it went on for at least two-thirds of its 19-page opinion attempting to justify the exclusion of some one solely on the basis of his race. Later on, other courts including the Supreme Court, affirmed the right to limit naturalization on the basis of race. *See* Ozawa v. United States, 260 U.S. 178 (1922)(denying residents of Japanese descent the privilege of naturalizing).

For analysis of In re *Rodriguez* from the perspective of critical theory, see George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV.-LATINO L. REV. 321, 326-27 (1997). Professor Martinez argues that racial categories can be constructed through the political process, as had been the case in *Rodriguez*, in which treaties between the United States and Mexico allowed Mexicans to naturalize; this contravened a strict anthropological perspective, which would have found Mexicans to be non-white. This construction, Professor Martinez noted, has done little to provide Mexicans with the usual benefits of whiteness.

[128] *Rodriguez*, 81 F. at 341-342.

[129] *See id.* at 355.

[130] *Id.* (internal quotations omitted).

elected to require of these applicants specific educational qualifications, the court chided that it would hesitate to legislate that.[131] Finally, the court explained its liberal handling of Mr. Rodriguez's claims by acknowledging its lack of fastidiousness in the past about the question of citizenship.[132]

Shortly after the *Rodriguez* case, Congress attempted to go beyond racial exclusions and limit as well the effect of birth on U.S. soil, which had historically provided automatic citizenship. In 1898, Congress enacted a statute denying citizenship to those born in the United States to permanent residents[133] who were racially ineligible to naturalize.[134] But while acknowledging Congress's power to regulate naturalization,[135] the Supreme Court declared the act to be beyond Congressional reach.[136]

One way to discourage new immigrants from arriving at our shores was to treat adversely citizens who became involved with immigrants. During this era, this was accomplished by enacting laws declaring that citizens marrying immigrants lose certain rights of citizenship. In the 1915 case of *MacKenzie v. Hare*,[137] precisely that occurred when a citizen married to an Englishman was denied the right to vote. It was claimed that by her marriage, she had relinquished her citizenship, hence her voting rights. While the Court affirmed the decision against her, it did so based on the then-prevailing theory of the identity of husband and wife;[138] but it did cite to *Burkett v. McCarthy*[139] in affirming that "[n]o act of the [L]egislature can denaturalize a citizen

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[131] *See id.*

[132] *See id.* at 351. In earlier cases, perhaps when the federal courts were less inclined to admit non-whites to citizenship, the term "non-white" was interpreted more broadly to prevent naturalization of native Americans and Asians. *See, e.g., In re* Camille, 6 F. 256 (D. Or. 1880); *In re* Ah Yup, 1 F. Cas. 223 (1878).

[133] The term "lawfully admitted for permanent residence" is defined in the INA, 8 U.S.C. § 1101(a)(20), to denote an immigrant who has been given permission by the government to remain here indefinitely, and to be eligible eventually for naturalization. I use that term here more loosely, to denote non-native immigrants, whether or not, at the particular time in question, naturalization was an option.

[134] *See* United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898).

[135] *See id.*

[136] *See id.* Recently Peter Schuck and Roger Smith, in CITIZENSHIP WITHOUT CONSENT (1985), have argued that the phrase "subject to the jurisdiction" should be reinterpreted to allow Congress to withhold citizenship from U.S.-born children of aliens who are not permanent residents — legal immigrants, it would seem, who under *Wong Kim Ark*, are protected against that under the Constitution. *See* PETER SCHUCK & ROGER SMITH, CITIZENSHIP WITHOUT CONSENT 103 (1985). The more traditional view of *Wong Kim Ark* is supported by Gerald L. Neuman in STRANGERS TO THE CONSTITUTION 176-178 (1996).

[137] 239 U.S. 299 (1915).

[138] *See id.* at 311.

[139] 10 Bush 758 (1866)(citations omitted).

without his concurrence."[140] In reiterating this principle, the Court decried statutes that persecuted citizens who interacted with the foreign-born.

During these years, there were surely laws that operated against immigrants outright, but there were also those whose discrimination was more covert. Some aimed to diminish Catholic immigration by placing statutory restrictions on parochial schools or interpreting real estate tax exemptions strictly so as to deny them to institutions. One of the first of these rulings, resolved against the Church, was the case of *Wilson v. St. Mary's Roman Catholic Hospital of Centralia*,[141] in which the Catholic Church appealed a charge of real estate taxes against hospital property it owned,[142] notwithstanding the good faith claim of the Church that the property was used for charitable purposes and should be exempt.[143] While the state alleged that the property on which the hospital was to be located was not being used for religious purposes, the Church countered that the property, owned by the Church, was organized solely as a charity. [144] But the court ruled otherwise, claiming itself stymied by a similar case in the jurisdiction which ruled that property used for these types of purposes did not qualify for the exemption.[145] The court iterated that "[s]tatutes declaring exemptions must be strictly construed against exemption and must come clearly within the provisions of the general law creating" it.[146]

B. The Middle Period—Invocation of the Constitution

Concomitant with the surge in anti-immigrant feeling among trade unionists, soon statutes were enacted to directly limit the activities of immigrants, in particular to limit their ability to find and maintain employment. To be sure, denying or preventing their economic independence became another means of discouraging them from continuing to flock here. In New York, for example, a statute was enacted, and eventually upheld by the Supreme Court, that prohibited employment of non-citizens on public works projects.[147] And Arizona enacted a statute that punished employers for hiring non-citizen workers. It was in the case challenging that law that the Supreme Court first invoked the Constitution to protect the newcomers against adverse treatment

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[140] *MacKenzie*, 239 U.S. at 310.

[141] 137 N.E. 865 (Ill. 1922).

[142] *See id.* at 865.

[143] *See id.* at 866.

[144] *See id.*

[145] *See id.*

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

[147] *See* Crane v. New York, 239 U.S. 195 (1915)(rejecting a challenge based on treaties and unfair classifications in violation of the Fourteenth Amendment's Equal Protection Clause).

through the law. In *Truax v. Raich*,[148] the Supreme Court considered a 1914 state statute, which required a company with a payroll exceeding five to employ at least eighty per cent eligible voters or native-born citizens; violating the law carried a possible misdemeanor conviction, fine, and imprisonment.[149] Mike Raich, a native of Austria and resident of Arizona, but not an eligible voter, was employed as a cook by Truax, who had nine employees, of whom seven were neither native born citizens nor otherwise qualified to vote.[150] Truax was arrested for violating the act.[151] After his arrest, he challenged the law, eventually finding himself before the Supreme Court, where the law was declared unconstitutional as a violation of equal protection.

Upon reviewing the act, the Court found its purpose to be clear, to force someone from a job "simply because he is an alien . . . ."[152] In order to determine whether that motivation could withstand constitutional scrutiny, the Court inquired as to whether that purpose was a proper exercise of the state's power to make reasonable classifications "legislating to promote the health, safety, morals, and welfare of those within its jurisdiction."[153] Answering in the negative, the Court explained that legislative discretion does not make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood.

> It requires no argument to show that the right to work for a living the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.[154]

The Court was unconvinced that the act was justified on the basis of a claim that, without it, the public welfare was threatened.

The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they

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[148] 239 U.S. 33 (1915).

[149] *See id.* at 35.

[150] *See id.* at 36.

[151] *See id.* at 36.

[152] *Id.* at 41.

[153] *Id.*

[154] *Id.* (citations omitted); *see also* United States v. Wong Kim Ark, 169 U.S. 649, 695 (1898).

cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in those states that chose to offer hospitality.[155]

In the end, the Court declared the act to violate the Fourteenth Amendment's Equal Protection Clause;[156] the proscription in that Amendment against denying 'any person the equal protection of the laws' was found to include non-citizens as well as citizens. Quoting from the seminal case of *Yick Wo v. Hopkins*,[157] the Court emphasized that the principles of equal protection "'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'"[158]

In dicta, the Court explained the distinction it made between restrictions between citizens and newcomers in employment relations and discrepancies between these groups in what it considered to be a state's common resources.[159] For example, in *McCready v. Virginia*,[160] the restriction that the citizens of Virginia alone had the right to plant oysters in one of its rivers was sustained on the ground that the regulation related to Virginia's 'common property,' and thus did not violate the Equal Protection clause. An analogous

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[155] *See* Truax v. Raich, 239 U.S. 33, 41-42 (1915).

[156] *See id.* at 39, 43. "In the ensuing years, equal protection jurisprudence developed its own persona, entailing at least two levels of scrutiny, minimum, requiring only a rational basis [and usually resulting in the law being sustained], or strict, requiring" such a high level of scrutiny that the provisions are rarely upheld. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1614 n.24 (2d ed. 1988)(citations omitted). "For example, between 1973 and 1982, the rational basis test sufficed to uphold statutes requiring citizenship as a requirement for probation officers, for public school teachers, state troopers, and for elective and important non-elective positions in state government." *Id.* But in 1971, 1982, and 1984, respectively, the Court applied the strict scrutiny test to invalidate citizenship requirements for receipt of welfare benefits and notaries public. *See id.* And generally, while the Court has sometimes advocated a narrow standard of review of Congressional decision made in the area of immigration, *see id.* at 360, n.33 (citing *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1976)), and to date the Supreme Court has not defined the impact of the Bill of Rights on Congress's regulation of non-citizens' activities and opportunities, it has held that the Equal Protection clause does not permit a state to deprive children of undocumented persons a free public education. TRIBE, *supra*, at 360 (citation omitted). So it would seem correct to infer that, "with only a few exceptions, resident aliens ought to enjoy the same constitutional rights secure from congressional abridgement as are possessed by American citizens." *Id.* at 361.

[157] 118 U.S. 356, 369 (1886)(interpreting the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

[158] *Truax*, 239 U.S. at 39; *see also Wong Kim Ark*, 169 U.S. at 695.

[159] *See Truax*, 239 U.S. at 39-40.

[160] 94 U.S. 391, 396 (1876).

principle was involved in *Patsone v. Pennsylvania*,[161] where discrimination against non-citizens was upheld when the case involved the protection of wild game in the state, "over which," the Court said, "the state could exercise its preserving power for the benefit of its own citizens. . . ."[162]

But while these cases imply that state legislators may legitimately claim that "common property" should be broadly interpreted and may even apply to social welfare benefits that are distributed,[163] more modern cases lead to a contrary conclusion: rules that restrict entry into a state by either (1) "discriminating against new residents with respect to various public services or benefits" or (2) "imposing quantitative controls on in-migration" have been stricken as a violation of the right to travel.[164] So the rule remains: the explicit "power of the federal government to limit immigration thus has no parallel at the state or local level."[165]

Moreover, in the years following *Truax*, the scope of this so-called "special public interest" doctrine was greatly reduced, "as a consequence both of a broadened interpretation of Congress's plenary authority and of judicial recognition that alienage itself constitutes a suspect criterion."[166]

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[161] 232 U.S. 138 (1914).

[162] *Id.* at 145-46. Other decisions during this period permitted restrictions on both hiring non-citizens as public contractors, *see, e.g.*, Crane v. New York, 239 U.S. 195 (1915), and allowing them the right to operate billiard halls. *See* TRIBE, *supra* note 156, at 1547 n. 20, 22. (citing Crane v. New York, 239 U.S. 195 (1915) and Clarke v. Deckebach, 274 U.S. 392 (1927)).

[163] In a subsequent article I will discuss how some sections of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 Pub. L. No. 104-193, 110 Stat. 2105 (codified at various titles and sections of the United States Code) could be challenged on the basis of more modern arguments attacking the notion that welfare benefits are "resources" of the state that could constitutionally be denied to non-citizens.

[164] TRIBE, *supra* note 156, at 1381, 1381 nn. 17 & 18.

[165] *Id.* at 1381. *See also* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 7-23 (2d ed. 1997); U.S. CONST. art. I, sec. 9, cl. 1 (Migration Clause), art. I, sec. 8, cl. 4 (Naturalization Clause), art VI, cl. 2 (Supremacy Clause); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

[166] *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948)(striking California law barring issuance of commercial fishing licenses to those ineligible to naturalize, as violating equal protection and not necessary to protect the special public interest of the state in conserving public fishing); Graham v. Richardson, 403 U.S. 365, at 374 (1971)(rejecting use of special public interest doctrine to deny welfare benefits to non-citizens or those who had not met certain durational residency requirements); Sugarman v. Dougall, 413 U.S. 634 (1973)(rejecting use of special public interest doctrine to uphold provision of New York Civil Service Law that only citizens could hold permanent, competitive positions — provision did not withstand Equal Protection scrutiny). *See also* TRIBE, *supra* note 156, at 1547-50.

Takahashi offers a helpful explanation of those rare occasions in which the special public interest doctrine may be justified. The Court rejected claims that, because the federal government regulates immigration and naturalization in part on the basis of race, a state could

do the same by using these classifications to prevent non-citizens within its borders from earning a living in the same way as do other state inhabitants. *See Takahashi* 334 U.S. at 418-19. But the Constitution did not grant the states the same powers to regulate immigration that it gave the federal government. Rather, states can neither increase nor diminish the conditions imposed by Congress upon admission, naturalization, and residence of non-citizens, and laws that attempt this have been invalidated. *Id.* at 419 (citations omitted). Congress' legislative provision states that:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. (citing 16 Stat. 140, 144, *codified in* 8 U.S.C. § 41). This provision further supports the proposition that states may not discriminate against non-citizens in this way. *See id.* Moreover, the Fourteenth Amendment, on which this statutory section rested, protects 'all persons' against state legislation applying unequally to them because of either their alienage or their color, "embod[ies] a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Id.* at 420.

The Court concluded succinctly: "[a]ll of the foregoing emphasizes the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation. . . ." *Id.* Thus, the "'special public interest' on which California relied," embodied by the notion that California's citizens "are the collective owners of fish swimming in the three-mile belt. . . ." did not support its ban on Takahashi's commercial fishing. *Id.* The Court noted the disfavor in which an earlier case that would seem to contradict its ruling was held; the *McCready* case ruled "that the citizens of a state collectively own 'the tide-waters * * * and the fish in them, so far as they are capable of ownership while running.'" *Id.* (citing McCready v. Virginia, 94 U.S. 391, 394 (1876)). And the Court noted the rationale of another case that considered the legality of a law that benefitted citizens over others by preventing non-citizens from using certain state-landed resources; that Court concluding that, "[t]o put the claim of the State upon title is to lean upon a slender reed." *Id.* at 421 (citation omitted).

Likewise, said the *Takahashi* Court. "To whatever extent the fish in the" waters "off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others" to do so. *Id.*

Finally, the Court looked at whether the cases sustaining Alien Land Laws (Terrace v. Thompson, 263 U.S. 197; Porterfield v. Webb, 263 U.S. 225; Webb v. O'Brien, 263 U.S. 313; Frick v. Webb, 263 U.S. 326) supported the statute. After questioning their validity, the Court finally determined that they were not controlling, resting, as they did, "solely upon the power of states to control the . . . ownership of land within their borders, a power long exercised and supported on reasons peculiar to real property," which related to fishing in the waters off California, not real property. *Id.*

This distinction — between preserving the state's real property for citizens, but not fish swimming in the waters — is important in considering the issues to be addressed in my second piece on this topic. The distinction between real property and fish can be said to mirror that between real property and welfare or education benefits: the former can be justified as appropriately preserved for citizens, but the latter cannot.

C. The Landmark Cases—More Constitutional Dimension

A landmark case from this era, whose controversy was borne from the legislative strength of the nativists, and that has had considerable influence generally but is rarely considered in discussions of nativism, can shed light on the courts' efforts to ameliorate the harsh effects of nativist legislation. That case, *Meyer v. Nebraska*,[167] represents the first time the Supreme Court invoked the doctrine of substantive due process to protect what can be deemed personal liberties.[168] Narrowly speaking, the case held that the "due process clause of the fourteenth amendment precluded Nebraska from prohibiting the teaching of foreign languages to elementary school students."[169] While it has had far greater impact than this unembellished summary may imply, its prime impact is found in a vision of the substantive due process clause that protects individuals from state interference in their personal lives.[170] Even fifty years later, courts continue to cite the case for this general proposition.[171] The liberty interest envisioned in the due process clause, according to *Meyer*,

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy these privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[172]

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[167] 262 U.S. 390 (1923).

[168] *See id.*; *see also* ROSS, *supra* note 72. In its opinion, the Court avoided application of the First Amendment to the facts of the case.

[169] *Meyer*, 262 U.S. at 399, 402, 403; *see also* Ross, *supra* note 71, at 125. In the context of the classical legal thought that predominated during this time, Meyer can also be seen as a standard defense of unfettered property and contract right. See WILLIAM W. FISHER, III ET AL., AMERICAN LEGAL REALISM (1993), especially Introduction and Chapter 1.

[170] O'Gorman & Young, Inc. v. Hartford Fire Ins. & Phoenix Assurance Co., 282 U.S. 251, 267 (1931)(dissenting opinion). The notion that the substantive due process clause protects against individual infringement of economic rights is already well accepted. See W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY: THE OLD LEGALITY 1889-1932 (1969), for a discussion of this point.

[171] *See, e.g.*, Medina v. Rudman, 545 F.2d 244, 251 (1st Cir. 1976), in which, in response to petitioner's assertion of his right to receive a license to operate a racetrack, the court invoked *Meyer* but nonetheless held that even under that case, racetrack ownership was not one of life's "common occupations." *Meyer* has been seen generally as one of the original civil liberties cases. Recently, many interested in supporting the rights of parents to limit communities' ability to expose their children to sex and drug education programs have invoked *Meyer* enthusiastically. *See* Brown v. Hot, Sexy & Safer Productions, Inc., 68 F.3d 525, 533-34 (1st Cir. 1995), *cert. denied*, 516 U.S. 1159 (1996).

[172] *Meyer*, 262 U.S. at 399 (citing *inter alia* Slaughter-House Cases, 83 U.S. 36 (1872); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Allegeyer v. Louisiana, 165 U.S. 578 (1897); Lochner

To reach its finding, the Court in *Meyer* recalled the *Slaughter-House Cases* as the first occasion in which the Supreme Court specified the protections envisioned in the privileges and immunities clause: "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, . . . embracing nearly every civil right for the establishment and protection of which organized government is instituted."[173] And "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without a reasonable relation to some purpose within the competency of the state to effect."[174] Finally, a determination by a legislature of what constitutes the proper exercise of police power is not conclusive but is subject to the supervision by the courts.[175]

In viewing the declaration of the Nebraskan legislature that the certain languages could not be taught in their schools, the Court stated that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful [to] . . . [plaintiff's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment."[176] While Latin, Greek, or Hebrew were not proscribed by the act, as they were considered ancient or dead languages outside its spirit,[177] German, French, Spanish, Italian, and "every other alien speech" were.[178] The court observed: "the individual has certain fundamental rights which much be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue."[179] And while "[t]he desire of the Legislature to foster a homogeneous people . . . is easy to appreciate," considering World War I, "the means adopted . . . exceed the limitations upon the power of the a state and conflict with" plaintiff's rights.[180] Finding no emergency "which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed[,] [w]e . . . conclude that the statute . . . is arbitrary and without reasonable relation to any end within the competency of the state."[181]

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v. New York, 198 U.S. 45 (1905); Truax v. Raich, 239 U.S. 33 (1915); Adams v. Tanner, 244 U.S. 590 (1917)). Note that these liberties were nowhere expressly itemized in any of the cases cited by the Court; these cases involved economic rights, as opposed to individual ones.

[173] *Meyer*, 262 U.S. at 399 (citing *Slaughter-House Cases*, 83 U.S. at 76).

[174] *Id.* at 399-400.

[175] *See id.* at 400.

[176] *Id.*

[177] *See id.* at 400-401.

[178] *See id.* at 401.

[179] *Id.*

[180] *Id.* at 402.

[181] *Id.* at 403.

Meyer's influence should not be understated, but its full impact cannot be appreciated without viewing another school-related case that was decided by a federal court the year following *Meyer*. In 1924, a federal district court in Oregon, in the case of *Society of the Sisters of the Holy Names of Jesus & Mary v. Pierce,*[182] struck down a 1922 statute mandating public education for children between the ages of 8 and 16 years.[183] The court did not hesitate to cite *Meyer's* Fourteenth Amendment proscriptions, specifically mentioning, as a key basis for its decision, the Court's emphasis on liberty as contemplated by the Due Process Clause.[184] In the context of the instant discussion, *Pierce* is important, as the 1922 Oregon statute was itself an "assault on Catholic parochial schools" and "the product of a coalition dominated by the Ku Klux Klan, the Masons and other white Protestant fraternal associations. . . ." "Their campaign dwelt on" the school "as a universal melting pot in which 'one flag, one school, one language' . . . would be taught."[185] Without the proscription against private or parochial schools, the campaign might be deflated.

These cases, particularly *Meyer*, have had a profound effect, both immediate and in the long-term; *Meyer* caused the Court to soon declare illegal acts in Iowa and Ohio, as well as Hawaiian legislation that differed in precise focus but still intended to promote so-called Americanization.[186] The Iowa act criminalized teaching, in either public or private schools, of any secular subject in a language other than English; the Ohio act criminalized teaching German to students below the eighth grade.[187] But *Meyer*'s influence has extended well beyond these cases. The decision is commonly understood

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[182] 296 F. 928, 937-38 (D. Or. 1924).

[183] The *Pierce* court also invoked *Truax*. *See id.* at 932. For a detailed description of the precise facts leading to the *Pierce* case and details of the arguments brought to the Supreme Court, see Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce, and the Origin of Wisconsin v. Yoder*, 25 CAP. U. L. REV. 887, 905-18 (1996).

[184] Interestingly, as had the Supreme Court a year earlier, the court refrained from relying on the First Amendment as the basis for its decision. *See Pierce*, 296 F. 928.

[185] KELLER, *supra* note 3, at 61 ("a chilling foretaste of the Nazis' 'Land, in Volk, in Fuher'"). The discussion of cases relevant to and resulting from the nativism movement can go on and on. For example, one can view the 1925 trial of John Thomas Scopes, charged with violating a law forbidding teaching of Darwinism the public schools, as part of the frenzy and fear of anything new, which in those days included new people as well as new ideas. It is no wonder that Clarence Darrow, identified as opposed to fundamentalist ideas, was his attorney, and that the state was represented by fundamentalist William Jennings Bryan.

[186] The Hawaiian Act set fees, required permits of schools and of teachers, regulated hours of instruction, and even the curriculum of "foreign language" schools that were privately funded and operating in Hawai'i. The schools would teach primarily the Japanese language to children of Japanese immigrants. *See* Farrington v. Tokushige, 273 U.S. 284, 291-95 (1927). Violation of the law was also a misdemeanor. *See id.* at 296.

[187] *See* Bartels v. Iowa, 262 U.S. 404, 409 (1923).

as the first case in which the Court held that the Fourteenth Amendment protected substantive individual liberties. But many courts have seen the case as limited in scope to the property-based rights inherent in a teacher's right to teach and a student's right to learn. While it is recognized that *Meyer* aided the movement of substantive due process from a purely property-based perspective towards one encompassing individual rights,[188] the revolutionary potential of the case is often missed.[189] And it is in that potential that lies the basis on which to locate many protections for today's new immigrants.

While *Meyer* did help enlighten the scope of the Fourteenth Amendment's Due Process Clause, its dicta forced the issue of precisely what rights are protected by the Clause. In *Meyer*, in particular, the students' right to learn in German and the teacher's right to teach in German were greater than simple property rights. Being able to speak in the German language, native for many of the students and more of the parents in that Nebraska community,[190] involved a freedom of individual action and choice unconnected to an economic one. *Meyer* was the first occasion in which the Court invoked the Due Process Clause to invalidate legislation intended to create One Hundred Percent Americans, legislation that made life here for newcomers extremely uncomfortable.

Shortly after *Meyer*, the Supreme Court again had to step in and declare unconstitutional a novel version of nativist legislation. Language again was the hook. On this occasion, in 1926, the Court reviewed a Philippine statute that criminalized the use of certain languages in the accounting books of businesses.[191] A Chinese businessman working in the Philippines[192] launched a successful challenge to an ordinance making it unlawful for anyone to keep

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[188] For cases invoking *Meyer* in the area of individual rights, see Loving v. Virginia, 388 U.S. 1 (1967)(reviewing and invalidating an anti-miscegenation statute); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970)(reversing suspension of high school student for having long hair); Santosky v. Kramer, 455 U.S. 745 (1982)(reviewing and invalidating statute permitting termination of parental rights); Walker v. Missouri, 911 F.2d 80 (8th Cir. 1990), *cert. denied*, 500 U.S. 941 (1991)(refusing to extend substantive due process to establishment employing exotic dancers that challenged adverse zoning regulations).

[189] Ross saw this also, but his view was limited to *Meyer*'s effect on the incorporation doctrine. See Ross, *supra* note 71. Actually, Ross's attention to the incorporation doctrine could also be helpful to this study; the right to enjoy religious freedom, protected by the First Amendment but held soon after *Meyer* to apply to the states through the incorporation doctrine of the Fourteenth Amendment, could also assist immigrants, as a substantial amount of the discrimination against them in the 1920s was disguised as restrictions against religious groups in general, but which adversely affected the religions of the immigrants, particularly those sharing the Catholic faith.

[190] *See* ROSS, *supra* note 71, at 136 & n.57.

[191] Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926).

[192] As a territory of the United States, the Philippines were within the exclusive jurisdiction of the United States, and subject to Congressional power. *See id.* at 522.

account books in any language other than English, Spanish, or in any local dialect.[193] The plaintiff kept his books in Chinese, and was ignorant in English, Spanish, and all local dialects; had he complied with the law, he would have been unable to understand his own books,[194] and would have likely been driven out of business along with many other Chinese merchants in the Philippines.[195] The law was defended as a necessary and proper exercise of legislative power, because without it, local officials feared a loss of tax money.[196] But there was evidence that no more than eight Chinese merchants in the Islands could read or write proficiently in anything other than Chinese.[197] The enactment followed complaints that Chinese business owners were neglecting to pay taxes; as local authorities could not read Chinese, the argument was made that it was difficult to calculate appropriate taxes if accounting books were kept in Chinese.[198]

Contrary to the wishes of the Philippine authorities, the Court found that enforcement of this law would drive out of business a great number of Chinese merchants, who were undoubtedly its prime targets.[199] Hence, the Court struck the law as a deprivation of both due process and equal protection,[200] ruling that the police power could not be invoked to support it.[201] To do so would be oppressive and arbitrary, and would prevent Chinese merchants from keeping abreast of their financial status.[202] "The Chinese books of those merchants who know only Chinese . . . are their eyes in respect of their business. Without them such merchants would be a prey to all kinds of fraud"[203] and, would be, basically, defenseless against it.

While the Court acknowledged that police power could theoretically justify such an exercise of authority, the evidence was insufficient to show that the public interest required the interference and that the means adopted were

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[193] *See id.* at 508.

[194] *See id.*

[195] *See id.* at 509.

[196] *See id.* at 510.

[197] *See id.* at 513.

[198] *See id.* at 513-14.

[199] *See id.* at 523-24.

[200] *See id.* at 524-27 (citing Meyer v. Nebraska, 262 U.S. 390 (1923); Society of the Sisters of the Holy Names of Jesus & Mary v. Pierce, 296 F. 928 (D. Or. 1924); Truax v. Raich, 239 U.S. 33 (1915); Adams v. Tanner, 244 U.S. 590 (1917)). "[T]his court has held legislative attempts arbitrary and oppressively to interfere with the liberty of the individual in the pursuit of lawful occupations to involve a lack of due process." *Id.* at 527. The Court applied the same criteria that would apply to a case arising in the U.S. controlled by the bill of rights because the Philippine bill of rights' due process and equal protection clauses guaranteed the same protections as did the United States' provision. *See id.* at 524.

[201] *See id.* at 525.

[202] *See id.*

[203] *Id.*

reasonably necessary to accomplish that purpose and were not unduly oppressive.[204] But, the Court said, it would not tolerate, under the guise of public interest, arbitrary legislative interference with private business or unusual and unnecessary restrictions to be visited upon lawful occupations.[205]

> We think the present law which deprives them of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws. We hold the law in question to be invalid.[206]

The following year, when new immigrants were again hounded by legislative efforts by One Hundred Percenters to force assimilation, the Court reiterated the view it had declared in *Meyer* and its progeny; owners, parents, and children enjoyed fundamental rights created by the Fourteenth Amendment[207] that could not be abridged by the government.[208] In the *Farrington* case, Hawaiian private schools teaching Japanese to its students were the target of new, pervasive regulations reminiscent of the rules operating in the Midwest in *Meyer* and the like. When challenged, the Court found that these rules ordered "affirmative direction concerning the intimate and essential details of such schools" to the extent that "[e]nforcement . . . probably would destroy most, if not all, of them" and "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful."[209] Pointing out that the Constitution protects Japanese parents as well as those who speak other languages,[210] the Court again pronounced the unassailable rights acquired by substantive due process as "the limitations of the Constitution [that] must not be transcended."[211]

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[204] *See id.* (citing Lawton v. Steele, 152 U.S. 133 (1894)).

[205] *See id.* at 526.

[206] *Id.* at 528.

[207] In *Farrington*, the protection came from the Fifth Amendment because Hawaii was a territory, so the Due Process Clause of that Amendment applied. *See* Farrington v. Tokushige, 273 U.S. 284, 299 (1927).

[208] *See Farrington*, 273 U.S at 299.

[209] *Id.* at 298.

[210] *See id.*

[211] *Id.* at 299. Appreciation of the effect these earlier cases may have on contemporary legislation and the judiciary is gained by considering the development of certain constitutional principles realized since then. First, the Court has created its equal protection analysis, and has addressed, specifically, in that analysis, the non-citizen. In one of the Court's first statements in which the strict scrutiny test in equal protection cases was evolving, in the 1938 case of *United States v. Carolene Products*, 304 U.S. 144 (1938), the Court mandated protection against legislative action suffering from a "prejudice against discrete and insular minorities" that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." *Id.* at 153 n.4; *see also* TRIBE, *supra* note 156, at 1544. As a result of

For the purposes of this study, then, in *Meyer*, *Pierce*, *Yu Cong Eng*, *Farrington*, and other cases, the courts took a stand against compelled assimilation. And, while taking this stand may not have been the result of a conscious intent on the part of these justices, nonetheless it was the result. The Hundred Percenters had gone too far this time, causing a judicial backlash, and preventing them from continuing their activities unfettered. As a result, both legislation akin to the Nebraska statute as well as other legislation aimed generally at an assimilation model of the United States thereafter stood to be measured against the strenuous test of *Meyer*.[212]

Carolene, alienage came to be considered a "suspect" class requiring a "more searching judicial inquiry" than is required when the class of people adversely affected by governmental action or legislation do not belong to a suspect class. *See Carolene*, 304 U.S. at 152 n.4; *see also* TRIBE, *supra* note 156, at 1544. By the Court taking this step and citing *Meyer* and other cases from that era while doing so, it seemed to have been indicating its sensitivity to the need to declare greater protections for immigrants groups such as those that had so recently been targeted by the Hundred Percenters. Commentators have noted the Court's awareness of the prejudice against Catholics in Oregon and against Germans in Nebraska. *See* ROSS, *supra* note 71, at 199 (citing TRIBE, *supra* note 156, at 904).

[212] There is nothing to prevent the recent nativist-inspired legislation from being held to the *Meyer* standard, or to an even higher one, given the development of Constitutional principles since *Meyer*.

However, the significance of the case has been rather limited, a limit derived from taking a formalistic approach to the opinion. With this perspective, *Meyer* can be seen as the first occasion in which the substantive due process clause was invoked to protect rights of a more personal nature than those traditionally understood to derive from the notion of substantive due process. From the era of *Lochner v. New York*, 198 U.S. 45 (1905), for example, the Clause protected a person's pure economic right, such as that to form a contract. To be sure, *Meyer* did involve contract rights — the right of a teacher to teach and students to study in accordance with the contract entered into with the school. But the rights affected by *Lochner* go far more to the details of that contract — the individual rights of the teachers to teach the subject matter they were hired to teach, and the individual rights of the parents to control the subject matter that their children would be taught.

It is in the destabilizing effects that *Meyer* had on the nativists' ability to control what went on in private classrooms, and in its destabilizing effects in general, that the case is interesting in the context of nativism. For, in this destabilization can be found the seeds to affect, similarly, the contemporary nativist movement. In the facts that gave rise to the decision, as well as in the political, social, and legislative context in which the case was decided, may lie the roots to an analysis of contemporary anti-immigrant legislation. Viewing the case in this historical perspective can shed yet another spectrum of light on the case; from that perspective, one can derive even more significance from the case than has been realized to date.

While a subsequent paper will address contemporary issues of nativism in detail, it is difficult to read *Meyer* without being reminded of the recent anti-immigrant ballot initiatives, such as Proposition 227 in California, that terminate most bilingual education. The denial by Nebraska of the right of teachers to teach and students to learn the native languages of their parents can be likened to the attempt, through Proposition 227 and other anti-immigrant efforts, to deny children the right to have an education that incorporates the native tongues of their parents.

D. Strict Interpretation—Avoiding Quotas and Alien Land Laws

In addition to the constitutional tests that had now become an obstacle for the Hundred Percenters, during the 1920s courts also effected a braking action on anti-immigrant legislation by demanding that its language be read strictly. For example, in 1924, a native of San Marino, a nation wholly surrounded by Italy, successfully challenged an exclusion order under the 1924 Act.[213] The basis of the exclusion had been that the newly-created quota for San Marino was already exhausted, so that no more natives of San Marino could enter the United States.[214] The only problem was that the Immigration and Naturalization Service ("INS") created its own category, "Other Europe," for applicants from countries not specifically listed in the appropriate census figures; this included San Marino.[215] So when the INS was faced with petitioner's application, it looked to the "Other Europe" category and determined that it was oversubscribed by people from Gibraltar.[216] But, upon reviewing this action of the government agency, the Court of Appeals for the Third Circuit ruled that the Act did not authorize the INS to create a category commingling nationalities. Rather, it ruled that, as no separate enumeration was made in the census for San Marino, the quota for Italy should apply; that quota was not exhausted for the month in which the petitioner had applied for entry.[217] Thus, he was to be admitted.[218]

By engaging in this strict reading of the wording of the immigration statute,[219] the court indicated its willingness to interpret the harsh statute in such a way so as to allow the least possible discretion to be employed by the immigration officials. With less discretion granted to these officials, the court was consequently limiting the power of the statute itself.

Strict readings of nativist statutes also helped immigrants defend against other types of nativist legislation. In addition to restrictions on naturalization and on communicating in languages other than English, there were also during these years laws enacted to restrict the rights of non-citizens from owning

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As the Court said in *Meyer*, while the effort to foster a homogeneous people was admirable it is not necessarily legal. *See* Meyer v. Nebraska, 262 U.S. 390, 402 (1923); *see also* Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118, 137-39 (1995)(contradicting the premise that homogeneity should be the norm).

[213] Hughes v. United States, 1 F.2d 417 (3d Cir. 1924).

[214] *See id.* at 417.

[215] *See id.* The census used at this time was from 1910.

[216] *See id.*

[217] *See id.* at 418.

[218] *See id.* at 419.

[219] *See id.* at 418.

land. This species of laws, commonly known as "Alien Land Laws," generally prohibited those who were ineligible to naturalize from holding title to land to be used for agricultural purposes, or even from having business interests companies dealing with agriculture. The fear was that these foreigners might come to cultivate most of the land. And, with relatively weak allegiance to the state as compared with that assumed from citizens, they would adversely affect the strength and safety of the state.[220] Additional provisions forbade these non-citizens from acting as legal guardians for their own minor children, U.S. citizens, who held title to land. Prior to and following World War I, these laws were often specifically aimed at those of Japanese descent. While the Supreme Court would not strike them as unconstitutional,[221] lower courts did find occasions in which to avoid their application, for various reasons. In a series of cases from California and Washington State interpreting these laws, their supreme courts ruled that the statute prohibiting non-citizens from acting as guardians for their own citizen children violated the equal protection clause,[222] that a cause of action brought under the statute to void title allegedly held in violation of the law should be dismissed for technical reasons,[223] and that the law preventing Japanese-born non-citizens from leasing land was inapplicable as it violated a treaty with Japan.[224]

An early case in which the Alien Land Laws were challenged was *In re Tetsubumi Yano's Estate*. Yano, a non-citizen of Japanese descent living in California, had a very young child who was a United States citizen and held title in her name to 14 acres of improved land.[225] Yano petitioned to become her guardian in order to care for the land. The petition was denied due to the convergence of two state laws enacted in 1913 and 1920.[226] The first of these, the Alien Land Act of 1913, denied the right to acquire agricultural land to those disqualified from becoming citizens; the second, the Initiative Alien Property Act of 1920, disqualified such persons from acting as guardians of a minor for property which the alien was incompetent to acquire under the Alien Land Act.[227] The property in question was conveyed to his daughter between the enactment of the two laws, and the proceedings in the case occurred before the Initiative Act went into effect, though the final order did

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[220] Webb v. O'Brien, 263 U.S. 313, 324 (1923).

[221] *See* Frick v. Webb, 263 U.S. 326 (1923)(upholding California law that forbade non-citizens from owning shares of stock in a farm company).

[222] *See In re* Tetsubumi Yano's Estate, 206 P. 995, 1000 (Cal. 1922).

[223] *See* Washington v. Ishikawa, 247 P. 730, 731 (Wash. 1926).

[224] *See* Jordan v. Tashiro, 278 U.S. 123 (1928).

[225] *See Yano's Estate*, 206 P. at 997.

[226] *See id.*

[227] *See id.*

not occur until after the law was adopted by popular vote.[228] The government claimed that the conveyance was made "solely to evade the laws of the state of California."[229]

Contrary to the wishes of the State of California, the state supreme court found that, in spite of the fact that Yano had the conveyance made to his daughter because the law did not permit him to buy it himself, it was lawful; the child, as a citizen, was entitled to own property.[230] Further, scrutiny of the Initiative Act revealed that it did not specifically apply to pending actions, so that it should not have determined the outcome of Yano's case.[231] In remanding the matter, the court instructed the trial court to consider the following points: that the Initiative Act violated the Equal Protection Clause of the Constitution;[232] that the lower court that the equal protection clause applies "'without regard to any differences of race, of color, or of nationality;'" that the guarantee of "'the equal protection of the laws is a pledge of the protection of equal laws;'"[233] and that "a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another . . . is not equal as between the two persons."[234] The court declared that the law improperly discriminated, by conferring privileges or imposing restrictions or disabilities on a particular class of people arbitrarily.[235] In standard, though early equal protection analysis, the court required a reasonable justification to uphold this discrimination.[236] Finding none, it declared the law to violate the equal protection clause.[237]

But the court did not stop there. It focused next on the child's rights under the privileges and immunities clauses of both the state and federal constitutions, and found that both were violated by the Initiative Act. Under this clause, privileges given generally to citizens of other races must also be given to this child without regard to race.[238] To effectuate the Initiative Act, all citizen children who owned agricultural land in California but whose parents were ineligible to naturalize would not be able to have their parents appointed guardian of that property, while other citizens whose parents were native-born would so benefit.[239] In fact, this law could lead these children to

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[228] *See id.* at 998.
[229] *Id.* at 997.
[230] *See id.* at 998.
[231] *See id.*
[232] *See id.* at 1000 (quoting Yick Wo v. Hopkins, 118 U.S. 396 (1886)).
[233] *Id.* at 999.
[234] *Id.* at 1000 (citation omitted).
[235] *See id.* (citation omitted).
[236] *See id.*
[237] *See id.*
[238] *See id.*
[239] *See id.*

nominate strangers as guardians of any farming land they owned. Because "[n]o such burdensome disability is imposed upon any native-born child whose parents are citizens or eligible to citizenship, . . . all such discriminations are forbidden . . . ." [240]

In spite of the United States Supreme Court's 1923 decision in *Webb v. O'Brien*,[241] when it refused to overturn the Alien Land Laws as unconstitutional,[242] the Supreme Court for the State of Washington succeeded in dismissing an action brought under Washington's version of these laws in *Washington v. Ishikawa*.[243] This was accomplished largely by an activist court being suspicious of the State's claims against the Ishikawas. First, while the complaint alleged that parents of the citizen child were working the agricultural land, the court found that the land was purchased before the law went into effect, so any allegation that it was bought to evade the act was untrue. Second, the complaint alleged neither that the land was purchased with the parents' and not the child's money, nor that the parents were not citizens.[244] Based on a pleading technicality, a Ishikawa's demurrer was sustained.[245] In this case, then, the court never addressed questions as to the illegality of the act. Rather, totally avoiding the merits of these statutes proved to be the way that the court escaped implementation of this harsh law.

In the final case of this trilogy, *Jordan v. Tashiro*,[246] the Supreme Court adhered to the time-honored principle of liberal construction of treaties to broadly interpret a claim of Japanese natives and allow them to operate a hospital they owned. The Court forced the state to allow the formation of a corporation by Japanese natives living in California.[247] California's earlier denial of the application was based on an allegation that the corporation would violate the section of the Alien Land Law prohibiting those ineligible for naturalization from forming a corporation whose purposes would be to possess, use, or occupy real property.[248] However, according to the Court, the treaty in force between the United States and Japan provided for subjects of Japan to carry on businesses in the United States.[249] It followed, then, that the argument that operating a hospital was not within the boundaries of the treaty

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[240] *Id.* at 1001.

[241] 263 U.S. 313 (1923).

[242] The Supreme Court ruled that the Alien Land Law enacted in Washington State was constitutional. *See* Terrace v. Thompson, 263 U.S. 197 (1923).

[243] 247 P. 730 (Wash. 1926).

[244] *See id.* at 730.

[245] *See id.* at 731.

[246] 278 U.S. 123 (1928).

[247] *See id.* at 125-26.

[248] *See id.* at 124.

[249] *See id.* at 127-28.

was mistaken.[250] "[F]or more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse."[251] Iterating that diplomatic relations require that obligations of treaties be liberally construed,[252] the Court found that reasonably embraced in the words "commerce," "commercial," and "trade," included every phase of business activity;[253] a construction of the treaty that authorized "Japanese subjects to operate a hospital" but denied them the means to control the property on which it lay "does not comport with a reasonable, to say nothing of a liberal construction."[254]

Finally, several years later,[255] another challenge to the limitations placed by the Alien Land Laws was successful when the Supreme Court reversed a criminal conspiracy conviction achieved under California's Alien Land Law. *Morrison v. California*,[256] involved an interpretation of California's Alien Land Law of 1927, which forbade conspiring to aid the occupation of land by an "alien."[257] The prosecution involved an alleged conspiracy on behalf of Doi, a Japanese national, and Morrison, a citizen. Morrison was convicted of the "crime," and given a two year suspended sentence.[258] The act made it a crime for one ineligible to naturalize on the basis of race to occupy land acquired through a conspiracy.[259] But the statute lifted the burden of proving that conspiracy from the state, and rather placed it on the accused to disprove.[260] In this case it meant that to avoid liability, Morrison would have to have assumed Doi ineligible under the law and refused to enter into the transaction with him; once the transaction proceeded, the statute allowed for the presumption that Morrison knew of Doi's ineligibility even without proof of that knowledge.[261] Thus, the statute imputed knowledge of racial ineligibility on a citizen entering land transactions with anyone who appeared to be of a race other than Caucasian; it neglected to account for any people of non-

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[250] *See id.* at 128-29.

[251] *Id.* at 127-28 (citations omitted).

[252] *See id.* at 127.

[253] *Id.* at 127-28.

[254] *Id.* at 129.

[255] Technically the case is beyond the scope of this study, having been decided in the 1930s. It is included for two reasons: first, it analyzes the California Alien Land Law, enacted for the same purposes and during the same period as were the other land laws studied in this section; second, the reasoning employed follows the lines of other decisions from this era.

[256] 291 U.S. 82 (1934).

[257] *Id.* at 87.

[258] *See id.* at 84.

[259] *See id.*

[260] *See id.* at 90.

[261] *See id.* at 91.

Caucasian races who might be citizens.[262] The Court found that the statute placed undue hardship on the defendant and violated his due process rights.[263] "'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.'"[264] Even during these harsh years, then, a conspiracy could not be formed without the involvement of at least two conspirators.[265]

The Court continued, determining that the statute imposed hardship and injustice far outweighing any procedural convenience enjoyed by the state.[266] For, unless the defendant could prove the racial origin of the person with whom he was accused of conspiring, he would have failed to discharge his burden, and would be found guilty.[267]

In this final example of one of the many ways in which the courts of this age often stymied the legislative agenda of the One Hundred Percenters, it is evident that the courts achieved the results they believed were fair by a multi-faceted approach to the law. Once a certain nativist act came before them, the choices were many. Of course, the act could be sustained — many were.[268] But, given the relative economic weakness of the victims of this legislation, it might be surprising how many of these laws encountered difficulty when challenged. These difficulties were wide in range, from dismissal because of technicalities to dismissal because of unconstitutionality. It has been beyond the scope of this piece to delve into underlying motivations of the many justices who were on the deciding line of these cases. Maybe it is wishful thinking to imagine, though, that notions of fairness and openness akin to those expressed on the Statue of Liberty motivated these officers of the law. Be that as it may. One can always wish.

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[262] *See id.* at 92-93.

[263] *See id.* at 93.

[264] *Id.* at 90.

[265] *See id.* at 92.

[266] *See id.* at 96.

[267] *See id.* at 95.

[268] Some examples include the following: in 1922, the Court upheld the ban on foreign-born Japanese from being naturalized in *Ozawa v. United States*, 260 U.S. 178 (1922); the racial ban on Asian naturalization was upheld as it applied to a Hindu in *United States v. Thind*, 261 U.S. 204 (1923); the Alien Land Laws were sustained in *Terrace v. Thompson*, 263 U.S. 197 (1923); and racial prerequisites in the naturalization law were sustained in *Morrison v. California*, 291 U.S. 82 (1934).

Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or "Death From Overwork" in Japan

"Let's think about slavery, then and now. In the past, slaves were loaded onto slave ships and carried off to the new world. But in some way, aren't our daily commuter trains packed to over-flowing even more inhumane? And, can't it be said that today's armies of corporate workers are in fact slaves in almost every sense of the word? They are bought for money. Their worth is measured in working hours. They are powerless to defy their superiors. They have little say in the way their wages are decided. And these corporate slaves of today don't even share the simplest of pleasures that those forced laborers of ages past enjoyed; the right to sit down at the dinner table with their families."

- From the writings of Toshitsugu Yagi, who died in February, 1987 at the age of 43 from a myocardial infarction.[1]

I. INTRODUCTION

Toiling selflessly for the company has long been a romantic sentiment in Japanese culture.[2] It exemplifies perseverance in the face of difficult odds and devotion to the company—cardinal virtues under the Japanese work ethic.[3] Such values are termed *kaishashugi* in Japanese, literally "companyism."[4] These values have, moreover, been attributed as the primary impetus that lifted Japan from the ashes of World War II into its current status as one of the world's wealthiest countries.[5]

Japan's phenomenal economic achievement has not gone unnoticed. Even in the United States, critics of modern liberal democracy are calling for less emphasis on individual rights and more on Japanese-style communitarianism.[6] Such critics hope for increased productivity and economic gain like the

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[1] NATIONAL DEFENSE COUNSEL FOR VICTIMS OF KAROSHI, KAROSHI: WHEN THE "CORPORATE WARRIOR" DIES 4 (1990) [hereinafter NATIONAL DEFENSE].

[2] *See Fatal Attraction: A Wealthier Asia Should Ease Up On Conditions That Cause Karoshi*, ASIAWEEK, May 23, 1997, 1997 WL 10819306 [hereinafter *Fatal Attraction*].

[3] *See id.*

[4] *See* KENKYUSHA'S NEW JAPANESE-ENGLISH DICTIONARY 671, 1615 (4th ed. 1974) [hereinafter KENKYUSHA].

[5] *See* Ronald E. Yates, *Japanese Live...and Die...for Their Work*, CHI. TRIB., Nov. 13, 1988, at 1.

[6] *See* Tatsuo Inoue, *The Poverty of Rights-Blind Communality: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517, 518-21 (1993). Liberal democracy is epitomized in the United States where individualism is emphasized to the extreme. *See id.* at 518. In contrast, communitarianism can be broadly characterized as "groupism," with more emphasis on community rather than on individual rights. *See id.*

Japanese have witnessed.[7] Ironically, the communitarian work ethic that has made Japan into an economic giant is now contributing to the demise of its work force through what is called "karoshi," or "death from overwork." Karoshi represents the "dark side" of Japanese communality.[8] Its increasing incidence has caused the Japanese to rethink the fanatical work ethic in which they have prided themselves for almost half a century.

In 1988, a group of Japanese attorneys formed the National Defense Counsel for Victims of Karoshi ("National Defense Counsel") in order to provide legal advice to families of victims through a Karoshi Hot Line.[9] They preface their book on the subject by proclaiming:

> [i]t is said that all human rights are based on respect for the individual. We believe that the freedom of an individual to live and die naturally without being subjected to destruction by others is the foundation of all human rights. We therefore believe that conditions and practices which destroy workers' health and life should never be tolerated.[10]

"This is a forcible call for individual rights."[11] For the most part, however, the legal response to karoshi has been delayed and inadequate in Japan.

The prevalence of karoshi highlights two particular areas of Japanese law that have fallen short of their purpose of protecting the rights of workers and their families: (1) the work hour regulations in the Labor Standards Law,[12] and (2) the workers' compensation system.[13] For example, while the Japanese government revised the Labor Standards Law to implement a forty hour work week, it simultaneously allowed many exceptions, and never strictly enforced the regulation.[14] Moreover, the standards of the Workers' Accident Compensation Insurance Law are so rigid that families of karoshi victims are rarely able to recover benefits.[15] It is thus inaccurate to characterize karoshi solely

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[7] *See id.* The call for more community values in the United States is not only motivated by economic aspirations. Since the 1970s, Americans have become painfully aware of the chronic diseases in society such as crime, moral and social decay, and inner-city collapse. *See id.* at 519. Japanese-style communitarianism has been looked upon as a cure to these social ailments as well. *See id.*

[8] *Id.* at 532.

[9] *See* Kumiko Makihara, *Death of a Salaryman*, IN HEALTH, May-June 1991, at 41, 46.

[10] Chikanobu Okamura & Hiroshi Kawahito, *Preface* to NATIONAL DEFENSE, *supra* note 1, at IV.

[11] Inoue, *supra* note 6, at 534.

[12] *See* Rodo Kijun Ho [Labor Standards Law], Law No. 49 of 1947.

[13] Rodosha Saigai Hosho Hoken Ho [Workers' Accident Compensation Insurance Law], Law No. 50 of 1947; *see also* Kiyoko Kamio Knapp, *Warriors Betrayed: How The "Unwritten Law" Prevails in Japan*, 6 IND. INT'L & COMP. L. REV. 545, 548 (1996).

[14] *See* discussion *infra* section IV.A.1.

[15] *See* discussion *infra* section IV.B.1.

as a socio-economic problem or as a personal tragedy; efforts to eradicate karoshi will be futile without concrete legal remedies.[16]

Workaholism is not a phenomenon unique only to the Japanese.[17] It is prevalent among other countries, particularly throughout eastern Asia, where it has been manipulated to incite economic advancement.[18] By comparison, the number of death from overwork cases is small in the United States and Europe;[19] nonetheless the story of karoshi in Japan teaches an important lesson to the United States where, according to an International Labor Organization ("ILO") report, $200 billion is spent annually on job-related stress costs.[20] Thus, although the high incidence of karoshi is a circumstance peculiar to Japan, the workaholic tendencies that contribute to karoshi are not that far from home.[21]

This paper explores karoshi as a deeply-rooted socio-economic problem that is sorely in need of legal remedies. Part II proffers an overview of karoshi and its incidence. Part III discusses the reasons behind the existence of karoshi from a social standpoint, whereas Part IV considers karoshi as a legal problem. Part V presents the relevant United States law regarding labor standards and workers' compensation. Part VI engages in a comparative analysis, discussing how a hypothetical case is resolved under the laws of Japan and the United States in order to illustrate the differences between the

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[16] *See* Knapp, *supra* note 13, at 549. Admittedly, the reach of the law in transforming deep-rooted social attitudes is limited. *See id.* at 574. For example, racial prejudice in the United States unavoidably stands beyond the reach of law, and the struggle for equality continues today. *See id.* Notwithstanding such limitations, coercive powers inherent in the law help induce predictable and conforming behavior. *See id.* at 562. The imposition of legal force is therefore meaningful because it regulates one's outward behavior. *See id.* at 575.

[17] *See Fatal Attraction*, *supra* note 2.

[18] *See id.* In July of 1995, Japanese and South Korean lawyers and doctors held a symposium in Tokyo to exchange views on karoshi and to adopt a joint communiqué calling on the governments of both countries to eliminate karoshi and improve procedures to grant victims workers' compensation. *See Japan, S. Korean Experts Hold Symposium on Karoshi*, JAPAN ECON. NEWSWIRE, July 22, 1995, *available in* LEXIS, ASIAPC/ALLASI Library.

[19] *See Death From Overwork Remains Problem for Corporate Japan*, NIKKEI WKLY., Aug. 18, 1997, at 13.

[20] *See U.S. Costs Could Reach $200 Billion Annually; Afflicts Blue-Collar Workers Widely, ILO Says*, 22 O.S.H. Rep. (BNA) 1757, 1757 (1993). Such high costs come from diminished productivity, direct medical expenses, absenteeism, health insurance, and workers' compensation claims in particular. *See id.* For example, California witnessed a sevenfold increase in stress-related workers' compensation claims between 1979 and 1988. *See id.* A 1990 nationwide survey in the U.S., "The Mitchum Report on Stress," found that half of those questioned said their lives are more stressful now than five years ago, most often due to greater pressure at work. *See* Makihara, *supra* note 9, at 43.

[21] For a comprehensive discussion of how the overwork phenomenon is escalating in the United States, see Mara Eleina Conway, *Karoshi: Is it Sweeping America?*, 15 UCLA PAC. BASIN L.J. 352 (1997).

two legal systems. Finally, Part VII concludes by proposing suggestions to control the predominance, and hopefully end the problem of karoshi.

II. OVERVIEW

A. What is Karoshi and Who are Its Victims?

In simplest terms, karoshi means death from overwork.[22] Some confusion exists, however, as to the conceptual underpinnings of karoshi and how it fits into historical paradigms of occupational health, since the term has grown to mean more than its original literal definition.[23] For example, karoshi has come to represent not just death from cardiovascular disease, but also other acute deaths, such as those related to delayed medical treatment because of lack of free time to see a doctor, or suicides attributable to overwork.[24] For statistical purposes, these types of deaths are generally treated like conventional karoshi cases. As discussed later, however, families of unusual karoshi cases may find it more difficult to prove causation, and therefore, to receive workers' compensation benefits.[25]

The medical definition of karoshi is:

> [A] condition in which psychologically unsound work processes are allowed to continue in a way that disrupts the worker's normal work and life rhythms leading to a build-up of fatigue . . . accompanied by a worsening of preexistent high blood pressure and hardening of the arteries[,]. . . finally resulting in a fatal breakdown.[26]

Dr. Tetsunojyo Uehata of the National Institute of Public Health has identified five work patterns that can lead to a "fatal breakdown:" extremely long hours or night hours that break up normal rest patterns; work without

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[22] The kanji characters that comprise "karoshi" perfectly define it, as the character for "ka" means excessive, "ro" pertains to work or labor, and "shi" signifies death. *See* WOLFGANG HADAMITZKY & MARK SPAHN, KANJI & KANA: A HANDBOOK AND DICTIONARY OF THE JAPANESE WRITING SYSTEM 129, 104, 83 (1981).

[23] *See* Katsuo Nishiyama & Jeffrey V. Johnson, *Karoshi-Death From Overwork: Occupational Health Consequences of Japanese Production Management*, 27 INT'L J. HEALTH SERV. 625, 629 (1997).

[24] *See id.* A specialized term, "karosjisatsu," has evolved for suicides caused by overwork. *See* Yuri Kageyama, *More Overworked Japanese Killing Selves Labor: As Reflected in Court Cases, the Deaths Typically Follow Months of Overtime with Few or No Days Off and Little Sleep*, L.A. TIMES, July 20, 1998, at D7 (discussing how Japan's economic slide throughout the 1990s has spurred the number of "karojisatus" to swell to an estimated 1,000 or more a year).

[25] *See* discussion *infra* section IV.B.1.

[26] NATIONAL DEFENSE, *supra* note 1, at 8 (explaining the medical definition of karoshi as given by Dr. Tetsunojyo Uehata of the National Institute of Public Health).

holidays or other normal breaks; high-pressure work; extremely hard physical labor; and continuously stressful work.[27] When these stress factors act on the cerebrum, the sympathetic nerves and suprarenal glands affect changes in the production of hormones that cause a rise in blood pressure, hardening of the arteries, and increased coagulating characteristics of the blood.[28] All of these symptoms can lead to various forms of heart failure.[29]

Victims are found in virtually every occupational category, so that no strata within the company, from top level management to the laborer in the workshop, is spared.[30] For example, of the cases the Karoshi Hot Line received between 1988 and 1993, the percentage of victims who were managers (20.0%) was close to the percentage of victims who were manufacturing workers (25.2%).[31] Male victims constituted most of the cases (94.3%), but there was also an unprecedented number of female victims during this period (4.5%).[32] The National Defense Counsel includes accounts in their book about victims who spanned the spectrum in age, occupation, gender, and even national origin.[33]

B. The Response of the Japanese Government and Corporations

The Japanese government first became concerned with overwork in Japan in the mid-1980's when foreign competitors began to pressure the Japanese government to shorten work hours.[34] These competitors argued that the long work hours of Japan's industries, especially the auto industry, gave Japan an unfair advantage in trade.[35] Responding to this criticism, Prime Minister

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[27] *See* Makihara, *supra* note 9, at 45.

[28] *See* NATIONAL DEFENSE, *supra* note 1, at 8.

[29] *See id.*

[30] *See* Hiroshi Kawahito, *Death and the Corporate Warrior*, JAPAN Q., April-June 1991, at 149, 152. In fact, the deaths of many prominent politicians and business figures, including former Prime Minister Ohira Masayoshi in 1978 and the presidents of the Fuji Sankei Group and Seiko Watches in 1987, convinced many Japanese that karoshi strikes even at the highest levels of business and politics. *See id.*

[31] *See* Tetsuro Kato, *The Political Economy of Japanese Karoshi*, 26 HITOTSUBASHI J. SOC. STUD. 41, 45 (1994).

[32] *See id.*

[33] *See, e.g.*, NATIONAL DEFENSE, *supra* note 1. Some sections of chapters in the book are titled: "Two Faces in the Auto Industry;" "The Case of an Assistant Manager in a Family Restaurant;" "The Life and Working Habits of an Advertising Director;" "A Foreign Worker Succumbs to Karoshi;" and "A Female Employee of a Major Bank." *Id.*

[34] *See* Davis Barrager, *Workaholic Japan Moves to Five-Day Workweek*, 29 J. AM. CHAMBER COM. 31 (1992).

[35] *See id.* The United States, in particular, wanted Japan to concentrate more on encouraging domestic demand rather than focusing all its efforts on its exports at the expense of American producers. *See* Charlotte Gray, *Sudden Death Caused by Work-Related Stress One*

Miyazawa introduced, as part of his 1988 five-year economic plan, the objective of reducing annual work hours in Japan to the internationally acceptable amount of 1,800 by the end of 1992.[36] In its quest to persuade companies and workers to take longer holidays and cut back on overtime, the government implemented a five-day work week for national government offices.[37] The Ministry of International Trade and Industry ("MITI") established a Leisure Development Office and launched an annual contest that rates companies according to their *yutori* (degree of ease)[38] as measured by holidays and work hours.[39] MITI also designated November 22 as Couples' Day and encouraged husbands to take their wives out to dinner.[40] These efforts have proven to be only "modestly successful."[41] Significantly, while the government has promoted a reduction in working hours in order to shift Japan's economy from an export to import-oriented one, it has not officially recognized karoshi or developed an official policy on karoshi.[42]

Even Japanese corporations have begun to acknowledge karoshi as a grave problem. Toyota Motor Corporation and six other major Japanese companies agreed to form a group by November 1997 to concentrate on work-related problems, including karoshi.[43] The companies contributed a total of 20-30 million yen toward the establishment of the organization, and membership is expected to reach 200-300 companies.[44]

Cost of Japan's Trade Success, 147 CAN. MED. ASS'N J. 241, 242 (1992).

[36] *See* Barrager, *supra* note 34, at 31.

[37] *See id.* at 33.

[38] *See* KENKYUSHA, *supra* note 4, at 2033.

[39] *See* Makihara, *supra* note 9, at 42.

[40] *See id.*

[41] *Id.*

[42] *See* Kato, *supra* note 31, at 47. Official papers including, "The Annual Economic Survey of Japan," "Annual Report on the National Life for the Fiscal Year," "Annual Report on Labour," and "Annual Report on Health and Welfare," published by the Japanese government, contain no mention of karoshi. *See id.* A Ministry of Health and Welfare annual report did not give any figures for karoshi, "reflecting the government's lack of policy on the issue." *See id.* Moreover, the Ministry of Labor informally protested to the ILO when the ILO printed the word "karoshi" in a 1993 Report. *See id.* Kato speculates that the government's failure to acknowledge karoshi is traceable to the increased liability the government would assume under the workers' compensation system if it were to recognize karoshi as an official cause of death. *See id.* at 47-48.

[43] *See generally Trans-Industry Corporate Ethics Body To Be Set Up Next Month*, NIKKEI, Oct. 31, 1997, 1997 WL 12926930.

[44] *See id.* Although it may be argued that joining such an organization merely represents an attempt by these companies to attain a more positive public image, it is more likely that these companies have a direct interest in improving working conditions, and that their efforts to do so are thus genuine. As karoshi becomes legitimized in society as a cause of death, more suits are being brought against employers. *See* Gwen Robinson, *Karoshi Award May Not Spell Death To Overwork*, FIN. TIMES, Oct. 10, 1997, at 6.

C. The Response of the Japanese Media and People

The Japanese media increasingly reports on karoshi and its striking incidence in Japan. Recent newspaper articles read: "Tokyo - A 38-year-old accountant from failed Japanese brokerage Yamaichi Securities Co. died of fatigue after spending two full weeks at the office as the company folded. . . ,"[45] or "Osaka - The parents of a 24-year-old who died in 1994 filed a 30 million yen lawsuit Wednesday against his company, Osaka Izumi Shimin Cooperative in Sakai, Osaka, claiming that overwork killed their son."[46] The attorneys at the National Defense Counsel estimate that about 10,000 workers fall victim to karoshi every year.[47] This figure is comparable to the annual number of deaths due to motor vehicle accidents in Japan.[48]

With media attention rising, it is not surprising that the Japanese people have become acutely aware of karoshi. Many fear they will become victims. According to a 1992 poll, nearly one of every two Japanese workers responded that they worry about karoshi, even though approximately 70% felt they were working fewer hours as a result of the government's efforts to reduce work hours.[49] Japanese citizens increasingly campaign to expand awareness of karoshi and win relief for victims.[50] Examples of such efforts include: a gathering of families of karoshi victims held in Tokyo in 1988 under the title "Thinking About Karoshi;"[51] and the 1989 formation of a pioneer group called "The Families of Karoshi Victims" in Aichi Prefecture,

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Japanese courts have also become more willing to hold employers liable for overworking their employees, and have ordered them to pay substantial damages to families of victims. *See, e.g., Japanese Family Gets Damages For Overwork Suicide*, WORLD NEWS (Feb. 24, 1998) <http://www.cnn.com/WORLD/asiapcf/9802/23/RB000950.reut.html> (discussing how Kawasaki Steel Corp. was ordered to pay 52 million yen, or $403,000, in compensation to the family of Junichi Watanabe, because unreasonable working hours without rest led him to take his life). Moreover, as Japan currently experiences a labor shortage, employers have found it necessary to improve working conditions in order to recruit college graduates who are less inclined to tolerate the fanatical work ethic of the past. *See* Mariko Sugahara, *Five Fatal Symptoms of the Japanese Disease*, JAPAN ECHO, Summer 1994, at 68.

[45] *Report: Death After Work*, NEWSDAY, Dec. 3, 1997, at A58.

[46] *Japan: Family Sues Over Karoshi Death*, ASAHI SHIMBUN, Aug. 7, 1997, 1997 WL 11415090.

[47] *See* Raymond Lamont-Brown, *Karoshi-A Fatal Export From Japan*, 263 CONTEMP. REV. 197, 197 (1993).

[48] *See id.*

[49] *See Half of Workers Fear Karoshi*, REP. FROM JAPAN, Feb. 14, 1992, *available in* LEXIS, ASIAPC/JAPAN Library.

[50] *See* NATIONAL DEFENSE, *supra* note 1, at 13.

[51] *See id.*

followed by a sister organization formed in Tokyo in 1990.[52] When the Karoshi Hot Line expanded its service in 1989 to 28 locations around Japan, it received 309 calls on that day alone.[53]

D. *The Response of the International Community*

Karoshi is not only on the minds of the Japanese; it has captured the attention of the international community as well. "The American media has used karoshi as a vivid, well-documented example of the backwardness inherent in [Japan's] seemingly affluent society."[54] The American program 20/20 ran a special report on karoshi entitled "Rich Japan, Poor Japanese" on June 22, 1990.[55] Using Japan's problem with karoshi as a model, American academics have begun to evaluate the tendency to overwork in this country as well.[56] Even the United Nations has recognized karoshi as an acute problem, and has adopted karoshi as part of its agenda.[57] The ILO has established several international labor standards on working time, but the organization so far has no official policy on karoshi.[58]

III. THE "UNWRITTEN SOCIAL RULES" THAT CONTRIBUTE TO KAROSHI

Why does karoshi exist? What causes someone to work to the point of death? The first component of a comprehensive explanation is an examination of the role of law in Japan, which is quite different from the role of law in the United States. While Americans are noted for vigorously using the law as a tool for redressing grievances, the law in Japan has been described as "an

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[52] *See id.*

[53] *See* Toshiro Ueyanagi, Death From Overwork: Working Hours Law and Workers' Compensation Law in Japan and the U.S. 8 (1990)(unpublished L.L.M. thesis, University of Washington School of Law)(on file with Prof. Mark Levin, William S. Richardson School of Law).

[54] Knapp, *supra* note 13, at 552.

[55] *See id.*

[56] *See generally* Conway, *supra* note 21 (examining how karoshi may be sweeping America).

[57] *See* Knapp, *supra* note 13, at 552.

[58] Such standards on working time include: Hours of Work (Industry) Convention, 1919 (No. 1); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Forty-Hour Week Convention, 1935 (No. 47); Reduction of Hours of Work Recommendation, 1962 (No. 116); Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153). *See* ILO website (visited Oct. 25, 1998) <http://ilolex.ilo. ch:1567/public/english/50normes/infleg/iloeng/navigate.htm>.

heirloom sword that is no more than an ornament or a prestige symbol."[59] This is not to characterize Japan as a lawless society. Rather, the Japanese people operate on the basis of an informal legal system built on loyalty, acquiescence, and group identity.[60] This system has been termed the "unwritten law."[61] Thus, societal pressures and norms are the main reason Japanese people are driven to work as hard as they do. This pervasive, ever-present societal pressure consists of the following "unwritten rules," that lend insight into the socio-economic causes of karoshi.

A. Historical Roots

Karoshi stems not only from societal pressures, but is also rooted to some extent in history.[62] Following World War II and the American occupation,[63] Japan set itself on a fast-track course to "catch up" economically with the West.[64] The result was the development of an unrelenting work ethic in the

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[59] Knapp, *supra* note 13, at 564 (citing Jan M. Bergeson & Kaoru Yamamoto Oba, *Japan's New Equal Employment Opportunity Law: Real Weapon or Heirloom Sword?*, 1986 B.Y.U. L. REV. 865 (1986)).

[60] *See id.* at 566.

[61] *Id.* at 545.

[62] For an interesting account of the historical roots of the American propensity to overwork, see Conway, *supra* note 21, at 364-65. Conway argues that the overwork phenomenon in America can be traced to the Puritan colonists who came to America:

> In medieval times, there were plenty of regular holidays that provided needed rest times for the workers. The Puritans, however, changed that by "launch[ing] a holy crusade against holidays, demanding that only one day a week be set aside for rest." This day of rest was to be given to God with strict rules about attending Church and doing Church work. Building upon this cultural heritage . . . Americans structured a socio-economic life in which "[l]abour is not merely an economic means: it is a spiritual end. Covetousness, if a danger to the soul, is a less formidable menace than sloth. So far from there being an inevitable conflict between money-making and piety, they are natural allies, for the virtues incumbent on the elect - diligence, thrift, sobriety, prudence - are the most reliable passport to commercial prosperity. Thus, the pursuit of riches, which once had been feared as the enemy of religion, was now welcomed as its ally."

Id. (citations omitted).

[63] After Japan's defeat in World War II, the United States occupied Japan and imposed sweeping political and economic reforms in an effort to democratize the country. *See* Alex Y. Seita, *The Intractable State of United States-Japan Relations*, 32 COLUM. J. TRANSNAT'L L. 467, 499 (1995). As a result of the United State's efforts, Japan adopted a constitution based primarily on the United States' Constitution, as well as the American laws of corporations, competition, employment, income tax, and securities regulation. *See* Alfred W. Cortese Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity With Our International Rivals*, 13 U. PA. J. INT'L BUS. L. 1, 28 (1992).

[64] *See* Michael Lev, *Putting a Stop to This Working Non-Stop*, CHICAGO TRIB., Nov. 27, 1997, at 1.

Japanese work force, particularly during the 1960's and 1970's.[65] Because the post-war reconstruction effort was undertaken mainly by former soldiers, the warrior-ethic was permitted to thrive and permeate into the realm of business.[66]

Although Japan has more than "caught up" with the West, the workaholic attitude remains in the psyche of the Japanese work force. This is evident especially among the generation of workers from the 1960's and 1970's, who now consist of the managerial class in corporate Japan.[67] One business executive from that generation who did not take vacation one year admitted that working non-stop is so ingrained in the culture that "we can't stop."[68]

B. Long Work Hours and "Service Overtime"

Perhaps the primary reason behind karoshi's existence is the disproportionately high number of hours that Japanese employees work annually.[69] According to a Ministry of Labor study comparing Japan's annual work hours with those of other advanced countries, the Japanese worked 2,400 hours in 1990, about 100-200 hours more than in the United States or Great Britain, and 400-500 hours more than in Germany, France, or North European countries.[70] These statistics are sombering, yet they belie the actual number of hours worked by the Japanese reported by this study and other similar studies for a number of reasons.

First, the Ministry of Labor only polled firms with over five employees in conducting its study.[71] As such, the statistics do not take into account small-scale establishments where employees tend to work much longer hours than employees in larger firms.[72] The statistics are even more imprecise consider-

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[65] *See id.*

[66] *See* Esaka Akira & Kusaka Kimindo, *Farewell to the Corporate Warrior*, JAPAN ECHO, Special Issue 1990, at 38. During the war, the Japanese army demolished the highly stratified pre-war structure of society so that all citizens became equal before the emperor. *See id.* Thus, with the race for success starting from a single vantage point following the war, it is not surprising that Japanese workers became fiercely competitive amongst themselves and with other nations. *See id.*

[67] *See* Lev, *supra* note 64, at 1.

[68] *See id.*

[69] *See* Kato, *supra* note 31, at 46.

[70] *See id.* at 46-47.

[71] *See id.*

[72] *See* NATIONAL DEFENSE, *supra* note 1, at 65. For example, a special survey conducted by the Ministry of Labor directed at small and medium-sized enterprises found that companies employing less than 30 employees worked an average of 2 hours more per week, or 100 hours per year more than companies employing more than 30 employees. *See id.*

ing that employees of small businesses comprise about 60% of the workforce.[73]

Second, the official statistics combine the working hours of women and men even though there are vast differences between the hours worked by employees of each sex. Female employees generally work in part-time positions, in which overtime hours are seldom required.[74] In contrast, "almost all of the active waking hours of working-age males are spent working for their companies."[75] The inclusion of data for female employees in the Ministry of Labor's statistics distorts the actual average of hours worked annually. If the statistics for adult male workers are isolated, the actual hours worked per year increase to about 2,600—500 hours more than reported by the official statistics.[76]

Finally, and most importantly, Japan's annual work hours are much greater than the statistics indicate because they do not account for the high amount of hours worked as "sabisu zangyo," or "service overtime."[77] Sabisu zangyo is a practice in which employees "virtually donate overtime to the company by not recording it on their time cards, no matter how many additional hours they have worked."[78] According to an ILO survey, service overtime can reach up to 100 hours per month for bank officials.[79] With service overtime hours included in the total number of hours worked per year, some Japanese employees may work as many as 3,000-3,500 hours per year.[80]

The inaccurate statistical reporting of annual work hours of the Japanese exemplifies both the intense social pressure to work long hours, and the Japanese government's approach of turning a blind eye towards karoshi and its causes. Unchecked and barely recognized by the Japanese government, the long hours worked by the Japanese continue to contribute to a lifestyle of "paralyzing narrowness"[81] that centers totally on work, and places family and leisure at a lower priority.[82]

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[73] *See* Kato, *supra* note 31, at 46.

[74] *See* NATIONAL DEFENSE, *supra* note 1, at 66.

[75] *Id.*

[76] *See* Kato, *supra* note 31, at 47.

[77] *See id.* at 46.

[78] NATIONAL DEFENSE, *supra* note 1, at 9.

[79] *See* Kato, *supra* note 31, at 46.

[80] *See* Kawahito, *supra* note 30, at 154.

[81] *Waiwai: Seriously Senile*, MAINICHI DAILY NEWS, Nov. 30, 1997, 1997 WL 14874571.

[82] For a realistic account of an average "sarariman's" lifestyle and the rising phenomenon of the "absentee father," see generally Noriko Okifuji, *Men Who Can't Go Home*, JAPAN ECHO, Special Issue 1990, at 48. To some extent, Japanese businessmen have kept a sense of humor about the rigors of their daily lives. For example, in a poetry contest hosted by a major Japanese life insurance firm, entrants submitted poems such as: "Spent the weekend with/ Perfect strangers, or were they/ My wife and kids?," and "The boss works me too hard,/ And works

C. *Reluctance to Take Paid Leave*

Besides long work hours, the reluctance to take paid vacations is yet another unwritten social rule that contributes to the prevalence of karoshi. All eligible employees are statutorily entitled to an annual paid leave under the Labor Standards Law ("LSL").[83] Very few Japanese employees, however, take paid leave.[84] A Keio University survey revealed some reasons why Japanese employees are reluctant to take more of their vacation entitlement.[85] The order of responses was as follows:

1) "because my work load doesn't permit it;"
2) "taking time off causes other people trouble;" and
3) "tacit pressure from management not to take vacations."[86]

In this author's own survey, an interviewee responded that he does not take vacation simply because "there will just be more work to do when I come back."[87] In his estimation, about 90% of the employees at his company decline to take vacations for the same reason.[88]

D. *Solitary Transfers or "Tanshin Funin"*

Solitary transfers, or "tanshin funin," have recently become routine in Japan.[89] Tanshin funin occurs when an employee is ordered on a temporary job assignment in another part of the country or overseas and moves there leaving his family behind.[90] The life of a man working alone in a strange town

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himself a little too hard/ Telling me not to work too hard." Shokichi Oda, *Worker Bees*, LOOK JAPAN, June 1990, at 41.

[83] *See* Law No. 49 of 1947, art. 39. The LSL guarantees that employers will provide a paid leave for 10 working days to the employee who has continuously worked for 6 months from the date of hiring and who worked at least 80% of all working days during that employment period. *See id.*

[84] *See* NATIONAL DEFENSE, *supra* note 1, at 73-74.

[85] *See* Robert E. Cole, *Work and Leisure in Japan*, CAL. MGMT. REV., Spring 1992, at 52, 59.

[86] *Id.*

[87] Telephone Interview with a salesman at a trading company in Osaka, Japan (Apr. 11, 1998) [hereinafter Interview].

[88] *See id.*

[89] *See* Masae Shi'ina, *Coping Alone: When Work Separates Families*, JAPAN Q., Jan.-Mar. 1994, at 26.

[90] *See id.* Shi'ina characterizes the daily life of a salaryman as such:

> He commutes back and forth from a bare bachelor flat furnished only with the necessities. Not interested in or trained in homemaking, he busies his waking hours as much as

can be desolate and dismal.[91] Marriages held together only by long-distance phone calls often end in divorce, and families drift apart.[92] For example, one male caller to the Tanshin Funin Network, a support group for families undergoing work-induced separation, reported that his wife had a nervous breakdown because of the accumulated strain and loneliness of having to look after his bedridden mother alone due to his transfer eight years earlier.[93] This couple eventually divorced.[94] Approximately fifty callers to the Karoshi Hot Line mentioned the burdens of tanshin funin as a factor in health-related problems.[95] In one case, a worker on solitary transfer collapsed and died in his car without anyone knowing until the following morning when children on their way to school noticed his body in the parked car.[96]

E. Uninvolved Labor Unions

The Karoshi Hot Line receives calls from wives, brothers or sisters of victims, or occasionally from fathers of victims' wives, but none from labor union representatives.[97] Japanese labor unions have historically been weak compared to unions in the United States, and families of victims as well as proponents of change have been unable to rely on them for support. Unlike the independent unions in the United States, most Japanese unions are organized on a corporate basis, with some low-level managers of the company as members.[98] Corporations have often exploited these union-member

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possible with work and eats mainly to keep the hunger pangs at bay. Slowly the balance of physical and psychological needs is broken down, and many of these men develop nervous disorders, premature balding, and stomach ailments.

Id. at 30. As to the reasons why usually only the father moves, respondents to a survey answered: 1) that they did not want to disrupt the continuity of their children's education; 2) the high costs involved in buying and selling a house in Japan; and 3) responsibility for elderly family members currently living with them. *See id.* at 28-29.

[91] *See id.* at 30.

[92] *See* Oda, *supra* note 82, at 42. One salaryman submitted a poem on the subject of tanshin funin, writing: "My wife is concerned/ Less about me than the bill/ For long-distance calls." *Id.*

[93] *See* Shi'ina, *supra* note 89, at 32.

[94] *See id.*

[95] *See* NATIONAL DEFENSE, *supra* note 1, at 10.

[96] *See id.*

[97] *See id.* at 77.

[98] *See* Nishiyama & Johnson, *supra* note 23, at 634. Although the United States attempted to introduce the institution of independent unions to Japan during the American occupation, the independent unions quickly diminished and were taken over by company unions. *See* Fred Burmester, *The Team Act—"Employee Participation Plans" Versus "Company Unions": The Irony of Attempting to Reform American Labor Policy Via a Japanese Labor Policy Which is Itself a Reformation ("Corruption"?) of the American Labor Policy Imposed Upon Japan in*

managers in order to promote the views of management.[99] Moreover, there are generally no unions for workers in small companies,[100] where a large portion of the Japanese work force is employed.[101] Thus, without a strong and unitary voice to defend them, Japanese workers continue to fall victim to the social pressures that cause karoshi.

F. Other Factors

Another aspect of Japanese corporate culture which leads to a breakdown in the health of employees are the long commutes that Japanese workers often have to endure traveling to and from work.[102] These extra hours spent commuting between the office and home add to the length of the average Japanese worker's day.[103] The working day is further lengthened by the custom of drinking and carousing with fellow co-workers and bosses after work.[104] Besides adding to the length of the work day, this custom also leads to poor eating habits, smoking, and excessive alcohol intake, all of which can lead to a breakdown in health.[105] Even when a Japanese worker returns home after a tiring day at work, he or she may find trouble relaxing since space is such a commodity in Japan and houses tend to be cramped.[106] With so few opportunities to truly escape the obligations of work and relax during the

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the Final Settlement of World War II, 23 J. CONTEMP. L. 307, 346-47 (1997). The rise of the company unions can be explained by the following two reasons: 1) company unions appealed to traditional Japanese values and nationalism; and 2) because company unions were controlled by the company, company unions also controlled jobs and money and could more easily protect the interests of its striking members than the independent unions could. *See id.*

[99] *See* Nishiyama & Johnson, *supra* note 23, at 634.

[100] *See* Kato, *supra* note 31, at 52.

[101] *See* discussion *supra* section III.B.

[102] *See* Oda, *supra* note 82, at 41-42. This is due mainly to the fact that land in busy areas of the city, where most offices are located, is extremely expensive, so families are forced to buy houses sometimes two hours away by train. *See id.*

[103] *See* NATIONAL DEFENSE, *supra* note 1, at 9-10.

[104] *See* Okifuji, *supra* note 82, at 49.

[105] When asked if he ever had to go out with his bosses and co-workers after work, an interviewee responded that last year he had to drink with his boss at least four nights per week. He would not return home on these nights until 1:00 a.m., and then would have to wake up the next morning at 6:00 a.m. to go to work. Even when he did not have to socialize after work, he worked what has been referred to as the "7-11" (in at 7:00 a.m., out at 11:00 p.m.) work schedule. He claimed his health deteriorated that year compared to what it was like in college. Interview, *supra* note 87.

[106] *See* NATIONAL DEFENSE, *supra* note 1, at 11-12. If one seeks to escape a "rabbit hutch" for a more spacious home, the price is so high that the burden of loan payments forces one to work even harder in the quest for a higher salary. *See id.*

course of a day, it is no surprise that many Japanese workers lose hope and fall victim to the system that controls them.

IV. KAROSHI AS A LEGAL PROBLEM

All of the factors discussed above—long work hours, lack of vacation, separation from family, and tiring commutes—contribute to breakdowns in workers' physical and mental health. Japanese people are forced to endure such lifestyles since these social pressures actually have the force of unwritten law.[107] For this reason, the problem of karoshi is so deeply-rooted that ending its occurrence will demand the force of real law;[108] yet as will be discussed below, Japanese law has generally failed to afford workers meaningful protection from karoshi. The law's deficiencies in protecting Japanese workers is especially evident in Japan's Labor Standards Law and Worker's Compensation Insurance Law.

A. Japan's Labor Standards Law

1. Regulation of working hours

The Labor Standards Law[109] ("LSL"), promulgated in 1947, originally provided for a forty-eight hour workweek.[110] Foreign pressure over a mounting trade imbalance during the 1980's prompted Japanese politicians and businessmen to consider converting the national economy from its export-orientation to one primarily focused on domestic demand.[111] In order to implement its new policy, the government revised Article 32 of the LSL, reducing the maximum legal limit of work hours from forty-eight to forty hours per week.[112] However, the advisory council for the Labor Minister

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[107] *See* Knapp, *supra* note 13, at 574-75.

[108] *See id.*

[109] Law No. 49 of 1947.

[110] *See* KAZUO SUGENO, JAPANESE LABOR LAW 214 (Leo Kanowitz trans., Univ. of Wash. Press 2d ed. 1995)(1992).

[111] *See* Alexei P. Mostovoi, *That Obscure Object of Desire: The Decline of Informal Bargaining Over Employee Leaves in Japan*, 5 TUL. J. INT'L & COMP. L. 285, 309 (1997).

[112] *See id.* at 309-10. Article 32 of the LSL now states as follows:

> Article 32. An employer shall not have a worker work more than forty hours per week, excluding recesses.
>
> 2. An employer shall not have a worker work more than eight hours per day for each day of the week, excluding recesses.

Law No. 49 of 1947, art. 32.

proposed the revision only as a goal to be achieved in stages.[113] The advisory council also granted several exceptions of forty-eight and fifty-four hour workweek limits depending on the kind and size of the industry.[114] Thus, the 1987 revision "gave only the appearance" of adding a forty hour workweek provision to the LSL, and was ineffective in reducing the number of hours worked by Japanese employees.[115]

To rectify the shortcomings of the 1987 revision, the Japanese Parliament adopted the Act Concerning Interim Measures to Encourage the Reduction of Working Hours ("Hours Act") in 1992.[116] Among its reforms, the Hours Act obligated the government to formulate measures to facilitate the reduction of working time;[117] allowed the Ministry of Labor to delegate its enforcement authority to trade associations;[118] encouraged employers to establish "working time reduction committees";[119] and imposed certain reporting requirements on employers.[120] Despite adopting these measures, the Hours Act suffered from the ineffectiveness of the 1987 revision because it was premised on a system of "administrative guidance."[121] Called "the backbone of Japanese administration," administrative guidance is a system of coercion regularly relied upon by Japanese officials to ensure compliance with administrative guidelines based on the voluntary choice of the affected parties.[122] Administrative guidance can take various forms, such as: "'why don't you hire 30 new female employees by year-end' or 'make your new building only 12 stories tall,' up through the well-known case many years ago when Honda was advised not to enter the automobile manufacturing industry."[123] The Hours Act followed the same

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[113] *See* Kazuo Sugeno, *Final Step Toward Revision Of The Law Regulating Hours Of Work*, 26 JAPAN LAB. BULL. 4 (Apr. 1987). The revision contemplated stages that initially set a 46 hour maximum as a first stage, to be followed by a 44 hour maximum as a second stage before complete implementation of the 40 hour maximum. *See id.*

[114] *See* Yasuo Suwa, *Cabinet Order and Ministry Ordinance Regarding Working Hours and Paid Holidays*, 27 JAPAN LAB. BULL. 4 (1988).

[115] *See* NATIONAL DEFENSE, *supra* note 1, at 85.

[116] *See* Mostovoi, *supra* note 111, at 310 & n.135 (citing Law No. 90 of 1992).

[117] *See id.* at 310-11 & n.139 (citing Hours Act, Law No. 90 of 1992 § 4(1)).

[118] *See id.* at 311-12 & n.142 (citing Hours Act, Law No. 90 of 1992 § 5).

[119] *See id.* at 312 & n.143 (citing Hours Act, Law No. 90 of 1992 § 6).

[120] *See id.* at 312 & n.147 (citing Hours Act, Law No. 90 of 1992 § 7(2)).

[121] *See id.* at 309-11. Professor Tsuyoshi Kotaka defines administrative guidance as: "an action form of an administrative agency without legal binding force, to work on private persons through advice and guidance and to attain a fixed administrative purpose, based on voluntary cooperation by such persons." Tsuyoshi Kotaka, Administrative Guidance, 1 (Spring 1998)(unpublished Japanese Administrative Law course materials, on file with author).

[122] *See* Mark Levin, *Bureaucratic Sumo Wrestling*, ASIAN LAW J., Feb. 1995, at 29, 31.

[123] *Id.*

premise, and therefore seemed more like a political declaration of policy than a viable piece of legislation.[124]

Acknowledging the failure of the 1992 revision, the government revamped the Hours Act one year later by promulgating the Act Partially Amending the Labor Standards Act and the Act Concerning Interim Measures to Encourage the Reduction of Working Hours ("Amendment Act").[125] The Amendment Act established special-purpose legal entities called Working Time Reduction Assistance Centers ("WTRAC") to advance the goals of the statute.[126] The Amendment Act also authorized the WTRAC to distribute "incentive money" to trade associations and individual employers.[127] Nonetheless, the Amendment Act suffered from the same weaknesses as the Hours Act because it still operated under a system of administrative guidance,[128] and it maintained the exceptions to the forty hour workweek.[129]

Despite the past failures of the LSL and its revisions in 1987 and 1992, real change in the regulation of working hours under the LSL appears forthcoming. In 1996, the government completed implementation of the forty hour workweek.[130] On April 1, 1997, the forty hour workweek system became effective for small and medium enterprises that previously enjoyed a grace period for compliance.[131] Moreover, the Ministry of Labor recently proposed a bill to amend the LSL which would expand the "flex-time" system that enables employees to determine their own working hours based on personal factors like convenience and health.[132] The bill also proposes to delete clauses in the LSL that restrict overtime, holiday, and late-night work for women, to usher in a new age of gender equality in the workplace.[133]

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[124] *See* Mostovoi, *supra* note 111, at 310. For example, section 2(1) of the Hours Act provided that the employer should "*take steps* to gradually increase the number of days of the employee leaves and *take other necessary measures.*" *Id.* at 310 n.138 (emphasis added).

[125] *See id.* at 313 & n.15 (citing Law No. 79 of 1993).

[126] *See id.* at 313 & n.150 (citing Amendment Act, Law No. 79 of 1993 § 14).

[127] *See id.* at 314 & n.154 (citing Amendment Act, Law No. 79 of 1993 §§ 14, 16-17).

[128] *See id.* at 313.

[129] *See* Kato, *supra* note 31, at 48.

[130] *See* Lev, *supra* note 64, at 1. Recall that prior to 1996, the 40 hour workweek *goal* was actually implemented in stages of 46 hour and 44 hour workweeks. *See* Sugeno, *supra* note 113, at 4.

[131] *See* Japanese Ministry of Labor, *Realization of Meaningful, Secure Employment for Workers* (visited Apr. 18, 1998) <http:// www.mol.go.jp/english/outline/04-2.htm>.

[132] *See Panel Urges Expanding Flextime, Fixed-Pay System*, JAPAN WKLY. MONITOR, Dec. 8, 1997. For a general background on the flex-time system, see generally Toshio Taketani, *No More 9 to 5*, LOOK JAPAN, Feb. 1991, at 32; Takeshi Inagami, *Flextime and Personnel Management: Greater Emphasis on Discretionary Work*, 31 JAPAN LAB. BULL. 12 (1992).

[133] *See Equality Brings Opportunity, Burdens Women's Rights Activists Win Legal Sanction Against Discrimination But Lose Overtime Protection*, NIKKEI WKLY., July 14, 1997, at E3 [hereinafter *Equality*]. Currently, employers cannot have women work late-night shifts between

2. *Regulation of overtime*

The LSL does not set a legal limit for overtime work for men.[134] The Ministry of Labor has issued "guidelines" for maximum overtime hours for men and requested that both employers and employees observe these guidelines, which stand at 360 hours a year.[135] This effort on behalf of the Ministry of Labor has proven to be an unavailing deterrent of excessive overtime since there are no enforcement mechanisms, and employers continue to rely on service overtime.

The primary means by which employers circumvent the forty hour maximum workweek limit mandated in Article 32 of the LSL is through Article 36, which allows an employer to force employees to work overtime as long as the union (or a majority of the workers if there is no union) has agreed to the overtime in written form.[136] Once such an agreement, referred to as "saburoku kyotei," has been made, the employer can force its employees to work as many hours as the employer demands.[137] The Japanese Supreme Court validated this practice in *Tanaka v. K.K. Hitachi Seisakusho*,[138] where it upheld Hitachi's disciplinary discharge of the plaintiff employee when he refused to work overtime on a single occasion.[139] The court reasoned that the employee had a duty to comply with a company's overtime order that satisfied the terms of the saburoku kyotei agreement.[140] Under this theory, employees have no right to refuse overtime assignments as long as the union consents.[141]

Article 37 of the LSL is additionally ineffective in curtailing overtime hours in Japan because it sets the premium for overtime work at a meager 25% of the employee's normal wage.[142] The Ministry of Labor has estimated that it

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10 p.m. and 5 a.m. (except for certain categories of jobs such as nurses, doctors, and flight attendants), and they are prohibited from forcing women to work more than 150 hours of overtime a year. *See id.*; LSL, Law No. 49 of 1947, articles 64-3 and 64-2, respectively.

[134] Art. 64-2 of the LSL sets the legal limit of overtime for women at 150 hours per year, but this provision may be deleted pending passage of the 1997 Bill to amend the LSL that is currently before the Diet. *See Equality*, *supra* note 133, at E3.

[135] *See id.*

[136] *See* LSL, Law No. 49 of 1947, art. 36.

[137] *See* Knapp, *supra* note 13, at 554.

[138] 594 RODO HANREI 7 (Sup. Ct., Nov. 28, 1991).

[139] *See generally* Kazuo Sugeno, *The Supreme Court's Hitachi Decision on the Duty to Work Overtime*, 31 JAPAN LAB. BULL. 5 (1992)(discussing *Tanaka v. K.K. Hitachi Seisakusho* and its subsequent impact).

[140] *See* Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of - Stability?*, 43 UCLA L. REV. 635, 666 (1996).

[141] *See id.* at 667.

[142] *See* LSL, Law No. 49 of 1947, art. 37.

would cost employers in manufacturing industries 24.1% less to depend on overtime labor than to hire additional labor. [143] The cost of hiring new employees would remain comparatively higher unless the overtime premium were raised to 62.5%.[144] Rather than curbing excessive overtime hours, Article 37 encourages employers to force employees to work overtime.

3. Enforcement and remedies

The weak enforcement of the LSL adds to its overall ineffectiveness in controlling the number of hours worked by Japanese employees. Article 97 appoints the Labor Standards Management Bureau within the Ministry of Labor as the agency responsible for enforcing the LSL.[145] Article 97 requires a Labor Standards Inspection Office to be established within each prefecture.[146] Labor Standards Inspectors are authorized to inspect work-places, examine records and documents, question employers and workers, and investigate alleged LSL violations.[147] Workers have the right to report violations to the Labor Standards Office.[148] Despite these measures, Article 97 has not been successful in combating violations of employment standards. In one year, while 84,836 offenses were brought to the attention of the Inspectors, the Inspector Office referred only 1,025 offenders (1.5%) to public prosecutors, and of these cases, only 741 resulted in indictments.[149]

Enforcement of the LSL should be more effective, considering the penalties provided in the LSL. The penalties for violating the provisions of overtime hours and overtime pay premiums are relatively severe, consisting of imprisonment not exceeding six months or a fine not exceeding 100,000 yen.[150] These penalties could be sufficient to deter potential violators, yet, because the LSL is so weakly enforced, actual imposition of the penalties is rare, and the penalties lose their deterrent effect.

The first two Articles of the LSL state the policy goals of the LSL as:

> Working conditions shall be those which should meet the needs of workers who live lives worthy of human beings. The standards for working conditions fixed by this Law are minimum standards. Therefore, parties to labor relations shall

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[143] *See* NATIONAL DEFENSE, *supra* note 1, at 87.

[144] *See id.*

[145] *See* LSL, Law No. 49 of 1947, art. 97.

[146] *See id.*

[147] *See* NATIONAL DEFENSE, *supra* note 1, at 87.

[148] *See id.* at 88.

[149] *See id.* at 87.

[150] *See* LSL, Law No. 49 of 1947, art. 119. A rough conversion of 100,000 yen is approximately 1,000 U.S. dollars.

not reduce working conditions with these standards as an excuse, and instead, should endeavor to raise the working conditions.[151]

Notwithstanding this articulated goal, practices like "service overtime" and extended working hours validated by saburoku kyotei agreements prevail. A poignant example of the law's failure is found in the story of Ichiro Oshima, who was twenty-four when he committed suicide due to depression brought on by overwork.[152] Within a year of joining his company in 1990, he was handling about forty corporate clients.[153] He took just one half-day vacation in that year, and in the months before he committed suicide, he frequently worked until 6:30 a.m.[154] He began telling his boss: "I cannot function any more as a human being, I wake up after only two hours of sleep."[155] In Mr. Oshima's case and in many others, the Labor Standards Law did not live up to its stated purpose.

B. Japan's Workers' Compensation System

1. Coverage and standard for compensation

While the LSL fails to prevent karoshi by setting meaningful standards in the workplace, the Japanese workers' compensation system fails to provide assistance to families of workers who have already fallen victim to karoshi. Almost all workers in Japan are presently covered by the Workers' Accident Compensation Insurance Law ("WACIL").[156] The workers' compensation system is managed by the government and financed by insurance premiums paid by employers to insure against liability for employment-related injuries.[157] Because the first version of the LSL contained its own mechanism for workers' compensation, the WACIL was originally set forth as a subsidiary Act to the LSL.[158] In 1960, the WACIL was expanded in scope,

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[151] LSL, Law No. 49 of 1949, arts. 1-2.

[152] *See* Robinson, *supra* note 44, at 6 (discussing the complete story on Ichiro Oshima, and the subsequent suit his parents brought against his employer).

[153] *See id.*

[154] *See id.*

[155] *Id.*

[156] *See* LSL, Law No. 50 of 1947. Those sectors not covered are primarily seamen, farm and fishery workers, and national government employees. *See* 6 ZENTARO KITAGAWA, DOING BUSINESS IN JAPAN § 2.02 (1997).

[157] *See* Sugeno, *supra* note 110, at 322-23. The amount of the premium is calculated by multiplying the total amount of wages by a fixed rate that is set by the Ministry of Labor. *See id.* Based on this formula, the insurance rates that have been fixed for various undertakings have ranged from 0.5% to 14.5%. *See id.*

[158] *See* 6 KITAGAWA, *supra* note 156, at § 2.01(2).

whereby it obtained its own identity as the principle law governing compensation for accidents in the workplace.[159]

Benefits available to accident victims under the statute are generally characterized as: 1) compensatory (i.e. for losses caused by work-related accidents and diseases); and/or 2) social security type benefits (i.e. benefits which focus more on providing necessities to the accident victim).[160] Under this general framework, the statute provides the following benefits: injury and disease compensation pension, medical compensation benefit, temporary disability compensation benefit, disability compensation, survivors compensation pension, and funeral expenses.[161] Unlike workers' compensation statutes in the United States, a Japanese employee who receives any of the benefits provided under the WACIL is still entitled to file a civil suit against the employer under the Civil Code.[162]

If workers' compensation benefits are made available to families of karoshi victims, they can significantly augment a family's monthly income. In the case of death, certain dependents of the worker, including the spouse and children, are awarded a pension and a lump sum payment.[163] Where a wife and two children under the age of eighteen survive a deceased worker whose average wage (including bonuses) was 300,000 yen a month, the pension they will receive from workers' compensation and welfare insurance is approximately 270,000 yen a month.[164] Additionally, they will receive a lump sum payment of 3,000,000 yen and funeral expenses.[165] If, however, the same family is ineligible to receive workers' compensation benefits, they will receive only the welfare insurance portion of 120,000 yen a month.[166]

The Ministry of Labor has not established in the WACIL itself a coverage formula used to determine eligibility for benefits.[167] Rather, it has issued a number of circulars intended to illustrate the administrative coverage formula for establishing a causal relationship, if any, between the worker's job and the workers' ailment.[168] The present guidelines direct workers' compensation

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[159] *See id.*

[160] *See id.* at § 2.01(3). Examples of the latter kind of benefit would be those which are granted for commuting accidents, since such accidents are not considered "work-related," but as incidents of social risk. *See id.*

[161] *See* LSL, Law No. 50 of 1947, arts. 13-17.

[162] *See id.* at chapter V. In the event that the employee is successful, their WCIL benefits may be deducted from their damages award. *See* 6 KITAGAWA, *supra* note 156, at § 2.01(4).

[163] *See* NATIONAL DEFENSE, *supra* note 1, at 91.

[164] *See id.*

[165] *See id.*

[166] *See id.* As a household with an income of less than ¥150,000 a month, though, they may also be eligible for social security type benefits. *See id.*

[167] *See id.* at 91-92.

[168] *See id.*

benefits to be paid only when the claimant has worked twice the hours of a regular working week without a holiday or triple the regular working hours the day before dying.[169] Thus, if an employee works over sixteen hours a day for five days, takes one holiday, and then dies, he or she would not have a claim for insurance.[170] The practical effect of this standard is to exclude most cases of karoshi from coverage, since karoshi usually results from the gradual development of fatigue over an extended period of time.[171]

Families of workers who are provoked into committing suicide by overwork find it even more difficult to obtain workers' compensation benefits, as the criteria for certifying a suicide as work-related are especially rigorous.[172] In order for these families to qualify for compensation, the worker must have been mentally ill due to job-related injuries or ailments at the time of the suicide.[173] Since 1983, fifty-seven families of suicide victims have filed petitions for workers' compensation, but only three have been found eligible for compensation.[174]

Responding to criticism that regional labor offices were too strict in applying the standard for workers' compensation benefits, the Ministry of Labor recently relaxed the guidelines for karoshi, thus creating the possibility that more karoshi claims will be filed in the future.[175] A 1995 revision of the guidelines expanded the standard for deaths caused by either cerebrovascular[176] disease or ischemic[177] heart disease (both circulatory ailments) to include accumulated fatigue and psychological stress caused by

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[169] *See* Kato, *supra* note 31, at 49.

[170] *See id.*

[171] *See* Knapp, *supra* note 13, at 558. The Ministry of Labor has also been known to employ a narrower formula that appears in a manual prepared for in-house use. *See* NATIONAL DEFENSE, *supra* note 1, at 93. The existence of this manual was exposed in April 1990, and the Ministry later confirmed that it distributed this confidential manual to its officials who deal with claims in January 1988. *See id.*

[172] Editorial, *Death From Overworking*, MAINICHI DAILY NEWS, Oct. 28, 1997, 1997 WL 14874104. Moreover, the criteria for certifying suicides as work-related have remained almost unchanged since 1948, reflecting how outdated these standards actually are. *See id.* Suicides triggered by overwork rose after Japan entered into a recession in 1990; the increasing number of suicides corresponded to the increasing number of layoffs, transfers, and pay reductions during this period. *See id.*

[173] *See id.*

[174] *See id.*

[175] *See Guidelines Change Doubles Acknowledged Karoshi Toll*, NIKKEI WKLY., June 10, 1996, at E3 [hereinafter *Guidelines*].

[176] *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 338 (2d ed. 1987) ("Of, pertaining to, or affecting the anterior and largest part of the brain and its associated blood vessels").

[177] *See id.* at 1011 ("Local deficiency of blood supply produced by vasoconstriction or local obstacles to arterial flow").

work.[178] In 1996, the Ministry acknowledged a possible link between sudden death from arrhythmia, or an irregular heartbeat, and karoshi.[179] Hopefully, the expanded guidelines will not only encourage families to file claims, but will also result in more successful claims.

2. *Procedures for obtaining relief*

Labor Standards Inspection Offices under the Ministry of Labor administer workers' compensation claims.[180] To recover benefits, the disabled worker or one of the deceased worker's survivors must file a claim with the Labor Inspection Office in his or her district.[181] The possibility, however, of the claimant actually obtaining relief for his or her claim is unlikely. The law does not grant the claimant the right of access to evidence, such as employer or medical records, nor does it provide the claimant with the right to be heard in an administrative proceeding.[182] The Labor Standards Office usually interviews claimants by themselves, without their attorneys or any other parties.[183] There are no provisions limiting the time period within which the Office must come to a decision on the case.[184] Therefore, claimants in cases of cardiovascular diseases must usually wait one to two years before receiving a decision.[185]

A claimant may appeal the decision of the Office to a Workers' Injury Compensation Referee,[186] and thereafter to a Labor Insurance Referee Board, which sits in Tokyo.[187] The Board is supposed to be independent of the Ministry of Labor, but many of the referees are former Ministry officials.[188]

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[178] *See Guidelines*, *supra* note 175, at E3.

[179] *See id.*

[180] *See* KITAGAWA, *supra* note 156, at § 2.04.

[181] *See* Knapp, *supra* note 13, at 556. Several families of karoshi victims have reported on the indifference of the Labor Standards Inspection Offices. *See id.* at 558. The families complained about how, on their visits to the Labor Standard Inspection Office for an initial consultation, they were asked to leave after being simply told that compensation would unlikely be granted. *See id.*

[182] *See* NATIONAL DEFENSE, *supra* note 1, at 94.

[183] *See id.*

[184] *See id.*

[185] *See id.* Encountering such procedural difficulties in dealing with the Japanese bureaucracy is not unusual. *See* Levin, *supra* note 122, at 29. The Administrative Procedure Act (Law No. 88 of 1993)("APA"), which went into effect in October of 1994, was intended to alleviate some of these procedural difficulties. *See id.* However, the scope of the APA excludes governmental activities at a local or district level, or where administrative provisions already exist. *See id.* For this reason, the APA would not apply to the procedures involved in the workers' compensation system.

[186] *See* NATIONAL DEFENSE, *supra* note 1, at 94.

[187] *See id.*

[188] *See id.*

By the time a case arrives before the Board, usually four to six years have elapsed since the claim was initially filed.[189] The claimant also has the right to appeal to judicial courts, but such a process is extremely time and resource consuming. For example, it could take a district court two to four years, and a high court another one to three years to review a case.[190]

Additional obstacles may surface for the claimant when he or she attempts to gather evidence to prove causation, as the employer may become hostile and uncooperative. Many employers flatly refuse to submit to claimants documents such as timecards and employment regulations, and may even regard the claimant's request for compensation as an act of betrayal.[191] Withholding relevant records clearly violates Article 23 of the WACIL, which requires employers to provide claimants with the documents necessary to apply for benefits, immediately upon request.[192] The law, however, does not impose any sanctions against offending employers,[193] thereby permitting employers to ignore the law.

Because claimants encounter such difficulties both in proving causation and in having their cases heard, the vast majority of claims filed each year are denied.[194] In 1996, families filed 578 karoshi claims, but only 78 of them were successful.[195] Procedural and substantive obstacles also tend to discourage potential applicants from filing claims altogether.[196] These problems with the workers' compensation system have encouraged employers to disregard the tragic consequences of overwork and make no attempt to improve working conditions.[197]

V. THE EQUIVALENT UNITED STATES LAW

Evaluation of Japanese labor and employment laws is aided by a comparison of the Japanese laws to their United States counter-parts, as United States laws consist of a very different system of rights and remedies. This Part will discuss the Fair Labor Standards Act[198] ("FLSA") which, like the LSL, prescribes various regulations concerning working conditions, including

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[189] *See id.* Here, the claimant is given his or her first chance to be heard orally at a formal hearing, but no rules of testimony or evidence apply, and there is no provision for a time limit within which either the Referee or the Board must make a decision. *See id.*

[190] *See id.* at 95.

[191] *See* Knapp, *supra* note 13, at 559.

[192] *See id.*

[193] *See id.*

[194] *See id.* at 558.

[195] *See* Lev, *supra* note 64, at 1.

[196] *See* Knapp, *supra* note 13, at 559.

[197] *See id.*

[198] 29 U.S.C. §§ 202-219 (1994).

regulations on work hours and overtime. The workers' compensation system in Hawai'i will be evaluated as a representative system under United States law. Essentially, both the FLSA and Hawai'i's workers' compensation laws provide more protection to employees and their families than would be provided under Japanese laws.

A. Fair Labor Standards Act

Section 207(a)(1) of the FLSA regulates working hours by providing that no employer shall employ any employee for a workweek longer than forty hours.[199] This section was amended in 1966, but sections 207(a)(2)(A) and (B) of the FLSA provide for the gradual implementation of the amendment by granting a forty four hour workweek for the first year after the amendment, and then a forty-two hour workweek after the second year following the amendment.[200] Section 207(a)(2)(C) states that the forty hour workweek shall be fully implemented after the two year grace period.[201]

Overtime is also governed by section 207(a)(1) of the FLSA, which provides:

> no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.[202]

In short, section 207(a)(1) establishes that the premium for overtime work must be more than 50% of the employee's regular rate. "Regular rate" includes all remuneration for employment paid to the employee such as wages, salaries, shift differentials, commissions, piece-work earnings, non-cash wages, on-call pay incentives, and attendance or other non-discretionary bonuses, but excludes payments such as discretionary bonuses or gifts, pay for time not worked, expense reimbursements, or pension and welfare plan contributions to a third party.[203]

The FLSA establishes a series of procedures for enforcement of its overtime work provisions. First, investigators of the Wage and Hour Division of the U.S. Department of Labor can enter and inspect such places and records as the Administrator of that Division deems necessary.[204] Second, FLSA § 216(b) grants an employee the right to judicially enforce the statute, stating:

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[199] *See id.* § 207(a)(1); 29 C.F.R. pt. 548 (1999); 29 C.F.R. pt. 778 (1999).
[200] *See* 29 U.S.C. § 207(a)(2)(A) and (B).
[201] *See id.* § 207(a)(2)(C).
[202] *See id.* § 207(a)(1).
[203] *See id.* § 207(e); 29 C.F.R. pt. 548 (1999); 29 C.F.R. pt. 778 (1999).
[204] *See* 29 U.S.C. § 209.

> Any employer who violates the provisions of . . . [§]207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. . . . An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.[205]

Third, FLSA § 216(c) permits the Secretary of Labor to bring damage actions on behalf of affected employees:

> The Secretary may bring an action in any court of competent jurisdiction to recover the amount of . . . overtime compensation and an equal amount as liquidated damages. . . . Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor directly to the employee or employees affected.[206]

Finally, FLSA § 216(a) provides criminal sanctions of a fine not to exceed $10,000, or imprisonment for up to six months, or both.[207]

B. Hawai'i's Workers' Compensation System

In addition to federal labor laws, every state has a workers' compensation statute.[208] As a representative of United States law, Hawai'i's workers' compensation system will be discussed to furnish a basis of comparison between United States and Japanese laws regarding cases of death from work-related cardiovascular injuries. The governing law in Hawai'i is Hawai'i Revised Statutes ("HRS") § 386-3, which provides, in pertinent part:

> Injuries covered. If an employee suffers personal injury either by accident arising out of and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as provided in this chapter.[209]

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[205] *Id.* § 216(b). In such litigation, attorneys' fees and costs provided for in the statute are mandatory for successful plaintiffs. *See* Ueyanagi, *supra* note 53, at 22 (citing Wright v. Carrigg, 275 F.2d 448 (4th Cir. 1960)).

[206] 29 U.S.C. § 216(c).

[207] *See id.* at 216(a).

[208] *See* JAY E. GRENIG, PRENTICE HALL'S WORKERS' COMPENSATION HANDBOOK § 1301 (1987) ("All 50 states, the District of Columbia, and Puerto Rico have workers' compensation statutes"); Conway, *supra* note 20, at 372-73.

[209] HAW. REV. STAT. § 386-3 (1999).

Before the 1970s, this provision was interpreted rather rigidly by Hawai'i courts in determining eligibility for workers' compensation benefits.[210] The requirements of this traditional, more literal interpretation of the statute were two-fold. First, the claimant was required to establish that his or her injury arose both "out of" and "in the course of" his or her employment.[211] The words "out of" signified a "causal connection between the injury and the claimant's employment."[212] The words "in the course of" pointed to the injury's "proximity in time, place, and circumstances to the employment."[213]

Beginning in 1971, Hawai'i courts moved towards a liberal, unitary concept of work-connection for purposes of interpreting the statute.[214] "The work-connection approach rejects the necessity of establishing temporal, spatial, and circumstantial proximity between the injury and the employment."[215] Rather, it "simply requires the finding of a causal connection between the injury and any incidents or conditions of employment."[216]

In *Chung v. Animal Clinic, Inc.*, the Hawai'i Supreme Court officially adopted this less stringent work-connection standard for workers' compensation cases, termed the "unitary test."[217] The inquiry under the unitary test is whether the injury had been "caused by [the claimant's] work activity, regardless of where or when the injury had taken place."[218] In *Chung*, the plaintiff, a veterinarian employed by the defendant, suffered a heart attack while jogging after work.[219] The Labor and Industrial Relations Appeals Board granted the plaintiff workers' compensation benefits, applying the

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[210] *See, e.g.*, Holt v. Acme Mattress Co., 40 Haw. 660 (1955); Curtis v. Rivas, 38 Haw. 384 (1949).

[211] *See* Chung v. Animal Clinic, Inc., 63 Haw. 642, 647, 636 P.2d 721, 725 (1981); *see also* Thomas R. Head III, *Crochiere v. Board of Education of Enfield: Workers' Compensation for Job-Related Mental Disease Claims-Stress Reliever or Judicial Headache?*, 21 AM. J. TRIAL ADVOC. 131, 132 (1997)("Although workers' compensation laws vary statutorily from state to state, an almost universal cornerstone is that the employer is liable for all accidental injuries that arise out of and in the course of employment").

[212] *Chung*, 63 Haw. at 647-48, 636 P.2d at 725.

[213] *Id.* at 648, 636 P.2d at 725.

[214] *See id.* at 648, 636 P.2d at 725.

[215] *Id.* For more recent Hawai'i cases discussing the work-connection approach, see Ostrowski v. Wasa Elec. Servs., Inc., 87 Hawai'i 492, 960 P.2d 162 (Ct. App. 1998); Hough v. Pacific Ins. Co., 83 Hawai'i 457, 927 P.2d 858 (1996); Zemis v. SCI Contractors, Inc., 80 Hawai'i 442, 911 P.2d 77 (1996); Tate v. GTE Hawaiian Tel. Co., 77 Hawai'i 100, 881 P.2d 1246 (1994).

[216] *Chung*, 63 Haw. at 648, 636 P.2d at 725.

[217] *See id.* at 649, 636 P.2d at 726.

[218] *Id.* (citing Akamine v. Hawaiian Packing & Crating Co., 53 Haw. 406, 495 P.2d 1164 (1972)).

[219] *See id.* at 643, 636 P.2d at 723.

unitary test.[220] The defendants appealed to the Supreme Court, challenging the standard employed by the Appeals Board.[221] The court affirmed the decision of the Appeals Board and officially adopted the unitary test.[222] The court reasoned:

> the legislature has decided that work injuries are among the costs of production which industry is required to bear. . . . Inequity would easily result from a rule which denied compensation for injuries having their inception at work but not becoming manifest until the employee had left the employer's premises.[223]

In addition to the relatively loose standard courts created in interpreting eligibility for workers' compensation benefits, claimants are further benefited by a presumption that their injury is, in fact, work-related. HRS § 386-85(1), titled "Presumptions," provides in pertinent part: "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary: (1) That the claim is for a covered work injury."[224] Under this statute, the claimant prevails if the employer fails to adduce substantial evidence that the injury is unrelated to employment.[225] "Substantial evidence" signifies a high quantity of evidence that is "relevant and credible evidence of a quality and quantity sufficient to justify a conclusion by a reasonable man that an injury or death is not work connected."[226] In practice, the presumption is pivotal to the case of a claimant. In *Chung*, for example, doctors from both parties presented conflicting testimony regarding causation. The Appeals Board resolved the issue in favor of the claimant, relying on the basis of the statutory presumption.[227]

Similarly, in *Akamine v. Hawaiian Packing & Crating Co., Ltd.*,[228] the Hawai'i Supreme Court applied the statutory presumption in finding for the claimant. In *Akamine*, the decedent suffered acute coronary insufficiency while unloading crates on the job.[229] The decedent's dependents filed a claim for workers' compensation, which the Labor and Industrial Relations Appeals Board denied.[230] The Board reasoned that Mr. Akamine's death was due to a

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[220] *See id.* at 647, 636 P.2d at 725.
[221] *See id.*
[222] *See id.* at 649, 636 P.2d at 726.
[223] *Id.* (internal citations omitted).
[224] HAW. REV. STAT. § 386-85(1)(1999).
[225] *See Chung*, 63 Haw. at 650, 636 P.2d at 726-27.
[226] *Id.* (citing *Akamine*, 53 Haw. at 408-09, 495 P.2d at 1166).
[227] *See Chung*, 63 Haw. at 651, 636 P.2d at 727.
[228] 53 Haw. 406, 495 P.2d 1164 (1972).
[229] *See id.* at 407, 495 P.2d at 1165.
[230] *See id.*

long-standing cardiovascular disease that was not attributable to his employment.[231]

In reversing the decision of the Board, the Hawai'i Supreme Court looked to the "humanitarian nature" of the statute which directs that any doubt be resolved in favor of the claimant.[232] The court noted: "Operation of the statutory presumption is crucial in cardiac cases where the causes of heart disease are not readily identifiable."[233] Thus, claimants who die from cardiac problems, such as in a typical case of karoshi, enjoy an even greater presumption that their injury was work-related under Hawai'i law.

The process for filing a workers' compensation claim and appealing a decision of the Labor and Industrial Relations Board is relatively straightforward. The Director of Labor and Industrial Relations has jurisdiction over workers' compensation claims pursuant to HRS § 386-73.[234] When a claim for compensation is filed, the Director must make an investigation and render a decision within sixty days after a formal hearing.[235] Either the employee or the employer may appeal the Director's decision to the Appellate Board,[236] and thereafter directly to the Hawai'i Supreme Court.[237]

VI. A COMPARISON OF JAPANESE AND UNITED STATES LAW

A. Labor Standards

If a hypothetical case were brought challenging an employer's work practices as violating work hour or overtime regulations, a claimant would experience less difficulty obtaining remedies under United State's FLSA than under Japan's LSL. First, a claimant in the United States would generally benefit from a more forceful law. Although both countries have implemented a forty hour workweek, the United State's regulation is adhered to more strictly and is not based on a voluntary system of compliance like the LSL.[238]

A United States claimant would have an easier time deterring employer abuse of overtime since the FLSA sets the premium for overtime pay at 50% of an employee's regular wage, as compared to 25% in Japan.[239] The United States claimant would be entitled to enforce any violation of the FLSA

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[231] *See id.*

[232] *See id.* at 409, 495 P.2d at 1166.

[233] *Id.*

[234] *See* HAW. REV. STAT. § 386-73 (1999).

[235] *See* HAW. REV. STAT. § 386-86 (1999).

[236] *See* HAW. REV. STAT. § 386-87 (1999).

[237] *See* HAW. REV. STAT. § 386-88 (1999).

[238] *See* discussion *supra* sections V.A. and IV.A.1.

[239] *See* discussion *supra* sections V.A. and IV.A.2.

pursuant to FLSA § 216(b), which grants employees the right to judicially enforce the statute.[240] In contrast, an aggrieved employee in Japan only has the right to report a violation of the LSL to the Labor Standards Inspection Office.[241] However, very few of these reports are actually prosecuted. [242] Even if a United States employee chooses not to bring an action against his or her employer, the employee could appeal to investigators of the Wage and Hour Division of the United States Department of Labor or the Secretary of Labor to judicially enforce the FLSA.[243]

To say, however, that the FLSA is flawless in meeting the needs of workers in the United States would be a misstatement. Perhaps the largest obstacles to the FLSA's overall effectiveness are the many exceptions to the work hour and overtime regulations.[244] Most notably, § 213(a)(1) of the FLSA provides an exemption for "any employee employed in a bona fide executive, administrative, or professional capacity."[245] This exemption includes professionals such as lawyers and doctors, and furnishes a means for potential work hour abuse in these settings, as any associate in a law firm or medical resident could most likely confirm.[246]

In practice, thirty-four million people, or nearly one-third of the work force in the United States, work more than forty hours a week.[247] Most do not get paid for their extra hours because they are either self-employed, salaried supervisors, or professionals exempt from the FLSA.[248] Although the LSL contains a similar exception to its forty hour workweek regulation, it is estimated that only 4.4% of the Japanese workforce is in such a management or other exempt category, while 60% of the U.S. workforce is exempt from the equivalent provision in the FLSA.[249]

Additionally, the 50% premium for overtime, which was intended to act as a penalty to coerce employers into hiring more people rather than making

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[240] *See* discussion *supra* section V.A.

[241] *See* discussion *supra* section IV.A.3.

[242] *See* discussion *supra* section IV.A.3.

[243] *See* discussion *supra* section V.A.

[244] *See* Conway, *supra* note 21, at 369-72.

[245] 29 U.S.C. § 213(a)(1); *see also* 29 C.F.R. §§ 541.

[246] Lately, there has been an abundance of articles highlighting the "professional workers" plight. *See* Conway, *supra* note 21, at 370-71. Dr. William Cole, a cardiologist who heads the New York Downtown Hospital's Heartsavers program that serves Wall Street brokers says, "[s]tress has definite physiological effects, high levels of epinephrine (a stress-related hormone) cause constriction of blood vessels and increased blood pressure; this can lead to changes in lipid levels that could theoretically lead to acceleration in atherosclerosis." *Id.* (citing STOCKBROKERS-HEALTH ASPECTS, Rodale Press Inc. (1996)).

[247] *See* Ueyanagi, *supra* note 53, at 19 (citing SEATTLE TIMES, Feb. 9, 1990, at C1).

[248] *See id.*

[249] *See* Conway, *supra* note 21, at 360.

employees work longer shifts, lost its potency long ago.[250] Due to soaring costs of company-paid health insurance and other benefits,[251] employers find it far cheaper to scale back the number of permanent employees and get the job done by paying overtime.[252] An AFL-CIO economist commented that to force employers to use more hourly workers instead of relying on overtime, the law would have to be amended to require triple pay for overtime.[253] Therefore, although the FLSA acts as a much stronger deterrent against overtime abuse by employers than its Japanese counterpart, there is still room for improvement in this area.

B. Workers' Compensation

A family of a karoshi victim in Hawai'i could more easily prove causation and have its case heard as compared to a similarly situated family in Japan. First, the family in Hawai'i could invoke the relaxed work-connection standard before the Labor Board and the courts in arguing that the victim's death was work-related.[254] Second, a family of a karoshi victim in Hawai'i would most likely prevail due to the existence of the statutory presumption created in its favor.[255]

In contrast, a Japanese family of a karoshi victim would be unable to find the standards for benefit eligibility in the WACIL, as the Japanese Ministry of Labor does not state in the WACIL itself the standards it uses to determine compensability of claims.[256] Instead, the Ministry issues circulars that set the standards for proving causation.[257] These standards, however, are so rigid that the Japanese family would unlikely recover.

Third, a family of a karoshi victim in Hawai'i would meet comparatively fewer procedural barriers under Hawai'i law than would a Japanese family bringing the same suit under Japanese law. The administrative and judicial bodies established for hearing claims in Hawai'i must abide by the established procedural rules of HRS Chapter 386.[258] The Labor Board in Hawai'i, for example, would have to issue its decision within sixty days after hearing the

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[250] *See* Ueyanagi, *supra* note 53, at 17-18.

[251] *See id.* Company-paid health insurance and other benefits now comprise 25-35% of the cost of compensation. *See id.*

[252] *See id.* "For example, while the manufacturing sector of the economy saw significant layoffs in the 1980s, the average weekly overtime of individual manufacturing workers increased 40 percent from 1980 to 1988." *Id.*

[253] *See id.*

[254] *See* discussion *supra* section V.B.

[255] *See* discussion *supra* section V.B.

[256] *See* discussion *supra* section IV.B.1.

[257] *See* discussion *supra* section IV.B.1.

[258] *See* discussion *supra* section V.B.

Hawai'i family's case.[259] On the other hand, it might take years for the Labor Standards Inspection Office to investigate a Japanese family's case of karoshi, since the WACIL does not include time limits for issuance of decisions.[260]

VII. CONCLUSION: SUGGESTIONS FOR REFORM AND PROSPECTS FOR THE FUTURE

The concept of corporate loyalty, or "kaishashugi" is ingrained in the consciousness of the Japanese people and is perpetuated by "unwritten rules" in society and corporate culture. Because these values are so deeply rooted, it will require great force to untrench them. For this reason, revision of the law, which has thus far fallen short of protecting the Japanese work force, will be a vital and necessary step in eradicating karoshi, and in creating a work environment where personal lives can begin to enjoy priority over the rigors of the workplace.

Of course, the "unwritten law," or the social-economic pressures that have spurred the Japanese to work so hard for may years will probably act as a barrier to any legal reform. Moreover, if the law is to effectively change social behavior, it will take years to do so. However, if the law were revised to implement meaningful regulations of work standards, Japanese employers would at least no longer so easily transgress these standards. Revision of the law could thus be an impetus for change at a deeper level. The following suggestions for revising the law will hopefully prepare the way for transforming the "unwritten law," and ultimately ending the problem of karoshi.

First, now that the forty hour workweek has been fully implemented in Japan, the Ministry of Labor should take sufficient measures to enforce it. Government policy should require Labor Standards Inspection Officers to actually make a determined effort in investigating reports of violations of the LSL. Power to enforce the LSL should be granted directly to Japanese employees as well so that their rights will not be subject to the lackadaisical approach taken by the Labor Standards Inspection Officers in prosecuting violators.

Second, a maximum legal limit of overtime hours applicable to both sexes should be established in the LSL itself. Such a revision would replace the "guidelines" issued by the Ministry of Labor that have no legal force. This would bring Japan into accordance with the majority of countries in the ILO that set equal legal limits on overtime work for men and women.[261]

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[259] *See* discussion *supra* section V.B.

[260] *See* discussion *supra* section IV.B.2.

[261] *See Equality*, *supra* note 133, at E3.

Additionally, Article 36 of the LSL, which allows employers to enter into contracts with labor groups that circumvent work hour regulations, should be amended or repealed since this provision has rendered work hour regulations virtually meaningless.[262] The overtime premium should be increased to at least 50% of the employee's regular wage so that corporations will be deterred from taking economic advantage of the overtime work of its employees. Finally, the Ministry of Labor should continue to promote such systems as "flex-time," which give employees more freedom as to when they will go into the office, thereby lessening the pressure to succumb to a mind-numbing "7-11" type work schedule.

With respect to the workers' compensation system, the Ministry of Labor should increase access to benefits for families of karoshi victims by continuing to relax the high burden of establishing causation.[263] Essentially, the Ministry should not avert its eyes from the fact that employees engage in physically grueling work as a matter of routine.[264] Time limits within which the Labor Standards Office must render a decision on a claim should be set, as well as time limits within which employers must furnish documents and other evidence to claimants.

Statutory reform is not a panacea by any means. As mentioned earlier, real and complete change can only commence once certain societal transformations occur at a much deeper level. The good news, however, is that these transformations have recently been taking place. The younger generation in Japan simply does not display the same work ethic of their parents.[265] Even the government and the older generation of corporate warriors are talking about "quality of life" issues.[266] The Japanese media unanimously extols the virtues of leisure: "'Take a break, Japan,' a well-known Japanese commercial urges[.]"[267] If and when the pursuit of legal remedies is successful, it seems quite likely that more corporate warriors will be willing to take that advice.

Kaiulani Eileen Sumi Kidani[268]

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[262] *See* Knapp, *supra* note 13, at 575.

[263] *See id.* at 576.

[264] *See id.*

[265] *See, e.g.*, Gray, *supra* note 35, at 242 (asking a Tokyo University Professor how Japan was changing, he sighed and answered, "Now we have yuppies, just like you[.] They want to enjoy themselves"); *see also* Interview, *supra* note 87 (referring to the warrior-type work ethic as "furui kangaekata" (literally, "old way of thinking"), and when asked what he thought about it, he replied, "I hate it").

[266] *See* Gray, *supra* note 35, at 241.

[267] Sugahara, *supra* note 44, at 69.

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China's Trade Union System Under the International Covenant on Economic, Social and Cultural Rights: Is China in Compliance with Article 8?

I. INTRODUCTION

For years China has prohibited workers from establishing trade unions that function independently from the All-China Federation of Trade Unions ("ACFTU"),[1] China's massive, and often repressive, monolithic trade union.[2] In 1997, however, China signed the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[3] which explicitly provides workers with the right to establish independent trade unions.[4] China's signing of the ICESCR, coupled with President Jiang Zemin's prompt proclamation that the signing "demonstrates . . . the government's staunch determination to promote human rights' conditions in China and the world as a whole,"[5] appeared to

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[1] *See* U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1994, S. Doc. No. 105, at 735 (2d Sess. 1997) [hereinafter 1997 U.S. STATE DEP'T REPORT] (reporting that the ACFTU is China's only official union and that independent trade unions are illegal); *see also* Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 NW. J. INT'L L. & BUS. 66, 91 (1993)(explaining that independent trade unions are not allowed in China); Hillary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNT'L L. 559, 571-72 (1995)(stating that independent trade unions cannot organize).

[2] *See Laboring in Hong Kong*, THE NATION, July 14, 1997, at 3, *available in* 1998 WL 8866479 (stating that the ACFTU is dedicated to suppressing worker protest); *see also* Robert Evans, *Commerce Greed Attacking Unions, Labor Bodies Say*, COMMERCIAL APPEAL, June 14, 1997, at B7, *available in* 1997 WL 10383352. Evans explains that the International Confederation of Free Trade Unions, the world's largest labor organization, stated that China has "one of the worst records of trade union repression," because it keeps its workers "on a tight rein, harassing and persecuting independent trade unionists with the blessing of the (official) All-China Federation of Trade Unions." *Id.*

[3] *See China Signs UN Human Rights Covenant*, AGENCE FRANCE-PRESSE, Oct. 27, 1997, *available in* 1997 WL 13422031 (China's ambassador to the United Nations signed the ICESCR on October 27, 1997.). *See generally China Signs part of International Bill of Rights*, CHINA RIGHTS FORUM (1997-1998), at 6 (providing that China was the last permanent member of the U.N. Security Council to sign the ICESCR).

[4] International Covenant on Economic, Social and Cultural Rights, pt. III, art. 8(1)(a), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, 6 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

[5] *China: More on Jiang Zemin Interviewed by US Reporters*, BEIJING XINHUA (in English), Oct. 24, 1997, *reprinted in* Federal Broadcast Information Service-China-97-297 (FBIS-CHI-97-297), Oct. 25, 1997, at 1.

signify the end of the ACFTU's control of China's trade unions. The government's "staunch determination," however, was absurdly ephemeral. Months after China signed the ICESCR, ten Chinese police officers, under the cover of darkness, apprehended Li Qingxi at his home, confiscated his documents and tapes, and took him into custody for advocating free and independent trade unions.[6]

China's post-signing conduct evidences that China's signing of the ICESCR was not sincere. Instead, China signed the ICESCR as a public relations act designed to influence the United Nations Human Rights Committee in Geneva,[7] and to assuage international criticism of its human rights record.[8] The fact that President Jiang publicly announced that China would be signing the ICESCR on the eve of his historic visit to the United States[9] evidences that he intended for the signing to influence the international community.

China's conduct and its weak record of complying with international covenants[10] are foretelling as to whether China will actually ratify and abide

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[6] *See Officials Detain Trade Unionist and Activist Seeking Election*, SOUTH CHINA MORNING POST, Jan. 18, 1998, at 6, *available in* 1998 WL 2964427; *see also Chinese Worker Detained for Proposing Unions*, DOW JONES INT'L NEWS, Jan. 17, 1998.

[7] *See China Agrees to Sign Key Rights Treaty*, SAN DIEGO UNION-TRIBUNE, Apr. 9, 1997, at A12 (commenting that China's decision to sign the ICESCR was designed to influence voting at the U.N. Human Rights Commission that was in session in Geneva in early April 1997); *see also* Graham Hutchings, *China Might Endorse Human Rights Pact*, INT'L NEWS (Feb. 28, 1997) http://www.telegraph.co.uk/et?ac.html> (explaining that China considered signing the ICESCR to improve its international relations and that "[t]he move seems designed to head off any US attempts to censure Beijing at the UN Human Rights Commission in Geneva later this year"); Trevor Marshallsea, *Chinese Rights Pledge Welcomed As Positive: Analysts*, ASIA PULSE, Apr. 9, 1997, *available in* 1997 WL 10501266. Marshallsea reveals that President Zemin made the pledge to sign the ICESCR in early April 1997, and most analysts perceived the timing "as an unsubtle move by China to silence a resolution condemning its rights record at the current annual sitting of the UN Human Rights Commission in Geneva." *Id.* Marshallsea also notes that the United States had earlier determined that China would have to comply with four key steps if China wanted the United States to abandon the resolution. One of these steps was to sign the ICESCR. *Id.*

[8] *See China Will Only Implement UN Covenant After Ratification*, AGENCE-FRANCE PRESSE, Oct. 28, 1997, *available in* 1997 WL 13422566 (claiming that China's signing was merely a timely effort designed to mollify critics of China's human rights record during President Zemin's visit to the United States). *See generally* Sophia Woodman, *From the Editor*, CHINA RIGHTS FORUM, (Winter 1997), 1. Woodman asserts that sustained international and domestic pressure should be primarily credited for China signing the ICESCR. *See id.*

[9] *See* Betsy Pisik, *Dues Issues Deadlocked*, WASH. TIMES, Oct. 27, 1997, at A12 (commenting that President Zemin made a rare public appearance on the eve of his departure to the United States to inform reporters of China's plans to sign the ICESCR).

[10] *See* Mark Girouard, *China's Existing Obligations, Economic, Social & Cultural Rights Still Unfulfilled*, CHINA RIGHTS FORUM (Winter 1997), 20. Girouard explains that China has been bound by international covenants that obligate it to protect economic, social and economic rights, but that "[u]nfortunately, China's compliance with these treaties, including its reporting

by the ICESCR in the future. China however has not ratified the ICESCR, and, regardless of its motives or intentions, under the principles of international law its signing does not require it to be in compliance.[11] The purpose of this comment is to determine whether China's trade union system would be in accord with the ICESCR if China were to ratify the ICESCR today.[12] Subject to certain exceptions, Article 8 imposes upon states parties[13] the obligation to ensure that workers have the right to "form trade unions and join the trade union of his choice,"[14] as well as the right to strike.[15]

This comment reveals that China's trade union system precludes workers from establishing independent trade unions, and explains why this violates the

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record, has been poor, and it seems likely that it will treat its obligations under the ICESCR with the same degree of indifference." *Id.* China is bound by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted on Dec. 10, 1984, 23 I.L.M. 1027, modified in 1985, 24 I.L.M., 535 (entered into force on Jun. 26, 1987), *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS 444 (1995)(noting that China is a party to the convention). However, torture continues to be practiced in China on a widespread basis. *See* Tom Korski & Simon Beck, *Beijing Stalls on Fulfilling UN Covenant*, S. CHINA MORNING POST, Oct. 29, 1997, at 11, *available in* 1997 WL 13269064. Kenneth Roth, executive director of Human Rights Watch, states that China has completely ignored international covenants in the past and that despite China's status as a member of the torture convention, torture in China remains "pervasive and systematic". *Id.*; *Canadian TV Says Videotape Shows Police Torture in China*, SEATTLE TIMES, May 19, 1998, at A17 (revealing that the Canadian Television Network, using a concealed camera, recently captured Chinese police torturing suspects in a Beijing police station).

[11] *See* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 606 (4th ed. 1990)(explaining that the signing of a treaty does not constitute consent to be bound, and that the state is not bound when the covenant is subject to future ratification); *see also China Will Only Implement UN Covenant After Ratification*, AGENCE FRANCE-PRESSE, Oct. 28, 1997, *available in* 1997 WL 13422566 (stating that China does not consider itself to be bound by its signing of the ICESCR).

[12] *See Cook Welcomes China Invitation to UN Rights Chief Robinson*, AGENCE FRANCE-PRESSE, Jan. 26, 1998, *available in* 1998 WL 2208359 (Chinese officials assured the French Foreign Minister that China intends to ratify the ICESCR soon). *See generally, Human Rights in China: Hearings Before the House Comm. on Int'l Relations Subcomm. on Int'l Operations and Human Rights in China*, 105th Cong. (1998)(statement of Mike Jendrzejczyk), *available in* 1998 WL 12762076. The speaker reveals that China has informed European diplomats and others that even if China does ratify the ICESCR, it plans to enact reservations pertaining to the right to form trade unions included in Article 8. *See id.*

[13] States parties are those countries that have ratified a Covenant and have thus consented to be bound by it. *See* BROWNLIE, *supra* note 11, at 607.

[14] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(a), 993 U.N.T.S. at 6. Article 8 states in relevant part that states parties to the ICESCR "undertake to ensure: (a) the right of everyone to form trade unions and join the trade union of his choice. . ." *Id.*

[15] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(d), 993 U.N.T.S. at 6. Article 8(1)(d) states in relevant part that states parties to the ICESCR "undertake to ensure. . .(d) the right to strike. . ." *Id.*

right of workers to "form trade unions and join the trade union of his choice" within the meaning of Article 8(1)(a).[16] Furthermore, this comment shows that no limitations apply permitting China to restrict these rights, and thus why China's current trade union system contravenes the ICESCR. Part II begins with a comprehensive discussion of the ACFTU and the legal obligations and duties its trade unions have to protect the rights and interests of their workers. Part II further establishes that the Chinese Communist Party's ("CCP") control of the ACFTU compels China's trade unions to effectuate the CCP's policies, currently at the expense of its workers' rights and interests. Lastly, Part III conducts an in-depth analysis of the ICESCR, with particular emphasis on Article 8(1)(a) and (d), and explains the reasons why China's current trade union system and its failure to provide for the right to strike are in violation.

II. CHINA'S TRADE UNION SYSTEM

A. The Right to Establish a Trade Union—Providing it is Under the Control of the ACFTU

China's Constitution explicitly provides for "freedom of association."[17] Furthermore, pursuant to the Trade Union Law, all workers in China have the right to join and organize trade unions,[18] as well as to elect their trade union

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[16] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(a), 993 U.N.T.S. at 6.

[17] P.R.C. CONST. ch. II, art. 35, (amended 1993), *reprinted in* RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS 243 (1997). Article 35 provides that "[c]itizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration." *Id. But see* A REPORT OF THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, SHACKLING THE DEFENDERS, LEGAL RESTRICTIONS ON INDEPENDENT HUMAN RIGHTS ADVOCACY WORLDWIDE 25 (1994)(explaining that these freedoms are subverted in practice by the Preamble of the Constitution.). *See* P.R.C. CONST. preamble, *reprinted in* BROWN, *supra*, at 234. The Constitution decrees that "[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people . . . will continue to adhere to the people's democratic dictatorship and [follow] the socialist road" and that "[t]he Chinese people must fight against those forces and elements, both at home and abroad, that are hostile to China's socialist system and try to undermine it." *Id. See also* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 724. This report states that although the Constitution provides for freedom of association, this right is restricted in practice. All professional and social organizations must be officially registered and approved by the Chinese Communist Party (CCP). And, while these regulations are ostensibly aimed at curtailing criminal gangs and secret organizations, they effectively preclude the formation of labor organizations that challenge the government. *See id.*

[18] THE TRADE UNION LAW OF THE PEOPLE'S REPUBLIC OF CHINA, ch. I, art. 3, (adopted at the Fifth Session of the Seventh National People's Congress) [hereinafter TRADE UNION LAW], *translated in* LAWS OF THE PEOPLES' REPUBLIC OF CHINA 1990-1992, 363 [hereinafter LAWS OF THE P.R.C.]. *See generally* 1997 U.S STATE DEP'T REPORT, *supra* note 1, at 735 (stating that

representatives.[19] When union membership in an institution, enterprise, or State organ numbers twenty-five or more, union members may establish a basic-level trade union committee.[20] Where union membership numbers less than twenty-five, members may elect an organizer to institute union activities.[21]

Although the Trade Union Law grants workers these rights, it also subverts them by decreeing the ACFTU as China's highest trade union body.[22] Under China's principle of democratic centralism,[23] the ACFTU has ultimate control over all existing trade unions,[24] even basic-level trade unions.[25] Although workers may form union committees and elect organizers, these committees and organizers are also under the ultimate control of the ACFTU.[26] Furthermore, the ACFTU has control over the establishment of any basic-level trade union organization, local trade union federation, or national or local industrial trade union organization.[27] Requiring all nascent trade unions to obtain approval from a higher-level trade union ensures that workers in China can only establish ACFTU-controlled trade unions, as the ACFTU has refused to

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there are no repercussions against workers who do not join unions, and that approximately eight percent of the state-owned or collective enterprises refrain from joining).

[19] *See* TRADE UNION LAW, ch. II, art. 11, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 365.

[20] *See id.*

[21] *See id.*, ch. II, art. 12, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 365.

[22] *See id.* Article 12 provides that the ACFTU shall be China's "unified national organization." *Id.*

[23] *See id.*, ch. II, art. 11, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 365. Article 11 states in relevant part: "[t]rade union organizations at various levels shall be established according to the principle of democratic centralism." *Id.* This system of centralized power governing from above in China is not unique to trade unions, but applies to all government organizations. *See* P.R.C. CONST. ch. I, art. 3, *reprinted in* BROWN, *supra* note 17, at 236. Article 3 provides in relevant part that "[t]he state organs of the People's Republic of China apply the principle of democratic centralism." *Id.*

[24] TRADE UNION LAW, ch. II, art. 11, translated in LAWS OF THE P.R.C., *supra* note 18, at 365 (decreeing that "[a] trade union organization at a higher level shall exercise leadership over a trade union organization at a lower level"). Because the ACFTU is decreed as the governing union body, by law it has ultimate control over all subservient trade unions.

[25] *See Change in Chinese Unions?*, 2 INT'L FED. CHEMICAL, ENERGY, MINE AND GEN. WORKERS' UNIONS, (1997) <http://www.icem.org/info/no1-97/china.html>. This article states that union cells which consist of 25 members or more must belong to a city or district section which is affiliated with the ACFTU. It states further that it is impossible to form a trade union that is not affiliated with the ACFTU. *See id.*

[26] The Trade Union Law does not explicitly state that the ACFTU has complete control over trade union organizers. However, because the Trade Union Law provides the ACFTU with complete control over all trade unions, it is highly likely that organizers are also under the control of the ACFTU.

[27] *See* TRADE UNION LAW ch. II, art. 13, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 365.

recognize any trade union not under its control.[28] Consequently, the Trade Union Law "ensures that the [ACFTU] has a legal monopoly on all trade union organization."[29]

B. China's Trade Union Governing Body: the All-China Federation of Trade Unions

The ACFTU was officially established in the 1950's and has been China's only official trade union.[30] Its membership exceeds one-hundred million,[31] making it the largest trade union organization in the world.[32] Moreover, its branches are established in every state enterprise,[33] and it currently controls 153,000 trade unions in private and overseas-funded enterprises that represent over fourteen million workers.[34]

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[28] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 735. *See generally* Orentlicher & Gelatt, *supra* note 1, at 90-91 (stating that requiring all trade unions to be under the control of a national trade union undercuts the "freedom of association" protection established in the constitution).

[29] *See Human Rights in China: Hearings Before the House Comm. on Int'l Relations Subcomm. on Int'l Operations and Human Rights on Human Rights in China*, 105th Cong. (1998)(statement of Phillip Fishman, Assistant Dir., Int'l Affairs Dept Am. Fed'n of Labor and Congress of Indus. Orgs.) *available in* 1998 WL 12761757; *see also* Anita Chan & Robert A. Senser, *China's Troubled Workers*, FOREIGN AFFAIRS, Mar. 13, 1997, at 7, *available in* 1997 WL 9287258 (stating that the 1992 Labor Law renewed the ACFTU monopoly over all other trade unions); Orentlicher & Gelatt, *supra* note 1, at 90-91 (explaining that the trade union law does not allow for the formation of independent trade unions); *Labour Activists in China*, AMNESTY INT'L REPORT (May 1, 1996) <http://www.anmesty.org/alib/aipub/1996/ASA/31701396.html> (providing that the 1992 Trade Union Law grants the ACFTU control over all of China's trade unions).

[30] *See* Mao-Chang Li, *Legal Aspects of Labor Relations in China: Critical Issues for International Investors*, 33 COLUM. J. TRANSNAT'L L. 521, 548 (1995); LEE LAI TO, TRADE UNIONS IN CHINA, 1949 TO THE PRESENT 7, 8, 34 (1986)(stating that the ACFTU was established in 1925 by the Chinese Communist Party, and was officially designated as the country's highest union body in the 1950 Trade Union Law).

[31] *See* Sun Jie, *Standing Committee Member on Trade Union Law*, BEIJING XINHUA (in Chinese) Mar. 22, 1992, *translated in* FBIS-CHI-92-057, Mar. 23, 1992, at 29. Sun Jie explains that as of 1992, ACFTU affiliated trade unions represented 103 million of China's 140 million workers. *See id.*

[32] *See Trade Unions Protect Workers' Rights, Interests*, BEIJING XINHUA (in English), Apr. 27, 1995, *reprinted in* FBIS-CHI-95-081 Apr. 27, 1995, at 36.

[33] *See Dissidents Call on Chinese to Form Unions*, CHI. TRIB. Dec. 23, 1997, at 12.

[34] *See Trade Unions in China's Non-State Sector*, XINHUA ENG. NEWSWIRE, Dec. 21, 1997, *available in* 1997 WL 15763080. *See also* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 735 (revealing that according to 1996 official statistics, 4.54 million workers, 75% of the total work force employed in foreign investment enterprises, belonged to trade unions).

1. Protecting workers' rights

Workers in China are considered the "masters of the country,"[35] and from the beginning the official purpose of the ACFTU has been to protect their legitimate rights.[36] The Vice-Chairman of the ACFTU confirmed this notion in 1995 when he stated that the continuing goal of China's trade unions is to better safeguard workers' rights.[37] The Trade Union Law establishes the responsibilities and obligations trade unions have in protecting workers' rights and interests.

Under the command of the Trade Union Law, trade unions must serve the workers wholeheartedly[38] and protect their legitimate rights and interests.[39] Trade unions must look after the general welfare of their workers, and their functions include helping solve workers' difficulties, soliciting workers' opinions, and voicing workers' demands.[40] Specifically, if a state or privately owned enterprise encroaches on the lawful rights and interests of its workers, trade unions may send a representative to investigate.[41] In addition, if an enterprise violates the work hour restrictions, trade unions have the right to demand rectification by the management.[42] Similarly, if trade unions discover that workers operate under unsafe conditions, or that major work hazards

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[35] TRADE UNION LAW ch. I, art. 8, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 364; *see also* P.R.C. CONST. ch. II, art. 42, *reprinted in* BROWN, *supra* note 17, at 244.

[36] *See* Henry R. Zheng, *An Introduction to the Labor Law of the People's Republic of China*, 28 HARV. INT'L L.J. 385, 395 (1987). Zheng reveals that in 1950, nationalization was not yet complete. In accordance with the Marxist view that private enterprises necessarily exploit workers, the ACFTU's official function was to protect workers' rights from encroachment by management. *See id.*; *see also* Malcolm Warner, *Chinese Trade Unions: Structure and Function in a Decade of Economic Reform, 1979-1989*, *in* ORGANIZED LABOR IN THE ASIA-PACIFIC REGION 59, 70 (Stephen Frankel, ed. 1993)(stating that from its inception the formal goal of the ACFTU has been to unite workers and improve their welfare).

[37] *See Trade Unions Expected to Gain Prominence*, CHINA DAILY (in English) Feb. 10, 1995, *reprinted in* FBIS-CHI-95-029, Feb. 13, 1995, 41.

[38] *See* TRADE UNION LAW ch. I, art. 6, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 364.

[39] *See id.*

[40] *See id.*

[41] *See id.*, ch. II, art. 16, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 366.

[42] *See id.*, ch. II, art. 17, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 366. *See generally* THE LABOUR LAW OF THE PEOPLE'S REPUBLIC OF CHINA ch. IV, art. 36 (adopted at the Eighth Meeting of the Standing Committee of the Eighth National People's Congress) *translated in* 4 THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA 1994-1996, 61 (decreeing that work hours are restricted to an average of 8 hours a day and 44 hours per week); 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 738 (stating that the workweek was reduced by the government in 1995 to 40 hours per week).

exist, they have the right to propose a solution.[43] And, if work conditions are hazardous to the point of threatening workers' lives, trade unions have the right to propose that management organize a withdrawal of workers from the workplace.[44]

However, conspicuously absent from the Rights and Obligations of Trade Unions' provision is compulsory language requiring the trade unions to take affirmative action to protect workers' essential rights.[45] Although the law empowers trade unions with the "right" to defend workers when their rights are violated,[46] and provides unions with the "right" to intervene when workers' health or safety is endangered,[47] the law does not impose any mandatory obligations to do so.[48] As a result, trade unions retain discretion as to the defense of workers' essential rights.

2. *Carrying out the Chinese Communist Party's plan*

The discretion the Trade Union Law provides trade unions is significant because in all respects the ACFTU is controlled by the Chinese Communist

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[43] *See id.*, ch. III, art. 24, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 367-68.

[44] *See id.* Article 24 states in pertinent part that "where the very life of the workers and staff members is in danger, the trade union has the right to make a proposal to the management that a withdrawal of the workers and staff members from the dangerous site be organized, and the management must make a decision without delay." *Id.*

[45] *See id.*, ch. III, arts. 20, 21, 27, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 367-68. The Trade Union Law provides that there are some mandatory requirements to act affirmatively. However, they do not concern essential rights. For instance, trade unions "shall" assist workers when they go to court, "shall" organize workers for recreational activities, and "shall" assist in labor disputes. *Id.*

[46] *See id.*, ch. III, art. 17, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 366.

[47] *See id.*, ch. III, art. 24, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 367-68.

[48] *See* Vai Io Lo, *Labor and Employment in the People's Republic of China: From a Nonmarket-Driven to a Market-Driven Economy*, 6 IND. INT'L COMP. L. REV. 337, 384 (1996). Vai Io Lo explains that pursuant to the Trade Union Law, the "trade union can intervene in cases of a dismissal in violation of the law, is empowered in situations involving worker health and safety, but has the duty to maintain continuous production." *Id.* While there is no mandatory obligation to protect workers' rights, pursuant to Article 8 of the Trade Union Law, trade unions have a duty to maintain production. *See* TRADE UNION LAW ch. I, art. 8, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 364. Article 8 states in relevant part that trade unions "shall call on and organize the workers and staff members to strive to fulfill their production targets and work . . . . so as to raise labour productivity and economic returns." *Id.* This reasoning is being made with the understanding that the terms "may" and "shall," as they appear in legislation, are considered synonymous in some countries. It is this author's belief, however, that the term "shall" as it appears in China's Trade Union Law intimates a more mandatory obligation than that of the term "may".

Party,[49] and it must advocate and implement the party's policies.[50] The CCP uses trade unions for two primary purposes. First, as the ACFTU Research Institute Deputy Director stated, the CCP views workers as its "propaganda and indoctrination targets,"[51] and employs trade unions to transmit its political and ideological line to the masses so that they will perform the party's mission.[52] Second, the CCP considers itself to be "the vanguard of the

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[49] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 735 (stating that the ACFTU is controlled by the CCP); *see also* Kristi Heim, *Foreign-Invested Firms in China Face Pay Talks*, WALL ST. J. EUR., 2, Sept. 30, 1997, at 2 (explaining that the ACFTU is controlled by the Propaganda Department of the CCP); Gordon White, *Chinese Trade Unions in the Transition From Socialism: Towards Corporatism or Civil Society?*, 34 BRIT. J. INDUS. REL. 433, 443 (1996)(providing that the CCP's influence over trade unions in the 1990s is manifested by the existence of "'double postings'", whereby CCP members hold simultaneous positions as union officials); *China All-China Federation of the Trade Unions Holds Discussion*, BEIJING XINHUA (in English), Mar. 11, 1997, *reprinted in* FBIS-CHI-97-070, Mar. 11, 1997 (divulging that Wei Jianxing, who is the president of the ACFTU, is also the Secretariat of the CCP Central Committee and a member of the Political Bureau); *Anhui Leader on Trade Union Ideological Work*, HEFEI ANHUI RIBAO (in Chinese), June 4, 1990, *translated in* FBIS-CHI-90-120, June 21, 1990, at 34 (discussing a statement given by a deputy director of the CCP who declared that trade unions are led by the communist party and are "an important pillar of the state power organ"); *It is Necessary to Make a New Development in the Work of Trade Unions, Communist Youth League Organizations and Women's Federations*, BEIJING XINHUA (in Chinese) Jan. 31, 1990, *translated in* FBIS-CHI-90-022, Feb. 1, 1990, at 13 (stating that trade unions are "social props of state power").

[50] *See* Vai Io Lo, *supra* note 48, at 383; *see also* Zheng, *supra* note 36, at 401 (stating that trade unions are obligated to follow party policy); Han Peixin, *Several Questions About Wholeheartedly Relying on the Working Class*, BEIJING GONGREN RIBAO (in Chinese), Sept. 14, 1989, *translated in* FBIS-CHI-89-187, Sept. 28, 1989, at 47. In emphasizing the duty of trade unions to follow party policy, Han Peixin states that "[w]e stress the need to obey the party's leadership, and the most important thing is to take the implementation of the party's line principles, and policies as the main political task for the trade unions so as to unite the working masses to strive for the common objective set forth by the party rather than having their own way." *Id.*

[51] Han Xiya, *On the Need to Indoctrinate Systematically Enterprise Employees in Marxist Theory*, BEIJING ZHENLI DE ZHUIQIU (in Chinese), Nov. 11, 1996, *translated in* FBIS-CHI-97-009, Nov. 11, 1996, 15. *See also* Mehmet Nur, *Rely Wholeheartedly On the Working Class and Strive To Do a Good Job With Union Work*, XINJIANG RIBAO (in Chinese), Dec. 24, 1996, *translated in* FBIS-CHI-97-046, Dec. 24, 1996. Mehmet Nur explains that the CCP views trade unions as the "bridge and the link between the party and the workers." *Id.*

[52] *See* An Yuanchao, *The Class Nature of Labor Unions Has Not Withered Away*, BEIJING ZHENLI DE ZHUIQIU, (in Chinese), Nov. 11, 1996, *translated in* FBIS-CHI-97-009, Nov. 11, 1996, 22. Using trade unions to perform the party's mission was stressed in a speech given by Hu Jintao, a Member of the Standing Committee of the Political Bureau of the Communist Party of the CCP Central Committee. He stated at an ACFTU official meeting that trade unions need to become "'working class mass organizations led by the CPC and armed with the theory of building socialism with distinctive Chinese characteristics that can lead the employee masses in bold struggle to perform the party's mission.'" *Id. See also Human Rights in China:*

working class,"[53] and uses trade unions to protect the rights and interests of China's workers.[54]

If the CCP stresses that trade unions concentrate their efforts on achieving one mission, the propensity exists for the other to be compromised. The CCP's current plan emphasizes using the ACFTU and its subservient trade unions to protect workers' rights so workers will be able and willing to carry out the CCP's central task of realizing China's economic reform.[55]

Hearings Before the House Comm. on Int'l Relations Subcomm. on Int'l Operations and Human Rights on Human Rights in China, 105th Cong. (1998)(statement of Phillip Fishman, Assistant Dir., Int'l Affairs Dept Am. Fed'n of Labor and Congress of Indus. Orgs.) *available in* 1998 WL 12761757. The speaker stated that in 1994, the official magazine of the ACFTU explained that "'[t]he premise for unions [in China] is to carry out the tasks of the party.'" *Id.* He stated further that the General Secretary of the ACFTU declared in 1995 that "'unions [in China] should resolutely uphold the unitary leadership of the party. . . [and] should maintain a high degree of unanimity with the party politically, in ideas and actions'". *Id; see also* TRADE UNION LAW ch. I, art. 5, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 364. Article 5 contains a provision that makes it the duty of trade unions to carry-out the state plan. Article 5 provides in pertinent part that "trade unions shall assist the people's governments in their work and safeguard the socialist State power . . . ." *Id.*

[53] Liu Rixin, *Enterprise Reform Must Not Change Workers' Status as Masters*, ZHENLI DE ZHUIQIU (in Chinese), Jan 11, 1997, *translated in* FBIS-CHI-97-030, Jan. 11, 1997, 9.

[54] *See* Mehmet Nur, *supra* note 51 (commenting that the CCP uses trade unions to protect workers' welfare); *see also* Han Peixing, *supra* note 50, at 47. Han Peixing explains that the CCP uses trade unions to protect workers' rights so that the workers will effectuate the CCP's objectives. *Id.*

[55] *See China: All China Federation of Trade Unions Holds Discussion*, *supra* note 49, at 2-3. Wei Jianxing, president of the ACFTU, stated at a recent speech that "trade unions at all levels should show concern for workers' troubles and daily life in order to unite them around the Party and the government and to carry out the enterprise reform, [and to] step up the economic development . . . ." *See also* Mehmet Nur, *supra* note 51 ("[m]aking economic construction the core is the party's central task. Trade unions serve this central purpose, and to do that, they must guide, mobilize, and protect the masses of workers' enthusiasm in immersing themselves in the socialist modernization construction."); *China: Union Meeting Sets Out Worker's Roles*, CHINA DAILY, Dec. 10, 1997, *available in* 1997 WL 13648601. The ACFTU vice-chairman recently stated that "trade unions should make more effort to arouse the enthusiasm of workers to help State-owned enterprises run smoothly." *Id.* The Trade Union Law provides that trade unions are required to aid the state by ensuring that workers comply with state economic goals. *See* TRADE UNION LAW ch. I, art. 8, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 364. Article 8 states in relevant part that "[t]rade unions shall organize the workers and staff members . . . so as to raise labour productivity and economic returns and develop the social productive forces." *Id.*; *see also China's Gradual Reform: Backing into the Future*, JOURNAL OF AMERICAN CHAMBER OF COMMERCE IN HONG KONG, Aug. 1, 1997, *available in* 1997 WL 9724737. This article explains that China's economic reform began in the late 1970's and early 1980's and that "China faced two tasks: reforming an irrational economic system and rectifying a distorted economic structure." *Id.* State-enterprise reform became the focus of the economic transition. *See id.*; *see also China: Living Standard Guarantees Urged; Employment Issue Critical*, CHINA DAILY, May 15, 1998, *available in* 1998

Effectuating the economic reform places China's trade unions in an ambiguous position.[56] Trade unions are supposed to protect their workers' rights while simultaneously implementing the enterprise reforms that are essentially causing their workers' rights to be violated.[57]

As previously elucidated, the Trade Union Law does not require trade unions to protect their workers' essential rights. The discretion the law leaves to trade unions is significant because when the CCP demands an increase in production, China's trade unions must comply.[58] Trade unions that attempt to protect the rights and interests of their workers at the expense of the economic plan are held in contravention of the CCP's policy and are immediately criticized by the CCP for protecting the conservative forces and impeding the economic reform.[59] As the vice president of the ACFTU recently stated, "[w]orkers' rights are secondary to economic growth and the party."[60]

WL 7575686. In reference to state enterprise reform, this article quotes China's President Jiang Zemin as stating that "[t]o attain this goal, we must first solve the overstaffing problem that is haunting many State enterprises, and help them raise efficiency and competitiveness through laying off their redundant employees"; *Dissidents Call on Chinese to Form Unions*, *supra* note 33, at 12. The article notes that laying-off workers from state enterprises has effectively smashed "the 'iron rice bowl' of lifetime employment for tens of millions of workers." *Id.*; Chan & Senser, *supra* note 29 (stating that a major objective of the economic reform was eliminating "lifetime employment").

[56] *See* White, *supra* note 49, at 439.

[57] *See id.*

[58] *See* Warner, *supra* note 36, at 70; *see also* Vai Io Lo, *supra* note 48, at 385 (stating that the ACFTU must follow the CCP's policies); Chan & Senser, *supra* note 29. Chan and Sensor assert that the inherent weakness of trade unions lies in their being controlled by the CCP and management. Consequently, trade unions are unable to protect their workers. *See id.*; *see also* Michael Richardson, *A Dissident's Determined Battle Q&A/Han Dongfong*, INT'L HERALD TRIB., May 12, 1997, at 4, *available in* 1997 WL 4491271. Han Dongfang, who established an independent trade union in 1989 and was subsequently imprisoned, states that "[i]n China, trade unions are controlled by the party and government, and they serve the interests of the employers, not workers. We want unions that speak for workers." *Id.*; *see also Chinese Dissident Urges Workers to Stand up for their Rights*, AGENCE FRANCE-PRESSE, Jan. 26, 1998 *available in* 1998 WL 2208122. Wei Jeinsheng, an exiled Chinese dissident, implies that it is impossible for the CCP to protect the interests of workers because it owns "all the state-owned capital but is also in charge of the unions and workers' rights." *Id.* He then asks rhetorically "[w]hat is the point of having a union if it is directly under the control of the party?" *Id.*

[59] *See* Feng Tongqing, *Workers and Trade Unions under the Market Economy: Perspectives from Grassroots Union Cadres*, 28 CHINESE SOC. & ANTHROPOLOGY 3, 44 (1996); *see also* Zhang Mingxin, *PRC Trade Union Role in Market Economy*, BEIJING ZHONGGUO XINWEN SHE, (in Chinese), Mar. 22, 1994, *translated in* FBIS-CHI-94-063, Apr. 1, 1994, 58. Zhang Mingxin asserts that "China's trade union are now becoming 'antishock valves' enabling the reform to progress in a stable society." *Id.*

[60] China Country Report: Presented to the Hong Kong Christian Industrial Committee, (June, 1995)(statement of Shek Ping Kwan) <http://www.citinv.it/associazioni/CNMS/archivio/

Consequently, the CCP's control of the ACFTU has a deleterious effect, supplanting workers' rights for the economic reform. This was illustrated during the first nine months of 1997, when more than 9.6 million workers were laid-off from bloated state-owned enterprises.[61] The ACFTU's own report divulges that eleven million workers, representing ten percent of China's total workforce, were laid-off as of 1999.[62] Furthermore, many deficient state-owned enterprises are unable to pay their workers,[63] or can pay them only partial wages.[64] Seven million workers employed in state-owned enterprises live in poverty.[65]

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paesi/chinareport. html>. *See also* White, *supra* note 49, at 440. White explains that when the economic reforms began in 1978,

> [a]n increasingly wide gap has opened up between the official ideological description of workers as 'masters of the enterprise' and the reality that they are turning into wage labourers in increasingly profit-oriented enterprises and into commodities in increasingly competitive labour markets. While these trends have generated new interests and demands among workers which deserve union attention, this has conflicted with their role as an organizational instrument of the Party. [As a result] strategic responsibility to support official reform policies continued to take precedence over [trade unions'] responsibilities to their members . . . .

Id.

[61] *See* Peter Charles Wonacott, *High Number of Laid-Off Workers in China Spurs Call for More Aid*, ASIAN WALL. ST. J., Nov. 28, 1997, at 10; *see also* U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICE FOR 1996, S. DOC 105-10, at 617 (1st Sess. 1997) [hereinafter 1996 U.S. State Dep't Report] (reporting that "[a]n estimated 10 million state workers [in 1996 were either] laid-off, or not paid. Millions more have been idled on partial wages.").

[62] *Trade Unions Drive to Help Laid-Off Workers*, BEIJING XINHUA (in English), Dec. 16, 1997, *reprinted in* FBIS-CHI-97-350, Dec. 16, 1997, at 1.

[63] *See* Vai Io Lo, *supra* note 48, at 387.

[64] *See* 1996 U.S. STATE DEP'T REPORT, *supra* note 61, at 617 (reporting that partial wages are paid to millions of idle, but not laid-off, workers); *see also* James Harding, *Shanghai's Invisible Unemployed*, FIN. POST, Feb. 12, 1997, at 53 (divulging that the unemployment percentages are probably much higher considering that state-owned enterprises that lay-off workers keep them on a subsistence wage, so they are not counted as being unemployed).

[65] *See* Feng Tongqing, *supra* note 59, at 63. Feng Tongqing states that this was revealed by the ACFTU's own report. *See id.* Trade unions, however, are attempting to alleviate the effects layoffs have on workers by providing them with job-training and financial assistance. *See Trade Unions Launch Nationwide Aid-The-Needy Drive*, XINHUA ENGLISH NEWSWIRE, Dec. 16, 1997, *available in* 1997 WL 15761783 (explaining that 500 job agencies and 1,300 job training facilities have been established by trade unions to assist needy workers); *see also* Cao Min, *Officials Pay Visits to Workers Nationwide*, CHINA DAILY, Feb. 6, 1997, at 21, *available in* 1997 WL 8258585. Cao Min points out that trade unions have established special funds to help laid-off and poorer workers, and that the ACFTU has allocated 15.5 million yuan or $1.87 million U.S. dollars for this purpose. In addition, trade unions have established job agencies to train one million laid-off workers, and these agencies have helped 150,000 find new jobs. *See id.*

C. Independent Trade Unions in China and the Government's Response

Workers feel that the CCP's control over their trade unions has prevented the trade unions from being able to promote and protect their rights and interests.[66] Their estrangement from, and dissatisfaction with, their ACFTU-controlled trade unions have compelled workers to establish and join independent trade unions.[67] The most organized of these unions was the Workers' Autonomous Federation (WAF).[68] Workers from the manufacturing, service, and building industries joined the WAF in an attempt to oppose

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[66] *See* Lu Ping, *Preface* to HONG KONG TRADE UNION EDUCATION CENTRE, A MOMENT OF TRUTH: WORKERS' PARTICIPATION IN CHINA'S 1989 DEMOCRACY MOVEMENT AND THE EMERGENCE OF INDEPENDENT UNIONS xi, xii (Gus Mk & Kit Chan et al., trans., 1990)(1990) [hereinafter MOMENT OF TRUTH], (stating that because the ACFTU is under the control of the CCP it is unable to protect or fight for the interests of its workers); *see also* Richardson, *supra* note 58, at 4 (commenting that trade unions are controlled by the CCP, and that they are thus more concerned with serving employers than protecting the rights and interests of workers); Zheng, *supra* note 36, at 400. Zheng explains that "[i]n cases of conflict between the interests of employees and the interests of the state, union leaders may find it difficult to vigorously defend the interests of the union members." *Id.*; *see also* White, *supra* note 49, at 447 (explaining that during a poll taken in two cities, workers regarded trade unions "primarily as organizational instruments of managerial or party priorities and not autonomous agents of workers' interests); Feng Tongqing, *supra* note 59, at 15-16. Feng Tongqing claims that trade unions are also frustrated with their inability to perform under the control of the ACFTU, and that this is causing the ACFTU to be alienated from its grassroots trade unions and their members. He states further that the dissatisfaction with the ACFTU is partly represented by the trade unions' refusal to contribute the yearly required funds to the ACFTU. In 1993, the ACFTU received merely 10% of its total annual budget from union dues. By the first quarter of 1993, one province that has four million union members, merely submitted 600,000 yuan. And, in another province that consists of 104 counties, 88 counties refused to pay any dues to the ACFTU. *See id.* This appears to violate the Trade Union Law. *See* TRADE UNION LAW ch. IV, art. 36, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 370. Article 36 provides in relevant part that the source of trade union funds come from "(1) membership dues paid by union members; (2) a contribution, equivalent to two percent of the workers' monthly payroll, paid by the enterprise or institution owned by the whole people or by the collective or paid by the State organ where the trade union is established . . . ." *Id.*

[67] *See* Lu Ping, MOMENT OF TRUTH, *supra* note 66, at preface.

[68] *See* Liang Hong, *Beijing Workers' Autonomous Union: Origin and Activities, in* MOMENT OF TRUTH, *supra* note 66, 1-2 (reporting that the WAF was established in 1989 during the democratic movement in Beijing.).

the official union structure.[69] However, the WAF and all subsequent attempts to form independent trade unions have been repelled by the government.[70]

The leaders of the WAF were arrested, and twelve of its members were charged with counterrevolutionary sabotage and subsequently executed.[71] The International Confederation of Free Trade Unions asserts that "[w]henever questioned by the international community . . . about the arrest, detention and sentencing of independent trade union activists, the PRC government invariably presents the victims as dangerous criminals, guilty of the gravest crimes, including 'counter-revolution' and now . . . subversion endangering state security."[72] Workers who attempt to establish independent trade unions

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[69] *See* Lu Ping, *A Brief History of the Workers' Autonomous Federation*, *in* MOMENT OF TRUTH, *supra* note 66, at 13-14. Lu Ping claims that over 10,000 workers joined the WAF. *Id.* *See also Commentator Examines "'Illegal'" Trade Unions*, BEIJING GONGREN RIBAO (in Chinese), June 18, 1989, *translated in* FBIS-CHI-89-134, July 14, 1989, at 23. The article states that the members of the WAF were the "dregs of society" who "harbor[ed] [an] inveterate hatred" of the government and the socialist system. *See id.*

[70] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 735 (stating that all attempts to establish independent trade unions in 1997 were unsuccessful); *see also China Bars Efforts to Unionize*, L.A. TIMES, Apr. 10, 1997, A10. The article reveals that "[a] report on workers' rights in China says Beijing is systematically crushing all attempts to form trade unions and has detained dozens of activists on spurious charges". *Id.*

[71] *See* Lu Ping, *A Brief Moment History of the Workers' Autonomous Federation*, *in* MOMENT OF TRUTH, *supra* note 66, at 19; *see also* Michael R. Curran, *On Common Ground: Using Cultural Bias Factors to Deconstruct Asia-Pacific Labor Law*, 30 GEO. WASH. J. INT'L L. & ECON. 349, 381 (1996-1997). Curran notes that only workers involved in the WAF, and not students, were executed following the June 1989 movement. *See id.*; Susan Finder & Fu Hualing, *Tightening up Chinese Courts' "Bags" - the Amended PRC, Criminal Law*, CHINA LAW & PRACTICE, June, 1997, at 35-36. Finder and Fu Hualing explain that the crime of counterrevolution has been abolished and replaced in the 1997 amendment to the Criminal Law with "Crimes of Endangering National Security." *See id.* They argue, however, that it is actually easier to prove crimes endangering national security than counterrevolutionary crimes. *See id.* Although it was usually imputed, to prove counterrevolutionary crimes it was required that counterrevolution intent be proven. In contrast, no counterrevolutionary intent is required to be found guilty of "Crimes of Endangering National Security[.]". *See id.*; *see also* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 719. This report explains that "[t]he new Criminal law . . . replaced 'counterrevolutionary' offenses with provisions barring 'treasonous acts designed to threaten national security.' Crimes that threaten national security are loosely defined and some observers think they will be used to punish the same 'crimes' covered under the counterrevolutionary laws." *Id.*; *see also Whose Security? "State Security" in China's New Criminal Code*, CHINA RTS. FORUM, (Summer 1997) <http://www.igc.apc.org/hric/crf/english/97summer/e8.html>. The article states that "China has merely replaced the term 'counterrevolution' with the equally elastic notion of 'endangering state security' and has, in the process, actually broadened the capacity of the state to suppress dissent." *Id.*

[72] *See "Search and Destroy": Hunting Down Free Trade Unions in China*, INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, 1997, at ch. V., 14, & app. 1. <http://www.icftu.org/english/turights/etuchinareport. html> [hereinafter *Search and Destroy*] (revealing that trade union activists are often arrested for subversion); *see also* The P.R.C. CRIMINAL LAW part. II.

are persecuted by the Chinese government.[73] More alarming for workers, however, is that the government engages in preemptive attacks against anyone who merely advocates the positives of having independent trade unions.[74]

The primary reason China prohibits independent trade unions is because China's leaders fear any labor organization that could galvanize workers into forming a movement like Poland's Solidarity movement.[75] China relies on its

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ch. I, art. 105, at 16 (adopted by the Second Session of the Fifth National People's Congress and amended by the Fifth Session of the Eight National People's Congress), *available in* XINHUA (in Chinese) Mar. 17, 1997, *translated in* FBIS-CHI-97-056, Mar. 17, 1997 [hereinafter P.R.C. CRIMINAL LAW]. Subversion is defined in article 105 of the Chinese Criminal Law, and falls under Crimes of Endangering National Security. *See id.* Article 105 states in pertinent part that

> [w]hoever organizes, plots, or acts to subvert the political power of the state and overthrow the socialist system, the ringleaders or those whose crimes are grave are to be sentenced to life imprisonment, or not less than 10 years of fixed-term imprisonment; active participants are to be sentenced from not less than three years to not more than 10 years of fixed-term imprisonment . . . .[and] [w]hoever instigates the subversion of the political power of the state and overthrow the socialist system through spreading rumours, slandering, or other ways are to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, control or deprivation of political rights[.]

Id.

[73] *See Human Rights in China: Hearings Before the House Comm. on Int'l Relations Subcomm. on Int'l Operations and Human Rights on Human Rights in China*, 105th Cong. (1998)(statement of Phillip Fishman, Assistant Dir., Int'l Affairs Dept Am. Fed'n of Labor and Congress of Indus. Orgs.) *available in* 1998 WL 12761757. The speaker states that "[w]orkers attempting to organize independent trade unions or carry out strikes in response to dreadful working conditions . . . are fired, imprisoned, beaten and tortured." *Id.*; *see also Search and Destroy*, *supra* note 72, at I (asserting that the P.R.C. is intent on destroying any attempt by workers to form independent trade unions).

[74] *See Search and Destroy*, *supra* note 72, at I (explaining that "[t]he mere expression of an intention to advise, let alone organize workers, leads to arrest and detention upon discovery"); *see also Human Rights in China: Hearings Before the House Subcomm. On Int'l Operations and Human Rights in China* 105th Cong. (1998)(statement of Mike Jendrzejczyk), *available in* 1998 WL 12761756. The speaker reveals that in 1998 a dissident calling for the right to organize was arrested and sentenced to three years of reeducation through labor. *See id.*

[75] *See* Lorien Holland, *Chinese Activist Urges Presidential Action Over Labour Unrest*, AGENCE FRANCE-PRESSE, Jan. 18, 1998, *available in* 1998 WL 2202696 (stating that the communist authorities crack-down on those voicing their opposition to the massive state enterprise lay-offs because they are fully aware that any labor unrest could rival that of the [Poland's] political Solidarity movement); *see also China Concedes Need to Boost Workers' Role Amid Rising Dissent*, AGENCE-FRANCE PRESSE, Dec. 24, 1997, *available in* 1997 WL 13460386 (revealing that China's government is loathe to allow any independent trade union movement because of the threat that it will open the door for a political rival like Poland's Solidarity movement); Feng Tongqing, *supra* note 59, at 19 (stating that "[i]n 1980 the Chinese authorities were shocked by the Solidarity and the government in Poland, as well as similar labor unrest in other former state socialist countries"). *See generally* Michael Albright, *Poland's 1991 Labor Statutes: A Refinement of Earlier Legislation Rather than a Liberalization*

workers for political stability,[76] and uses its ACFTU-controlled trade unions to "protect the party's class base and protect the party's status as the ruling party."[77] Thus, any independent trade union activity is seen as usurping the status of the ACFTU and is perceived as a great threat to the CCP's power and

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of Union Rights and Powers, 25 CASE W. RES. J. INT'L L. 571, 575-76 (1993). Albright describes Poland's Solidarity Movement as an independent trade union movement that manifested a militant attitude and was concerned with representing workers' rights. *See id.* at 575. Before the emergence of Solidarity, the communist government controlled all trade unions. Solidarity destroyed Poland's trade union structure. *See id.* at 576. In time Solidarity forced Poland's government to move towards a market economy, which eventually transformed Poland from a socialist state to a capitalistic democracy. *See id.* at 571.

[76] *See* Zhu Youdi, *Leaders Urge Working Class to Protect Socialism*, BEIJING XINHUA (in Chinese) Dec. 21, 1989, *translated in* FBIS-CHI-89-009-S, Jan. 12, 1989, at 1 (commenting on Premier Li Peng's speech in which he stated that workers are the basis for China's political stability); *see also Hubei Leader Cites Trade Union Role in Stability*, WUHAN HUBEI PROVINCIAL SERVICE (in Mandarin) Jan. 12, 1990, *translated in* FBIS-CHI-90-015, Jan. 23, 1990, at 50 (stating that the main task of the CCP is to maintain social stability, and if the working class is stable, the whole society will be stable); Isabelle Wan & Steven Blayney, *On May Day, Consider China's Labor Time Bomb*, ASIAN WALL ST. J., May 1, 1997 (Wan and Blayney believe that "[f]or a country preoccupied with maintaining social stability, particularly among the revolutionary proletariat, the implication of labor instability [caused by a surplus of workers from state enterprises] is a source of considerable anxiety." *Id.* China's fear of labor unrest is not irrational. *See* Richardson, *supra* note 58, at 4. Richardson reports that in interviewing Han Dongfang, China's most famous independent trade union activist, Han explained that

> [a]s state enterprises lay off staff and rural workers move in very large numbers into urban centers looking for jobs, unemployment is becoming a very serious problem. The gap between rich and poor is widening. It's a time bomb for China. . . The workers won't keep quite forever. One day the situation will explode and they will rebel.

Id.; *see also Human Rights in China: Hearings Before the House Comm. on Int'l Relations Subcomm. on Int'l Operations and Human Rights on Human Rights in China*, 105th Cong. (1998)(statement of Phillip Fishman, Assistant Dir., Int'l Affairs Dept Am. Fed'n of Labor and Congress of Indus. Orgs.) *available in* 1998 WL 12761757. The speaker testified that "authorities have good reason to be concerned as worker discontent has proliferated all over the country over such issues as lay-offs, nonpayment of wages, and unsafe work conditions." *Id.*; *see also* Chan & Senser, *supra* note 29 ("[t]oday a state of near-panic grips a large part of China's work force").

[77] *See* Mehmet Nur, *supra* note 51. Mehmet Nur states that the ACFTU and its trade unions "play a mainstay role in reinforcing the state's political power and preserving social stability." *Id.*; *see also* Andrew K. Stutzman, *Our Eroding Industrial Base: U.S. Labor Laws Compared with Labor Laws of Less Developed Nations in Light of the Global Economy*, 12 DICK. J. INT'L L. 135, 151 (1993)(explaining that main purpose of China's trade unions is to safeguard the socialist state power and not to protect workers' interests). *See generally* Lu Xiaowei, *Jiangsu Governor on Enhancing Trade Unions' Role*, NANJING XINHUA RIBAO (in Chinese) Aug. 26, 1990, *translated in* FBIS-CHI-90-174, Sept. 7, 1990, at 58. The provincial governor, speaking at a meeting to discuss ways for the CCP to improve its leadership over the people, stated that "[s]trengthening the ties between the government and the trade unions is an important measure initiated by the [CCP] to establish close relations with the people." *Id.*

control over China's workers.[78] Strikes are also seen as a threat and are feared by China's leaders.[79] Consequently, the Chinese government prohibits workers from exercising this important means of protecting their rights and interests.

D. Strikes in China

In 1975, the right to strike received official recognition when it was included in the Constitution.[80] The 1975 Constitution deleted the 1954 Constitutional provision which demanded that workers uphold labor discipline and maintain public order,[81] effectively circumscribing the right to strike. However, the right to strike provision was deleted in the 1982 Constitution,[82] and was not added in the 1993 amendment to the Constitution. The provision mandating that workers uphold labor discipline and maintain public order has

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[78] *See* Josephs, *supra* note 1, at 572 (explaining that the "[t]he government may surmise that independent union activity carries a much greater potential threat to its domination of the political process and direction of economic development than either tabloid journalism or religious observance"). *See generally* Stutzman, *supra* note 77, at 150-51. Stutzman believes that laws such as China's Trade Union Law were specifically "designed to maximize state control over the citizenry." *Id.*

[79] *See* Vai Io Lo, *supra* note 48, at 359 (revealing that the deletion of the right to strike from the 1982 Constitution was in response to the Chinese leaders' fear that a similar Solidarity-like movement might occur in China).

[80] *See* John Bruce Lewis & Bruce L. Ottley, *China's Developing Labor Law*, 59 WASH. U. L.Q. 1165, 1196 (1982). Lewis and Ottley go on to explain that an important part of the CCP's labor policy prior to 1949 was the right to engage in strikes. Although the general rule to strike was not supported by Mao Zedong, in 1957 strikes received his philosophical support as a means of resisting the bureaucracy. *See id.* at 1195. *See generally* Ann Kent, *Waiting For Rights: China's Human Rights and China's Constitution 1949-1989*, 13 HUM. RTS. Q. 169, 180 (1991). Kent explains that the right to strike was "not introduced in order to protect individual expression or to promote material interests but to empower the masses to participate in the political struggle of the Cultural Revolution under party leadership." *Id.*

[81] *See* Lewis & Ottley, *supra* note 80, at 1196.

[82] *See* Guo Luoji, *A Human Rights Critique of the Chinese Legal System*, 9 HARV. HUM. RTS. J. 1, 7 (1996). *See generally* ANDREW J. NATHAN, CHINESE DEMOCRACY 117, 117-35 (1985)(explaining that rights in the United States are viewed as being inherent whereas China perceives them as being granted by the state and established by law). In China, however, the state grants rights and thus can also take them away. *See* R.P. Peereboom, *What's Wrong with Chinese Rights*, 6 HARV. HUM. RTS. J. 29, 49 (1993). Peereboom notes that in China "rights have been seen as political expedients, granted by the state as needed and revoked when necessary." *Id.*

resurfaced.[83] Thus, present-day workers in China do not have the legal right to strike.[84]

Workers in China, however, do engage in strikes and work slow-downs.[85] China's Ministry of Labor revealed that in the first part of 1993, more than 32,000 workers engaged in 194 strikes and slow-downs nationwide.[86] In 1994, 1,300 workers participated in a strike over working conditions,[87] and there were an estimated 1,870 work stoppages in 1995.[88] Six-hundred workers in a hardware manufacturing factory went on strike to protest unpaid back wages in 1996,[89] and in the spring of 1997, workers staged a slow-down in Dalian to protest a reduction of workers.[90] And, in March 1997, 22,000 workers joined to protest wage arrears.[91] However, because there is no legal right to strike, workers who engage in strikes are often arrested.[92]

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[83] *See* P.R.C. CONST. ch. II, art. 53, *reprinted in* BROWN, *supra* note 17, at 246. Article 53 provides in relevant part that "[c]itizens of the People's Republic of China must abide by the Constitution and the law . . . observe labour discipline and public order and respect social ethics." *Id.*; *see also* TRADE UNION LAW ch. I, art. 8, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 364. Article 8 provides in relevant part that trade union members have the duty to "safeguard the property of the State and the enterprise and to observe labour discipline." *Id.*

[84] *See* Vai Io Lo, *supra* note 48, at 359; *see also* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736 (stating that strikes in China are not officially sanctioned and are banned). *See generally* Yuan Zhou, *New Law to Give Trade Unions Greater Role*, CHINA DAILY (in English), Mar. 6, 1989, *reprinted in* FBIS-CHI-89-042, Mar. 6, 1989, at 32. Ni Zhifu, the ACFTU president in 1989, dismissed strikes as "'something more likely to complicate rather than resolve problems.'" *Id.*

[85] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736. The report states that although accurate statistics on strikes in China are unavailable, numerous reports from credible Chinese and foreign sources indicate that there has been an increase in work stoppages from previous years. *See id.*

[86] *See* Feng Tongqing, *supra* note 59, at 12. *See generally* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736 (explaining that prior to 1993, China's Ministry of Labor officially denied that strikes occurred in China).

[87] *See* U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1994, S. DOC. NO. 105-10, at 569 (1ST SESS. 1995) [hereinafter 1994 U.S. STATE DEP'T REPORT].

[88] *See* 1996 U.S. STATE DEP'T REPORT, *supra* note 61, at 637.

[89] *See id.*

[90] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736.

[91] *See China Labour Activist in Hong Kong Throws Down Gauntlet*, AGENCE FRANCE-PRESSE, July 18, 1997, *available in* 1997 WL 2160878 (reporting that this strike occurred in the city of Nanchong).

[92] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736 (revealing that a protest in Mianyang resulted in the estimated arrest of hundreds or even thousands of protesters); *see also Search and Destroy*, *supra* note 72, at appendix (reporting that Wang Zhaobo, a WAF member, was sentenced to 7-15 years in prison for leading demonstrations and strikes). No law in China explicitly prohibits strikes, so it is difficult to determine what crime strikers are actually charged with violating. The most applicable crime is found in Article 290 of the 1997 amendment to the Chinese Criminal Law. Article 290 provides in pertinent part that

III. CHINA'S TRADE UNION SYSTEM UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Social, Economic and Cultural Rights ("ICESCR"), which went into effect in 1976,[93] is the most detailed international law document concerning economic, social and cultural rights.[94] To fully comprehend the intricacies of the rights, obligations, and implementation measures of the ICESCR, and whether China's trade union system is in compliance, it is necessary to posses a basic understanding of what constitutes economic, social, and cultural rights.[95] To aid understanding, comparisons will be drawn between economic, social, and cultural rights contained in the ICESCR and the civil and political rights incorporated in the ICESCR's sister Covenant, the International Covenant on Civil and Political Rights ("ICCPR").[96]

> [i]n cases where crowds are assembled to disturb public order with serious consequences; where the process of work, [or] production . . . are disrupted; and where serious losses have been caused, the ringleaders are to be sentenced to not less than three years but not more than seven years of fixed-term imprisonment; other active participants are to be sentenced to not more than three years of fixed term imprisonment, criminal detention, control, or deprivation of political rights.

P.R.C. CRIMINAL LAW art. 290, *available in* XINHUA, *supra* note 72.

[93] *See* ICESCR, *supra* note 4, 993 U.N.T.S. at 6. *See generally* International Covenant on Economic, Social and Cultural Rights, <http://www.un.org/Depts/ Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_3/html.> As of November 1998, the ICESCR has been ratified by 138 countries, and that there are 61 additional signatory states. *See id.*

[94] *See* David M. Trubek, *Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205, 210 (Theodore Meron ed., 1984). *See generally* ICESCR, *supra* note 4, 993 U.N.T.S. at preamble (The basic purpose of the ICESCR is to provide freedom from fear and want by creating conditions where everyone may enjoy his economic, social and cultural rights).

[95] *See* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159 (1987). As of December 1997, Professor Alston was the Chairperson for the Committee on Economic, Social and Cultural Rights. *See* Committee on Economic, Social and Cultural Rights. Sess. 16 and 17 (Apr. 28 - May 16, 1997, and Nov. 17 - Dec. 5, 1997). ESCOR. Official Records, 1998. Supp. No. 2., ¶ 183, at 163. Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1998/22 (1998); U.N. Doc. E/C.12/ 1997/10 (1997) [hereinafter *Committee Report on 16th and 17th Sessions*].

[96] *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, SELECTED DOCUMENTS, at 387. *See also* A. GLENN MOWER, JR., INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE, 10-18 (1985). Mower notes that the ICESCR and the ICCPR are both outgrowths of the United Nations Universal Declaration of Human Rights. Originally one Covenant was supposed to

A. *Economic, Social, and Cultural Rights*

Economic, social, and cultural rights are positive rights.[97] That is, they require active government intervention and cannot be realized absent such government intervention.[98] Positive rights are viewed as being resource intensive, requiring governments to allocate funds to effectuate their realization.[99] Conversely, civil and political rights create negative obligations.[100] These rights can be implemented without resources,[101] and can be achieved if governments simply abstain from interference.[102] In distinguishing between the different obligations that these respective sets of rights impose, one commentator notes "[i]t has been argued that protection of social-economic rights presupposes active social and government intervention, but

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emerge that would be inclusive of both economic, social, and cultural rights as well as civil and political rights. However, many nations would not agree to the inclusion of all rights in one Covenant, and so two were established. *See id.*

[97] *See* Alston & Quinn, *supra* note 95, at 159; *see also* ICESCR, *supra* note 4, pts. II, III, arts. 6, 7, 9, 11, 13, 993 U.N.T.S. at 6-8. Specific examples of economic, social and cultural rights protected by the ICESCR include the right to: work, rest, education, social security, and equal pay. *See id.* China grants its citizens these same rights. *See generally* P.R.C. CONST. ch. II, arts. 42-48, *reprinted in* BROWN, *supra* note 17, at 244-45. China's Constitution explicitly provides people with the right as well as the duty to work, the right to rest, the right to receive social security, the right as well as the duty to receive an education, and the right of equal pay for women. *See id.*

[98] *See* Alston & Quinn, *supra* note 95, at 159; *see also* Trubek, *supra* note 94, at 211 (explaining that positive rights cannot be immediately realized by merely enacting a law, but require legal implementation as well as active government programs that take time and effort to effectuate).

[99] *See* Alston & Quinn, *supra* note 95, at 159; *see also* ICESCR, *supra* note 4, pt. III, art. 9, 993 U.N.T.S. at 7. A classic example of a positive right in the ICESCR is provided by Article 9. Article 9 obligates states parties to recognize the right of everyone to social insurance and social security. *See id.* The realization of this right likely requires legal changes, as well as government policies, programs and resources.

[100] *See* Alston & Quinn, *supra* note 95, at 159.

[101] *See id.*; *see also* ICCPR, *supra* note 96, pt. III, art. 19(1), 999 U.N.T.S. 171, *reprinted in* CARTER & TRIMBLE, at 394. A classic example of a negative right contained in the ICCPR is the right of everyone "to hold opinions without interference." *Id.* Arguably this right does not require government intervention or the allocation of resources, but can be given immediate legal effect by merely adopting legislation, and can be immediately realized if the government simply abstains from interference.

[102] *See* Kitty Arambulo, *Drafting an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Can an Ideal Become Reality*, 2 U.C. DAVIS J. INT'L L. & POL'Y 111, 115 (1996).

protection of civil and political rights merely requires that governments leave individuals alone."[103]

Officially, economic, social, and cultural rights were recognized by the United Nations General Assembly as having equal significance to civil and political rights.[104] In reality the international community often neglects economic, social, and cultural rights.[105] The Chairperson of ICESCR Committee posits that economic, social, and cultural rights have failed to receive approval because many states parties perceive these rights to "concern issues that are considered to be inherently intractable and unmanageable and are thus much too complex to be dealt with under the rubric of rights."[106] Thus, the ICESCR is not greatly respected by states parties,[107] and has failed to gain support from the international community.[108]

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[103] Xiaorong Li, *Are Social & Economic Rights Collective?*, CHINA RTS. FORUM, at 8, 10 (Winter 1997).

[104] *See* MOWER, *supra* note 96, at 18. Mower explains that when the ICESCR and the ICCPR were created, there was no intention to suggest that economic, social, and cultural rights were inferior to civil and political rights. Rather, there was formal recognition that both sets of rights were of equal significance. The decision to draft two separate Covenants was due to the fact that their respective rights were merely different in character. *See id.*

[105] *See* Audrey Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 26 (1996). Chapman notes that "[d]espite a rhetorical commitment to the indivisibility and interdependence of human rights, the international community, including the international human rights movement, has consistently treated civil and political rights as more significant, while consistently neglecting economic, social and cultural rights"; *see also* TRANSNATIONAL LEGAL PROBLEMS 360, 361 (Henry Steiner et al. eds., 4th ed. 1994). This article explains that economic, social, and cultural rights have become "the neglected stepchild of the human rights movement, rarely discussed seriously, rarely debated in the mainstream international human rights organizations or leading nongovernmental organizations, but rather consigned for debate and weak implementation to a corner of the entire human rights movement." *Id.*

[106] *See* Alston & Quinn, *supra* note 95, at 160-61. Alston and Quinn offer other following reasons why states fail to support economic, social, and cultural rights: they require state resources and thus are not cost free; they are not capable of being precisely defined; they are not readily judiciable; they are susceptible to enforcement; and they are inherently incompatible with a capitalistic economy. *See id.*; *see also* Arambulo, *supra* note 102, at 116. Arumbulo explains that the rights incorporated in the ICCPR have more clarity than the rights included in the ICESCR, and are better understood because they have been subject to judicial interpretation. *See id.*

[107] *See* Chapman, *supra* note 105, at 27. Chapman writes that "few states parties take their responsibilities seriously enough to attempt to comply with the standards of the Covenant in a deliberate and carefully structured way." *Id.*

[108] *See* Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 366 (1990). The elastic language of the ICESCR is another possible reason it has failed to receive widespread support. *See* Louis B. Sohn, *The New International Law: Protection of the Right of Individuals Rather than States*, 32 Am. U. L. REV. 1, 38-40 (1982). Sohn states that the ICESCR is viewed by

The inherent differences between economic, social, and cultural rights and civil and political rights have had implications on the implementation obligations required by both the ICESCR and the ICCPR.[109] Because civil and political rights are relatively easier to implement, the ICCPR requires states parties to guarantee civil and political rights immediately upon ratification.[110] Critics point out that since the implementation of economic, social, and cultural rights necessitates financial resources, the ICESCR does not impose an obligation upon states parties to immediately realize most of its rights.[111]

B. *General Obligations under the ICESCR*

The ICESCR's language is self-executing.[112] Therefore, states parties to the ICESCR are legally bound by international law to comply with the ICESCR's obligations in good faith.[113] The ICESCR generally establishes rights that states parties are obligated to recognize.[114] There are also rights contained in the ICESCR that states parties are obligated to ensure,[115] such as the right of workers to form and join trade unions and the right to strike.[116] The different obligations that arise from recognizing rights and ensuring them are significant. The ICESCR's obligations relating to the recognition of rights are established by Article 2(1).

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many critics as having too many loopholes that allow states parties to easily evade their obligations, and that this negative perception of the ICESCR has greatly diminished its value. *See id.*

[109] *See* Sohn, *supra* note 108, at 19-20.

[110] *See id.*

[111] *See id.*, at 40.

[112] *See* Burns Weston, *U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights: With or Without Qualifications*, *in* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 68, 71 (2d ed. 1996). Weston asserts that the language of the ICESCR clearly conveys a self-executing intent; *see also* Scott Leckie, *An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights*, 13 HUM. RTS. Q. 545, 551-52 (1991)(citing 5 U.N. ESCOR C.12 Supp. (No. 3) para. 129, U.N. Doc. E/C.12/1990/8 (1991)). The ICESCR Committee questioned a states party's claim that the ICESCR was not self-executing, and responded by citing many examples of obligations in the ICESCR that most observers considered to be self-executing, the right to strike being among them. *See id.*

[113] *See* Vienna Convention on the Law of Treaties, pt. III, sec. 1, art. 26, 1155 U.N.T.S. 331, 339 (entered into force Jan. 27, 1990); *see also* BROWNLIE, *supra* note 11, at 616 (stating that "a treaty in force is binding upon the parties and must be performed by them in good faith").

[114] *See* ICESCR, *supra* note 4, pts. II, III, arts. 4, 6, 7, 10, 11, 12, 13, U.N.T.S. at 5-8. The respective rights contained in Articles 4, 6, 7, 10, 11, 12, 13, and 15 of the ICESCR are all prefaced by the phrase "[s]tates Parties to the present Covenant recognize . . . ." *Id.*

[115] *See* ICESCR, *supra* note 4, pts. II, III, arts. 3, 8, 993 U.N.T.S. at 5, 6 (decreeing that states parties are obligated to ensure the rights contained in Articles 3 and 8).

[116] *See* ICESCR, *supra* note 4, pt. III, art. 8 (1)(a) & (d), 993 U.N.T.S at 6.

Article 2(1) governs the obligations regarding the recognition and implementation of most rights. It provides in relevant part that "[e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . ."[117] The phrase "undertakes to take steps" imposes a legal obligation on states parties to take immediate action towards the full realization of the rights enumerated in the ICESCR.[118] It is palpable, however, that the obligations Article 2(1) sets forth are qualified.[119]

The effect of "undertakes to take steps" is undermined by the subsequent phrase that the rights enumerated in the ICESCR are to be "achieve[d] progressively."[120] The progressive realization principle[121] implies that while states parties are obligated to immediately undertake steps to realize the ICESCR's rights, they are not obligated to immediately achieve them.[122] Instead, this principle allows states parties to achieve these rights gradually.[123] As one commentator noted, the ICESCR is aspirational in that it merely "provides an ideal goal which the parties must work toward, but not necessarily achieve."[124] Thus, the obligation to "undertake to take steps" is not equivalent to guaranteeing the rights enumerated in the ICESCR.[125]

The phrase "undertakes to take steps" is further weakened because it is subject to the states parties' "maximum . . . available resources."[126] Critics claim that by permitting states parties' obligations to be subject to their

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[117] *See* ICESCR, *supra* note 4, pt. II, art. 2, 993 U.N.T.S. at 6.

[118] *See* Alston & Quinn, *supra* note 95, at 165-66. *See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122, 125 (1987) [hereafter *The Limburg Principles*].

[119] *See* PAUL SEIGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 26 (1983).

[120] *See* Sohn, *supra* note 108, at 39-40. Sohn explains that in defense of the ICESCR, proponents "argued that it would have been futile to impose obligations that could not be fulfilled; either no state would ratify the Covenant, or those ratifying it would soon discover that they were unable to comply and therefore would withdraw from the Covenant." *Id.* at 40.

[121] *See* Trubek, *supra* note 94, at 213.

[122] *See* E.V.O. Dankwa & Cees Flintermant, *Commentary by the Rapporteurs on the Nature and Scope of States Parties' Obligations*, 9 HUM. RTS. Q. 136, 139 (1987).

[123] *See* Yvonne Klerk, *Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 250, 260 (1987).

[124] *See* Joy Gordon, *The Concept of Human Rights: the History and Meaning of its Politicization*, 23 BROOK. J. INT'L L. 689, 704 (1998); *see also* Burns Weston, *Human Rights*, ENCYCLOPEDIA BRITTANICA, 713-721 (15th ed. 1990) *in* HUMAN RIGHTS IN THE WORLD COMMUNITY 14, 26 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992)(stating that the ICESCR "is essentially a 'promotional convention', stipulating objectives more than standards").

[125] *See* Sohn, *supra* note 108, at 40.

[126] *See* ICESCR, *supra* note 4, pt. II, art. 2 (1), 993 U.N.T.S. at 5.

available resources, Article 2(1) provides a loophole that allows for indefinite delays.[127] Impoverished states parties, or those merely in an temporary economic crises, may cease progressively realizing the ICESCR's rights on the alleged grounds that it lacks available resources.[128] The Chairperson for the Committee on Economic, Social and Cultural Rights ("the Committee") confirmed this by acknowledging that "it is the state of a country's economy that most vitally determines the level of obligations as they relate to any of the enumerated rights under the Covenant."[129]

C. An Analysis of Article 8 and Whether China is in Compliance

Article 2(1) governs most articles contained in the ICESCR. However, the obligations contained in Article 8 are regarded as an exception.[130] Article 8 provides in relevant part:

> The States Parties to the present Covenant undertake to ensure: (a) the right of everyone to form trade unions and join the trade union of his choice . . . for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in . . . the interests of . . . public order . . . ; (d) the right to strike, provided it is exercised in conformity with the laws of the particular country.[131]

The phrase "undertake to ensure" in Article 8 is inherently different from Article 2(1)(a)'s mere "undertakes to take steps."[132] The term "ensure" requires states parties to implement the rights contained in Article 8 immediately.[133] Thus Article 8 is not subject to the flexible progressive realization

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[127] *See* Sohn, *supra* note 108, at 19-20.

[128] *See id.*, at 40; *see also* TRANSNATIONAL LEGAL PROBLEMS 361, (Henry J. Steiner et al. eds., 4th ed. 1994) (stating that "[r]esource constraints [in Article 2] are formally taken into account; the rich state must provide more than the poor one").

[129] Alston & Quinn, *supra* note 95, at 177 (stating that in addition, the states party itself is accountable for determining the amount to set aside for the progressive realization of the rights, and is given a wide measure of discretion in its determination).

[130] *See* Trubek, *supra* note 94, at 213 (explaining that ensuring rights implies a different obligation that merely recognizing them); *see also* Leckie, *supra* note 112, at 564-65 (arguing that Article 8 is among those with an inherent self-executing nature). *See generally* Alston & Quinn, *supra* note 95, at 210 (noting that Article 8 is the only article in section III of the ICESCR to have its own limitations clause.)

[131] *See* ICESCR, *supra* note 4, pt. III, art. 8, 993 U.N.T.S. at 6.

[132] *See* Trubek, *supra* note 94, at 213; Leckie, *supra* note 112, at 165; Alston & Quinn, *supra* note 95, at 185.

[133] *See* Alston & Quinn, *supra* note 95, at 185-86; *see also* Gordon, *supra* note 124, at 705 (acknowledging that the "undertake to ensure" pledge, as it relates to the right to form and participate in trade unions, imposes a different obligation upon states parties than Article 2(1)'s

principle.[134] By not being centered around the progressive realization principle, Article 8 implies that states parties' obligations are not contingent upon their maximum available resources. Therefore, the "undertake to ensure" obligation precludes states parties from not implementing the rights contained in Article 8 due to a lack of financial resources.

1. Article 8(1)(a)'s obligations

Pursuant to Article 8(1)(a), a worker has the right to "form trade unions and join the trade union of his choice."[135] This clearly provides workers with the indisputable right to establish independent trade unions,[136] which is considered to be a fundamental human right.[137] The ICESCR Committee has enunciated that government domination of a states party's trade unions contravenes this right, as it does not allow for trade union pluralism.[138] For a states party to be

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mere recognition of rights). *See generally* Fried Van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, *in* TRANSNATIONAL LEGAL PROBLEMS 361, 362-63 (Henry J. Steiner et. al. eds., 4th ed., 1994)(claiming that the right to form trade unions is more like a negative right in that it does not require state intervention to effectuate).

[134] *See* Alston & Quinn, *supra* note 95, at 174-75. Alston and Quinn reveal that in drafting the ICESCR the Danish representative and other delegates agreed that trade union rights were not subject to the "progressive achievement" regime because they were capable of immediate implementation. *See id.* at 175.

[135] *See* ICESCR, *supra* note 4, pt. III, art. 8 (1)(a), 993 U.N.T.S. at 6. This right is provided "for the promotion and protection of [a worker's] economic and social interests." *Id.*

[136] *See Committee Report on 16th and 17 Sessions*, *supra* note 95, ¶ 183, at 37; *see also* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736 (stating that the ICESCR provides for the right to form independent trade unions).

[137] *See* United Nations High Commissioner for Human Rights, *The Committee on Economic, Social and Cultural Rights*, Fact Sheet No. 16 (Rev. 1), (July, 1991), art. 8 <http://www.unchr.ch/html/menu6/2/ fs16.html. [hereinafter U.N. High Commissioner for Human Rights]. The article states that

> [t]he right to form and join trade unions is closely linked to the right to freedom of association, which widely recognized throughout the international human rights law. These rights, combined with the right to strike, are fundamental if the rights of workers and other citizens under the Covenant are to be implemented.

Id. See generally N. Valticos & G. Von Potobsky, *International Labour Law*, *in* INTERNATIONAL ENCYCLOPEDIA FOR LABOR LAW AND INDUSTRIAL RELATIONS 1, 92 (R. Blanpain ed., 1994). Valticos & Potobsky refer to the International Labor Organization, but their explanation of the importance of independent trade unions is relevant to Article 8 of the ICESCR. They note that allowing workers to join the trade unions of their choice "is an essential means for workers to defend their interests and a particular aspect of the right of association in general, and is therefore considered among the fundamental human rights." *Id.*

[138] *See* Chapman, *supra* note 105, at 51 (citing Committee on Economic, Social and Cultural Rights. Report on the Eighth and Ninth Sessions (10-28 May 1993 and 22 Nov.-10 Dec. 1993). ESCOR. Official Records, 1994. Supp. No. 3, Committee on Economic, Social and Cultural

in compliance with Article 8(1)(a), the "freedom to join a trade union cannot be confined to a mere freedom to join the single trade union established and controlled by the . . . government[.]"[139] The rationale behind this is that by compulsorily requiring all trade unions to be under the control of the government or a single monolithic trade union would abrogate a worker's rights under Article 8(1)(a) to truly establish or join the trade union of "his [own] choice."[140]

The ICESCR Committee recently informed Iraq, a states party to the ICESCR, that it was in violation of Article 8(1)(a) for this very reason.[141] Iraq had submitted a report to the Committee explaining that its Trade Union Organization Act explicitly grants workers the right to form and join trade unions,[142] which it claimed complied with Article 8.[143] However, in reviewing Iraq's report the Committee determined that Iraq's Trade Union Organization Law effectively established a single state-wide trade union structure.[144] Iraq's law effectively centralized all of Iraq's trade unions within the General Federation of Trade Unions, which was itself controlled by the ruling Ba'ath Party.[145] The Committee concluded that because Iraq's trade union law precluded workers from establishing independent trade unions, it was in contravention of Article 8.[146]

Rights, U.N. Doc. E/1994/23 (1994); U.N. Doc. E/C.12/1993/19 (1994)). After viewing Kenya's and Vietnam's reports, the Committee responded by stating that "[t]he domination of the Central Organization of Trade Unions (COTU) by KANU [in Kenya] appears to contravene the letter and spirit of the Covenant. There is a similar absence of an independent and pluralized trade union movement, with the right to strike, in Vietnam." *Id.*

[139] *See* PAUL SEIGHART, THE LAWFUL RIGHTS OF MANKIND 152 (1985).

[140] *See* ICESCR, *supra* note 4, pt. III, art. 8, 993 U.N.T.S. at 6; *see also* PAUL SEIGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 349-50 (1983). Seighart writes that the ICESCR is the only international covenant that qualifies the right to form and join trade unions by making it subject to being that of the workers' choice. *See id.*

If workers were not given full freedom to establish or join the trade union of their choice, a states party could comply with the Article 8(1)(a) by allowing workers to form or establish trade unions of their choice but mandating that these trade unions be controlled by the government or a monolithic trade union. If these controlling parties were ineffective in protecting workers' rights and interests, workers would have no real "choice" within the meaning of article 8(1)(a), for they would be forced to either be a member of the subservient trade union or work without trade union representation. This would go against the spirit of the ICESCR and was certainly not the intent of the ICESCR's drafters.

[141] *See Committee Report on 16th and 17th Sessions, supra* note 95, ¶ 260, at 53.

[142] *See* ESCOR. Third Periodic Report: Iraq. ¶ 49-53, at 13-14, U.N. Doc. E/1994/104/Add.9 (1995) [hereinafter Iraq's Report].

[143] *See id.*

[144] *See Committee Report on 16th and 17th Sessions, supra* note 95, ¶ 260, at 53.

[145] *See id.*

[146] *See id.*

Furthermore, the Committee's suggestions and recommendations to the Republic of Korea (Korea) illustrate that a states party is in violation of Article 8(1)(a) unless its domestic legislation is in compliance.[147] In responding to the report Korea submitted, the Committee determined that Korea's laws placed restrictions on the right of workers to form trade unions which were inconsistent with Article 8 of the ICESCR.[148] The Committee suggested that Korea "immediately amend its laws and regulations concerning the freedom to form trade unions . . . in order to bring them into compliance with the Covenant[.]"[149] Therefore, Article 8(1)(a) imposes an obligation upon states parties to have their domestic legislation provide workers with the right to establish and join independent trade unions.

More significantly, however, is that Article 8(1)(a) precludes a states party from satisfying its obligations by enacting conforming legislation while continuing to violate its obligations in practice.[150] The Committee's reply to the Libyan Arab Jamahiriya (Libya) supports this interpretation of Article 8.[151] Libya reported that it was in compliance with Article 8 because its Promotion of Freedom Act grants citizens the right to establish and join trade unions to protect their legitimate rights and interests.[152] The Committee responded that although Libya's domestic legislation guarantees trade union rights, the "gap between law and practice is quite significant."[153] Thus, the Committee

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[147] *See Annual Report of the Committee on Economic, Social and Cultural Rights on its 12th and 13th Sessions*, U.N. ESCOR, 12th and 13th Sess., Official Records, 1996, Supp. No. 2, ¶ 80, U.N. Doc.E/1996/22 (1996) [hereinafter *Committee Report on the 12th and 13th Sessions*]. *See generally The Limburg Principles*, *supra* note 118, at 125. The article explains that Article 2(1) would often require states to amend their existing legislation to comply with the ICESCR when such legislation is in violation of the ICESCR. *See id.* There is no indication that Article 2(1) differs from Article 8 in this respect. Therefore, in this particular respect Article 8 should be considered synonymous with Article 2(1). As such, states parties whose domestic legislation contradicts Article 8 must amend their domestic laws in order to be in compliance.

[148] *See Committee Report on 12th and 13th Sessions*, *supra* note 147, ¶ 71, at 25.

[149] *See id.* ¶ 80, at 27.

[150] *See The Limburg Principles*, *supra* note 118, at 125; *see also* Alston & Quinn, *supra* note 95, at 167-69 (citing Report of the Ghana-Portugal Commission of Inquiry, 45 Int'l Labour Off. Official Bull. 231 (Supp. 2, 1962). The article explains that the "mere enactment of legislation does not ipso facto constitute a discharge of the relevant obligations. What is required is 'to make the provisions of the Convention effective in law and in fact. . . . Full conformity of the law. . . is therefore essential, but taken alone is not enough.'" *Id.* at 169; *see also* Leckie, supra note 112, at 564 (reporting that "'[t]he adoption of legislative measures . . . is by no means exhaustive of the obligations of States Parties.'") (citing 5 U.N. ESCOR C.1 Supp. (No.3) Annex III, ¶ 3, U.N. Doc. E/C.1/1990/8 (1991).

[151] *See Committee Report on 16th and 17th Sessions*, *supra* note 95, ¶ 183, at 40.

[152] *See* State Party Report. Initial Report: Libyan Arab Jamahiriya, ¶ 50, U.N. Doc. E/1990/5/Add.26. (1996). <http:www.unchr. ch/tbs/doc/snf/c1256.html>

[153] *See Committee Report on 16th and 17th Sessions*, *supra* note 95, ¶ 183, at 40.

recommended that Libya undertake energetic efforts to bring its practices into conformity with its domestic legislation.[154]

2. *China's trade union system under Article 8(1)(a)*

Based upon the Committee's application of Article 8(1)(a) in these situations, China must, in both in law and in fact, provide workers with the opportunity to establish and join independent trade unions. China does provide workers with the right to establish and join trade unions,[155] and no law explicitly prohibits workers from forming independent trade unions. However, the hierarchical structure established by the Trade Union Law requires the unification of China's trade unions under the control of the ACFTU.[156] Legally conferring the ACFTU with ultimate control over existing trade unions, as well as providing it with discretionary power to approve or deny official recognition to new trade unions,[157] thwarts trade union pluralism. The ACFTU has never recognized a trade union that was not under its control,[158] and thus the Trade Union Law therefore acts as a de facto prohibition on the right to establish independent trade unions. Accordingly, China does not permit its workers to exercise the right to "form trade unions and join the trade unions of his choice" within the meaning of Article 8(1)(a).[159]

3. *Article 8(1)(a)'s limitations do not apply to China*

The right of workers to form and join the trade unions of their choice is not an absolute right under the ICESCR. Instead, this right is limited by three qualifications.[160] China may restrict the right of workers to form trade unions

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[154] *See id.*

[155] *See supra* note 18 and accompanying text.

[156] *See* TRADE UNION LAW ch. I, art. 3, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 363.

[157] *See id.*, ch. II, arts. 12-13, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 365.

[158] *See* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 736.

[159] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(a), 993 U.N.T.S. at 6.

[160] *See id.* These limitations permit a states party to limit the right of workers to form and join the trade unions of their choice when it is "prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others[.]" *Id.*; *see also* U.N. High Commissioner for Human Rights, *supra* note 137, at art. 8. This article explains that the national security, public order and rights and freedoms of others exemptions are to be narrowly interpreted; *The Limburg Principles*, *supra* note 118, at 130. It further states that the national security limitation in Article 8(1)(a)

> may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence

if the limitation is 1) prescribed by law; 2) necessary; and 3) in the interest of public order.[161] The first limitation means that the restriction on the right to form and join trade unions must be in the form of delegated legislation, statutory law, or common law.[162] In addition, the law must be in force when the restriction is applied,[163] and it can be neither unreasonable nor arbitrary.[164]

China's Trade Union Law arguably satisfies the "prescribed by law" restriction. The mere existence of a states party's statutory law appears to satisfy this phrase,[165] and China's Trade Union Law designates the ACFTU as China's highest union body.[166] While this law is not arbitrary,[167] it is arguably unreasonable.[168] Even if the law is reasonable and not arbitrary, its restriction comports with the ICESCR only if it is "necessary in . . . the interests of . . . public order[.]"[169]

The term "necessary" is the linchpin of Article 8(1)(a)'s limitations clause. A states party's restriction is deemed "necessary" only if it satisfies three elements.[170] The restriction must 1) be in response to a pressing public or social need; 2) pursue a legitimate aim; and 3) be proportional to that aim.[171]

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against force or threat of force. . . National security cannot be invoked as a reason to prevent merely local or relatively isolated threats to law and order. . . The systematic violation of economic, social and cultural rights undermines true national security . . . A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or a perpetrating repressive practices against its population.

Id. China is not presently at war. Thus the "national security" and the "protection for the rights and freedoms of others" limitations are clearly inapplicable, and were therefore omitted from analysis. *See also* Dankwa & Flinterman, *supra* note 122, at 145. The authors explain that "the protection of the rights and freedoms of others" limitation means that states parties may simply not use the ICESCR in any way to limit the rights and freedoms derived from outside the Covenant. *See id.*

[161] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(a), 993 U.N.T.S. at 6.

[162] *See* Alston & Quinn, *supra* note 95, at 210-11.

[163] *See The Limburg Principles*, *supra* note 118, at 128.

[164] *See id.*

[165] *See* Alston & Quinn, *supra* note 95, at 210-11 (asserting that statutory law satisfies the phrase "prescribed by law").

[166] *See* TRADE UNION LAW ch. II. art. 12, *supra* note 18, *translated in* LAWS OF THE P.R.C. at 365, and accompanying text.

[167] *See generally* Dankwa & Flinterman, *supra* note 122, at 143 (explaining that national laws may not be ad hominem).

[168] *See The Limburg Principles*, *supra* note 118, at 128. The article explains that this limitation is not applicable if the states party's law is unreasonable. *See id.* The Trade Union Law's unreasonableness stems from the fact that the structure it mandates effectively proscribes the establishment of independent trade unions.

[169] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(a), 993 U.N.T.S. at 6.

[170] *See The Limburg Principles*, *supra* note 118, at 130.

[171] *See id.*; *see also* Alston & Quinn, *supra* note 95, at 212 (noting that a pressing public or social need is implied in the term "necessary").

China's restriction on the right of workers to form and join independent trade unions does not satisfy the pressing public or social need element. Millions of trade union workers have been, and more will be, laid-off from state enterprises. However, China, as a country, is enjoying economic growth and prosperity,[172] and the standard of living for the majority of its citizens has increased dramatically.[173] Thus, no pressing public or social need in China justifies a restriction on the right to establish independent trade unions. Even if China's economic reform and the consequential unemployment of trade union workers is construed as constituting a pressing public or social need, the wholesale preclusion of independent trade unions is not legitimately aimed at, nor proportional to, alleviating the problem. [174]

Even assuming China's restriction on the right to form independent trade unions satisfies the "necessary" element, the restriction is not in the interests of "public order." There is no clear definition of "public order" in the ICESCR, nor do commentators adequately explain its meaning. One commentator suggests that the term relates to the fundamental principles upon which the states party's society is founded or the sum of rules that ensure the functioning of the states party's particular society.[175] This is a difficult standard to overcome and "must be interpreted narrowly by States parties seeking to invoke [it]."[176] Essentially, a states party may only restrict the right of workers to establish independent trade unions when necessary to protect the states party's fundamental rules and principles that allow its society to

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[172] *See China Can Achieve Eight Percent Growth This Year*, XINHUA ENG. NEWSWIRE, Sept. 17, 1998, *available in* 1998 WL 19485077 (reporting that the vice-president of China's State Development Planning Commission is optimistic that China can attain an eight percent growth rate in 1998); *see also China's Economic Growth Pushing Back Health Improvements*, AGENCE-FRANCE PRESSE, Oct. 17, 1997, *available in* 1997 WL 13415479 (explaining that China's economic growth rate has averaged ten percent per year since 1990).

[173] *See Standard of Living Improves for China's Peasants*, ASIA PULSE, Apr. 13, 1998, *available in* 1998 WL 2957062. This article reveals that the amount rural residents in China spend on food is up 516 yuan more in 1997 than it was in 1992, the average caloric intake has increased, and the quality of housing has improved. *See id.*; *see also Urban Living Standards in China Hit New High*, ASIA PULSE, Mar. 31, 1998, *available in* 1998 WL 2955345 (revealing that, according to the State Statistics Bureau, the 1997 urban income level is up a dramatic 155% from the 1992 figure, with the annual average increase per person at 20.6%).

[174] If the Chinese government was genuinely concerned with rectifying unemployment among its trade union workers, it would allow them to establish independent trade unions to protect and promote their rights. However, this would beget trade unions with leverage. Trade unions could then threaten to engage in strikes or slowdowns if their workers' rights and interests were not being met. A power struggle of this nature has the propensity to deleteriously effect the economic reform, which the CCP certainly wants to avoid.

[175] *See The Limburg Principles*, *supra* note 118, at 130.

[176] *See* U.N. High Commissioner for Human Rights, *supra* note 137, at art. 8.

function.[177] Attempts by workers in China to establish independent trade unions have not been so pervasive or violent so as to threaten China's "public order" within the meaning of Article 8(1)(a).[178] Thus, China fails to satisfy any of the limitations, and therefore its restriction on the right of workers to establish and join the trade unions of their choice is in violation of Article 8(1)(a).

4. China violates the right to strike provided in Article 8(1)(d)

Article 8 (1)(d) imposes upon states parties the obligation to ensure "the right to strike, provided that it is exercised in conformity with the laws of the particular country."[179] To be in compliance with Article 8(1)(d) a states party must explicitly incorporate the right to strike into its domestic law.[180] Article 8(1)(d) does permit a states party to limit the right to strike providing the limitation is in conformity with its laws.[181] Thus, "[a]s long as a strike obeys the applicable legal limitations, then it is protected under Article 8(1)(d)."[182] However, the laws limiting the right to strike cannot be overly extensive,[183]

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[177] *See generally* Alston & Quinn, *supra* note 95, at 213. Alston and Quinn explain that the European Convention interprets the term "public order" to be synonymous with "public disorder." The Chairperson states further that under this literal and narrow interpretation it would be extremely difficult for states parties to restrict the rights of workers to form and join the trade unions of their choice. He provides a riot as an example that may justify a restriction in the name of "public order." *See id.*

[178] It is virtually certain that the drafters of the ICESCR intended for a states party to invoke the "public order" limitation only when its public order was seriously threatened. Otherwise, states parties could justify smashing all movements, regardless of how peaceful, on the grounds that they were disturbing its "public order." It is more likely that this limitation was intended to be justified only when required to prevent violence or destruction arising from an existing or imminent worker movement, and then only until the threat abated.

[179] *See* ICESCR, *supra* note 4, pt. III, art. 8 (1)(d), 993 U.N.T.S. at 7.

[180] *See Committee Report on 16th and 17th Sessions*, *supra* note 95, at 58. In responding to the United Kingdom of Great Britain and Northern Ireland, the Committee stated that "failure to incorporate the right to strike in domestic law constitutes a breach of article 8 of the Covenant." *Id.*

[181] *See* ICESCR, *supra* note 4, pt. III, art. 8(1)(d), at 7.

[182] Alston & Quinn, *supra* note 95, at 214.

[183] *See* Committee on Economic, Social and Cultural Rights. Sess. 14 and 15. ESCOR. Official Records, 1996. Supp. No.2., ¶ 162, 165, at 36. Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1996/22 (1996); U.N. Doc. E/C.12/1996/6 (1996) [hereinafter *Committee Report on 14th and 15th Sessions*]. El Salvador failed to provide specific information pertaining to whether it was complying with Article 8 of the ICESCR. And, the Committee failed to give examples of El Salvador's restrictions. However, the Committee did explicitly state that the legal restrictions El Salvador placed upon strikes as being "far too extensive." *Id.*

leave authorities with absolute discretion to determine whether a strike is legal,[184] nor be unreasonable or arbitrary.[185]

China is not in compliance with Article 8(1)(d) because its laws do not provide for the affirmative right to strike.[186] Furthermore, although no legislation explicitly prohibits the right to strike, the failure to give effect to this right amounts to a de facto wholesale prohibition on the right to strike because China arrests and imprisons those who engage in such acts,[187] albeit under the pretense of subverting the government or for other crimes.[188]

The Trade Union Law does afford trade unions with the right to propose to management that workers vacate the work site if their lives are in danger.[189] However, this right is severely circumscribed and cannot be considered equivalent to providing workers with the affirmative right to strike. Pursuant to the Trade Union Law, only trade unions, not workers, are allowed to make proposals to management regarding when workers' lives are in danger.[190] Moreover, neither the ACFTU nor its subservient trade unions have ever organized strikes.[191] Therefore, China currently contravenes the right to strike in Article 8(1)(d).

D. China Can Ignore its Obligations with Impunity

Even if China ratifies the ICESCR, and indicates through its action or inaction that it is not complying, the ICESCR has no enforcement power to compel compliance. The only means of supervision provided by the ICESCR is the states parties' reporting procedure.[192] Pursuant to this procedure, states parties are to submit reports describing the measures they have adopted and

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[184] *See Committee Report on the 12th and 13th Sessions*, *supra* note 146, ¶ 71, at 26.

[185] *See The Limburg Principles*, *supra* note 118, at 128.

[186] *See* Vai Io Lo, *supra* note 48, at 359.

[187] *See Search and Destroy*, *supra* note 72, at app.

[188] *See id.*, at 22, 32.

[189] *See* TRADE UNION LAW ch. III. art. 24, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 367. Article 24 states in relevant part that

> where the very life of the workers and staff members is in danger, the trade union has the right to make a proposal to the management that a withdrawal of the workers and staff members from the dangerous site be organized, and the management must make a decision without delay.

Id.

[190] *See* TRADE UNION LAW ch. III, art. 24, *translated in* LAWS OF THE P.R.C., *supra* note 18, at 367-68; *see also* 1997 U.S. STATE DEP'T REPORT, *supra* note 1, at 738. The report states that it is unclear to what degree workers can actually utilize this law without risking loss of employment. *See id.*

[191] *See* Mao-Chang Li, *supra* note 30, at 548.

[192] *See* Arambulo, *supra* note 102, at 122.

the progress they have made towards fulfilling their obligations.[193] In addition, states parties are free to indicate in their reports any difficulties that may have affected their ability to implement or fulfill their obligations.[194] Although the ICESCR obligates states parties to submit their reports in a timely manner, effective monitoring is for the most part absent.[195]

States parties are essentially in charge of monitoring themselves,[196] and many fail to take their responsibilities seriously. This is evidenced by the number of states parties who fail to submit reports.[197] Even when their reports are punctual, they are often incomplete and contain insufficient data for proper review.[198] This leaves the Committee with scarce information with which to evaluate whether a states party is complying with the ICESCR. In sum, the Committee lacks any real enforcement power to sanction states parties who either submit insufficient reports or fail to provide any.[199] The lack of effective enforcement measures impedes the implementation of the ICESCR,[200] making it likely that China could ignore Article 8's obligations with impunity.

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[193] *See* ICESCR, *supra* note 4, pt. IV. art. 16, at 9.

[194] *See* ICESCR, *supra* note 4, pt. IV, art. 17, at 9; *see also* Chapman, *supra* note 105, at 45-46 (stating that the Committee responds by offering "recommendations and suggestions," which entails enumerating the rights the states party is not implementing, as well as advice on how to improve compliance).

[195] *See* Chapman, *supra* note 105, at 26-27. Chapman points out that the lack of effective monitoring is due to the inherent difficulty of monitoring compliance with such terms as "progressive achievement," which is inexact. *See id.*; *see also* Christine Loh, *One Country Two Human Rights Reports*, CHINA RIGHTS FORUM, winter 1997, at 14 (explaining that requiring states parties to submit reports provides some measure of international monitoring but that the Committee has no mechanism to force states parties to accept any improvements the Committee suggests).

[196] Presently, individuals and groups are not allowed to submit reports to the Committee when they feel there rights have been infringed upon. *See* Leckie, *supra* note 112, at 565 (commenting that there have been discussions about amending the ICESCR to allow individuals and groups to submit complaints "to the Committee when they feel their rights have been infringed, unenforced, or unfulfilled." *See id.*

[197] *See Committee Report on the 16th and 17th Sessions*, *supra* note 95, Annex I, at 96-108. This report states that as of December 6, 1997, there were 137 states parties to the ICESCR. Out of these states parties, 84 were overdue on submitting their reports. *See id.* Guinea's report has been overdue since 1978, Gambia's since 1979, Honduras' since 1981, and Gabon's since 1983. *See id.*, at 99-100.

[198] *See Committee Report on 14th and 15th Sessions*, *supra* note 183, ¶ 63, at 22. For example, Paraguay's report failed to provide clear statistics or provide satisfactorily answers. *Id.*

[199] *See* Leckie, *supra* note 112, at 560 (explaining that the Committee's coercion ability to get states parties to comply is limited).

[200] *See* Arambulo, *supra* note 102, at 111 (stating that "[e]ffective implementation of the ICESCR . . . has been thwarted by its failure to provide for an adequate means of supervision").

E. China's Obligations in Signing the ICESCR

China is currently under no obligation to take any affirmative acts to comply with the ICESCR. It is however obligated to refrain from acts that are calculated to frustrate the object and purpose of the ICESCR.[201] A state that signs an international covenant but vigorously enforces laws that contradict it or continues to engage in other practices which defeat a covenant's object and purpose, arguably violates its obligation imposed by international law.[202] Although China's signing does not obligate it to take affirmative action to amend its laws to comply with the ICESCR, continuing to arrest and imprison those who attempt to form or join independent trade unions is a probable violation of international law, as it defeats the object and purpose of the ICESCR.

VI. CONCLUSION

China's trade union system is conducive to realizing the CCP's goals, but adverse to protecting the welfare of China's workers. Under the current trade union system, China's trade unions are compelled to effectuate the CCP's economic reform and are unable to simultaneously protect and promote the rights and interests of its workers. Consequently, workers are suffering.

If China ratifies the ICESCR, its trade union system will be profoundly affected. The Trade Union Law will have to be amended to explicitly inscribe the right to strike and the provision establishing the ACFTU as the country's unified national trade union organization must be deleted. Moreover, a provision granting workers the right to form and join the trade unions of their choice will have to be added. Furthermore, and most significantly, China must comply with these laws in practice. Only then will China be in compliance with Article 8(1)(a) and (d), and only then will China's workers be truly able to exercise their rights as provided in the ICESCR.

Aaron N. Lehl[203]

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[201] *See* Vienna Convention, *supra* note 113, pt. II, sec. 1, art. 18, *reprinted in* CARTER & TRIMBLE, at 60. Article 18 provides in relevant part: "[A] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty[.]" *Id.*; *see also* BROWNLIE, *supra* note 11, at 606 (stating that the signing of a treaty "creates an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty").

[202] Interview with John Van Dyke, Professor of Law at the University of Hawai'i, William S. Richardson School of Law, in Honolulu, Haw. (Feb. 27, 1998).

[203] Class of 1999, William S. Richardson School of Law. The author would like to thank Hiroko & Connor Sho for their support and patience during the completion of this comment.

Resolving the Hostility: Which Laws Apply to the Commonwealth of the Northern Mariana Islands When Federal and Local Laws Conflict

I. INTRODUCTION

The United States Coast Guard confiscates a large cargo ship more than three miles off the coast of the Commonwealth of the Northern Mariana Islands[1] ("CNMI"), a United States commonwealth. Everything on the ship, as well as the ship itself, is confiscated according to United States forfeiture laws because the ship is carrying illegal drugs.[2] Since the ship was seized more than three miles off the CNMI coast, the United States Government claims it owns the ship and its contents.[3] The CNMI, on the other hand, insists that they belong to its local government. It argues that its unique political relationship with the United States distinguishes it from the individual states and grants it sovereignty over the water, up to two hundred miles from its coastlines.[4]

This hypothetical case raises the question of whether the CNMI controls the two-hundred-mile radius surrounding its islands or whether federal law, which grants the United States government jurisdiction three miles away from the

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[1] These islands are also referred to as the Commonwealth, Northern Mariana Islands, Northern Marianas, CNMI, or the Marianas. The Northern Marianas are located in the western Pacific Ocean in an area known as Micronesia. *See* DON A. FARRELL, HISTORY OF THE NORTHERN MARIANA ISLANDS 28, 30 (1991). The CNMI is a chain of approximately 14 islands, covering a total land area of 184.5 square miles. *See id.* at 30. Saipan, the CNMI capital, is the largest island, occupying roughly 47 square miles. *See id.* at 28. The islands are closer to Asia than they are to Hawai'i. *See id.* Saipan is only 1,272 miles south of Japan, while it is 3,226 miles west of Honolulu. *See id.*

[2] *See* 21 U.S.C. § 881(a)(4) (1994). Carriers, including ships, caught transporting drugs are confiscated according to U.S. forfeiture laws. *See id.*

[3] *See generally* 43 U.S.C. §§ 1301(a)(2), 1311(a) (1994)(granting the states title to lands beneath navigable waters); 48 U.S.C. § 1705 (1994)(granting Guam, the Virgin Islands, and American Samoa interest in navigable waters up to three miles from their respective shores). The individual states are granted the power to control their waters up to three miles from their coastline. *See* 43 U.S.C. §§ 1301(a)(2), 1311(a) (1994). After the initial three miles from shore, the U.S. Government retains jurisdiction. *See id.* The Exclusive Economic Zone gives each country exclusive economic control over the 200-mile radius from their coastlines. *See* D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283, 290 (1999).

[4] *See generally* D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283, 290 (1999) (describing the Exclusive Economic Zone).

states' coastlines, applies to the Commonwealth.[5] This type of conflict between federal and CNMI ("local") laws is not unusual.[6] More and more, controversies are being raised over the scope of the CNMI's self-governing power as a commonwealth and the extent of the United States' dominance over the islands.[7] Although some federal laws apply to the CNMI,[8] it is often unclear if they supersede numerous local laws that do not comport with the federal counterparts.[9]

Determining which federal laws apply to the CNMI is a compelling problem facing the CNMI legal system.[10] Courts must determine which federal laws apply to the CNMI and will continue to make such determinations in the future.[11] This comment analyzes examples of current conflicts between

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[5] *See generally* 43 U.S.C. § 1312 (1994)(limiting states' ownership of land beneath navigable waters up to three miles from coastlines); D.G. Stephens, *The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations*, 29 CAL. W. INT'L L.J. 283, 290 (1999) (describing the Exclusive Economic Zone which grants countries control of waters 200 miles from their coastlines).

[6] *See, e.g.*, Saipan Hotel Corp. v. NLRB, 114 F.3d 994 (9th Cir. 1997)(determining that the National Labor Relations Act ("NLRA") is applicable to the CNMI), *cert. denied*, 118 S.Ct. 1034 (1998); Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir.)(deciding that jury trials are not required in all CNMI civil actions or criminal prosecutions), *cert. denied*, 467 U.S. 1244 (1984).

[7] *See, e.g.*, Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717 (9th Cir. 1998)(resolving that the Longshore and Harbor Workers' Compensation Act ("LHWCA") applies to the CNMI); Fleming v. Department of Pub. Safety, 837 F.2d 401 (9th Cir. 1988)(deciding that the civil rights statute § 1983 applies to the CNMI).

[8] *See* 48 U.S.C. § 1801 note, art. V, § 501 (1987), *reprinted in* 15 I.L.M. 651 (1976) [hereinafter CNMI COVENANT]; *see also, e.g.*, DeNieva v. Reyes, 966 F.2d 480 (9th Cir. 1991)(stating that federal civil rights statute § 1983 applies to the CNMI); Micronesian Telecomm. Corp. v. NLRB, 820 F.2d 1097 (9th Cir. 1987)(holding that the NLRA applies to the CNMI).

[9] *See* N. MAR. I. CODE, tit. 3, div. 4 (immigration)(1997) and tit. 4, div. 9 (labor)(1997); *see also, e.g., Atalig*, 723 F.2d 682 (deciding that jury trials are not required in any civil or criminal proceeding except according to local law).

[10] *See, e.g., Saipan Stevedore*, 133 F.3d 717; *Saipan Hotel*, 114 F.3d 994. See *infra* section IV.A-B for case summaries.

[11] *See generally Micronesian Telecomm.*, 820 F.2d 1097; *Atalig*, 723 F.2d 682.

In *Micronesian Telecomm.*, the petitioner opposed the formation of a union, which sought to represent the petitioner's employees. *See Micronesian Telecomm.*, 820 F.2d at 1099. Upon review, the NLRB designated the union as the exclusive collective bargaining representative and charged petitioner with refusal to bargain. *See id.* The district court upheld the NLRB's decision. *See id.* The petitioner then appealed the district court's order to bargain with the union. *See id.* The Ninth Circuit held that, according to the Covenant, the NLRA applies to the CNMI and the NLRB had jurisdiction over the dispute. *See id.* at 1100, 1102.

In *Atalig*, the defendant was convicted of marijuana possession. *See Atalig*, 723 F.2d at 683. The CNMI appealed the U.S. District Court's decision to reverse on the grounds that the defendant was denied the right to trial by jury. *See id.* at 684. The Ninth Circuit held that the

federal and CNMI law, and poses possible solutions that courts may implement when determining whether it is necessary for the CNMI to follow federal law.

Part II gives a brief historical background of the Northern Mariana Islands and explains the fundamental elements of the CNMI's current commonwealth status, in light of the governing instrument between the United States and the CNMI. This part discusses some of the compromises made between the United States and the Northern Marianas during the bargaining process over the CNMI's commonwealth status. Part III describes a current example of the tension faced by the CNMI as a direct result of the negotiated political association between the United States and the CNMI. This part examines the CNMI garment industry and explores the allegations of labor abuses and human rights violations.[12] Part III also explores the threat of a federal takeover of CNMI immigration and minimum wage laws[13] and offers alternative solutions. Part IV examines two Ninth Circuit[14] decisions, involving conflicts between federal and local laws and their effects on the commonwealth status of the Northern Marianas. Finally, Part V offers a test to aid courts in (1) determining which law applies when federal laws and CNMI laws conflict, and (2) deciding if a federal statute is applicable to the CNMI when there is no counterpart in its own legal system.

CNMI's statutory law, requiring trial by jury only when a person is charged with a felony punishable by more than five years of imprisonment or more than a $2,000 fine, did not violate the Sixth or Fourteenth Amendments. *See id.* at 690-91. *See generally* CNMI COVENANT, *supra* note 8, art. V, § 501(a) (stating that jury trials are not required in the CNMI, unless required by local law); NMI CONST. art. I, § 8 (declaring that "[t]he legislature may provide for trial by jury in criminal or civil cases"); 5 Trust Territory Code § 501(1) (providing that "[a]ny person accused . . . of committing a felony punishable by more than five years imprisonment or by more than two thousand dollars fine, or both, shall be entitled to a trial by jury"). The Trust Territory Code applied in the Northern Marianas until amended or repealed by the CNMI government. *See* CNMI COVENANT, *supra* note 8, art. V, § 505; *Atalig*, 723 F.2d at 686 n.11.

[12] *See, e.g.*, Terry McCarthy, *Give Me Your Tired, Your Poor . . . And the Northern Marianas-a U.S. Possession-Will Put Them to Hard Labor*, TIME, Feb. 2, 1998, at 1 (describing some of the alleged labor abuses in CNMI garment factories).

[13] *See generally* W. John Moore, *American Dream or Pacific Nightmare*, NAT'L J., Dec. 13, 1997, at 1 (explaining the conflict between the Republicans and Democrats over a federal takeover of CNMI immigration).

[14] The CNMI is under the Ninth Circuit's jurisdiction. *See* CNMI COVENANT, *supra* note 8, art. IV, § 401. Both 28 U.S.C. § 1294, giving the Ninth Circuit jurisdiction over appeals from the District Court of Guam, and 48 U.S.C. §§ 1821-1824, stating that provisions of Title 28 which apply to the District Court of Guam shall also apply to the U.S. District Court of the CNMI, establish jurisdiction over appeals from the appellate division of the U.S. District Court of the CNMI. *See also Atalig*, 723 F.2d at 686-87; Camacho v. Civil Serv. Comm'n, 666 F.2d 1257, 1259-61 (9th Cir. 1982).

II. HISTORY OF THE CNMI

Foreign powers have controlled the Northern Mariana Islands since Magellan's arrival in 1521.[15] Since the sixteenth century, Spain, Germany, and Japan colonized the islands.[16] Although the CNMI currently holds commonwealth status, it is still under the sovereign control of the United States.[17]

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[15] *See* Marybeth Herald, *The Northern Mariana Islands: A Change in Course Under its Covenant with the United States*, 71 OR. L. REV. 127, 130 (1992). *See generally* LAWRENCE J. CUNNINGHAM, ANCIENT CHAMORRO SOCIETY (1992)(examining pre-contact Chamorro lifestyles, traditions, and culture in the Northern Marianas); FRANCIS X. HEZEL, S.J., FROM CONQUEST TO COLONIZATION: SPAIN IN THE MARIANA ISLANDS (1690 TO 1740) 1 (1989) (explaining Spanish colonialization of the Northern Mariana Islands).

Spain colonized the islands after taking possession for the Spanish Sovereign in 1565. *See* HEZEL, *supra*, at 1. Many remnants of the Spanish occupation can still be seen today in the culture, language, and religion of the indigenous islanders. *See* Herald, *supra*, at 131. Although the Spanish culture heavily influenced the culture and traditions of the CNMI, the current legal system is modeled after the U.S. legal system and shows no trace of the Spanish influence. *See generally* CNMI COVENANT, *supra* note 8, art. II, § 203(a) (stating that the CNMI has a republican form of government, including a constitution and a bill of rights, and three separate branches for the executive, legislative, and judiciary).

After the Spanish-American War, Spain sold the Northern Marianas to Germany. *See* COMMONWEALTH COUNCIL FOR ARTS AND CULTURE, LIFE IN THE NORTHERN MARIANA ISLANDS DURING THE GERMAN ADMINISTRATION (1899-1914) 2 (1982). *See generally id.* at 1 (examining German administration in the Northern Marianas). On June 30, 1899, Germany bought the Northern Marianas and the Caroline Islands from Spain for 25 million peretas, equivalent to 4.2 million dollars. *See id.* at 2. Guam, although geographically part of the Marianas island chain, has been separated from the rest of the islands since 1889. *See* FARRELL, *supra* note 1, at 241. At the end of the Spanish-American War, Guam was awarded to the Untied States in the Treaty of Paris. Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. 2, 30 Stat. 1754, 1755.

In 1914, Japan seized the islands from the Germans and received the power to administer them under a League of Nations mandate. *See* Herald, *supra*, at 131. The Japanese governed the islands until 1944, when the United States captured the Marianas, often referred to as the most important victory in the Pacific war. *See* FARRELL, *supra* note 1, at 337. *See generally* SCOTT RUSSELL, RISING SUN OVER THE NORTHERN MARIANAS LIFE AND CULTURE UNDER THE JAPANESE ADMINISTRATION (1914-1944) (1983)(describing life in the Northern Marianas during the Japanese administration). The Enola Gay, the B-29 aircraft which dropped the first nuclear weapon on Hiroshima, left for its deadly flight from the airfields on Tinian, an island in the Marianas. *See* CRISTINA AUSTRIA OLIVE, UNLIMITED SUPPLY OF LABOR IN A SMALL ISLAND ECONOMY: THE CASE OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 11 (1992); Donald C. Woodworth & Tim Bruce, *United States' Claims to Pacific Island Ocean Resources Trouble its Political Union with the Commonwealth of the Northern Mariana Islands*, 2 TERR. SEA J. 297, 329 n.3 (1993).

[16] *See* Herald, *supra* note 15, at 130; *see also* Victoria King, *The Commonwealth of the Northern Mariana Islands' Rights Under United States and International Law to Control Its Exclusive Economic Zone*, 13 U. HAW. L. REV. 477, 480-81 (1991).

[17] *See* CNMI COVENANT, *supra* note 8, art. I, § 101 (stating that the CNMI is "in political union with and under the sovereignty of the United States of America").

A. The Road to Becoming a Commonwealth

After World War II, the United Nations Trusteeship Agreement for the Former Japanese Mandated Islands[18] created the Trust Territory of the Pacific Islands ("TTPI").[19] The TTPI, administered by the United States, included the Northern Marianas and other Micronesian islands.[20] As a result of the strategic trust, the United States acted as a trustee with full powers of administration, legislation, and jurisdiction over the territories.[21]

In 1972, the United States negotiated separately with the Marianas about their political status.[22] The Northern Marianas sought a closer political relationship with the United States than its Micronesian counterparts.[23] A permanent relationship with the Marianas was advantageous for the United States because of the islands' strategic location and potential military defense

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[18] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.-N. Mar. I., art 3, 61 Stat. 3301, 3302. The Trusteeship Agreement was terminated for the Northern Marianas, the Federated States of Micronesia, and the Marshall Islands on November 3, 1986. *See* Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986); *see also* Herald, *supra* note 15, at 132.

[19] *See* OLIVE, *supra* note 15, at 11. The Trusteeship Agreement entrusted the United States to promote the future economic development and self-sufficiency of the TTPI, help the islands procure self-government or independence, and encourage the social and educational advancement of the inhabitants. *See* Herald, *supra* note 15, at 132.

[20] *See* Herald, *supra* note 15, at 132. Today, the four island groups that were part of the TTPI have become separate political entities: the CNMI, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. *See id.* See Gale v. Andrus, 643 F.2d 826, 828-30 (D.C. Cir. 1980), for a discussion of the Trust Territory history. *See generally* Roger S. Clark, *Self-Determination and Free Association - Should the United States Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980)(examining the proposed political arrangements among the TTPI islands and whether the United States should terminate the trust); Naomi Hirayasu, Comment, *The Process of Self Determination and Micronesia's Future Political Status Under International Law*, 9 U. HAW. L. REV. 487 (1987)(discussing the termination of the Trust Territory of the Pacific Islands and how it complies with the United Nation Charter requirements).

[21] *See* King, *supra* note 16, at 482.

[22] *See id.* at 484-85; *see also* PAUL M. LEARY, INSTITUTE OF GOVERNMENTAL STUDIES, RESEARCH REPORT 80-1, THE NORTHERN MARIANAS COVENANT AND AMERICAN TERRITORIAL RELATIONS 6 (1980); Larry Wentworth, *The International Status and Personality of Micronesian Political Entities*, 16 ILSA J. INT'L L. 1, 12-13 (1993).

[23] *See* OLIVE, *supra* note 15, at 11; Wentworth, *supra* note 22, at 12. The Northern Marianas identified more, both culturally and ethnically, with Guam, a U.S. territory, than with the other Micronesian islands. *See* LEARY, *supra* note 22, at 3; King, *supra* note 16, at 485. Guam, a separate political entity from the CNMI, is only 120 miles south of Saipan. *See* FARRELL, *supra* note 1, at 27. The people of the Northern Marianas were more westernized and accustomed to a higher standard of living than those, from the other TTPI islands, because they were administered separately by the U.S. Navy during the trusteeship. *See* LEARY, *supra* note 22, at 3.

value.[24] The Northern Marianas valued the United States political system and ideals,[25] desired economic development, and wanted a secure and stable political status.[26]

On February 15, 1975, representatives from the United States and the Northern Marianas signed the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" ("Covenant"),[27] which embodied the negotiated agreements and granted the islands commonwealth status.[28] Commonwealth status granted the CNMI a greater degree of self-government and autonomy.[29]

B. The CNMI Covenant as the Authoritative Agreement between the United States and the Northern Mariana Islands

The Covenant[30] reflects both the United States'[31] and the Northern

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[24] *See* LEARY, *supra* note 22, at 7; Herald, *supra* note 15, at 135. Giving the CNMI "permanent" commonwealth status guaranteed the United States that its interest in a strategic military location in the Pacific would be protected. *See* LEARY, *supra* note 22, at 6.

[25] *See* LEARY, *supra* note 22, at 5. A statement made before the Foreign Relations Committee exemplifies the strong U.S. values felt by the CNMI:

> [The people of the Northern Marianas] have come to know American ideals of government, civil liberties, and social justice. They have forwarded petitions, referenda, and other communications over a period of more than twenty-five years requesting that they become part of the American political family. The United States assumed an obligation under the Trusteeship Agreement to give them their choice as to their future political status. Various leaders of the Congress and of the Executive Branch have spoken out over the past thirty years for these people to become a permanent part of the United States.

Commonwealth of the Northern Mariana Islands, Hearing Before the Committee on Foreign Relations on H.R.J. Res. 549, 94th Cong. 165 (1975).

[26] *See* LEARY, *supra* note 22, at 5; *see also* King, *supra* note 16, at 485.

[27] 48 U.S.C. § 1801 note, art. V, § 501 (1987), *reprinted in* 15 I.L.M. 651 (1976).

[28] *See* LEARY, *supra* note 22, at 1; *see also* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 480 (1992). Signing the Covenant largely expanded the United States' political power with the explicit consent of those governed, rather than by conquest or procurement. *See* Herald, *supra* note 15, at 127. By 1976, the Covenant was ratified by a joint resolution in Congress and approved by plebiscite in the Northern Marianas. *See* LEARY, *supra* note 22, at 11. In the plebiscite, 78% of the voters approved of the Covenant. *See id.*; *see also* King, *supra* note 16, at 486; Wentworth, *supra* note 22, at 12.

[29] *See* Van Dyke, *supra* note 28, at 451. Puerto Rico and the CNMI are the only U.S.-affiliated entities that currently have commonwealth status. *See id.* Guam, on the other hand, is a territory. *See id.* The CNMI enjoys a political status that is somewhere between a state and a territory. *See* Herald, *supra* note 15, at 135.

[30] The Covenant states that the relationship between the Northern Marianas and the United States "will be governed by [the] Covenant", which together with the United States Constitution, treaties, and applicable laws "will be the supreme law of the Northern Mariana

Marianas'[32] motives for choosing commonwealth status.[33] The Covenant bestows upon the United States the responsibility for the Marianas' foreign affairs and defense,[34] grants the islands the right of self-government, and insures the islands' internal autonomy.[35]

By becoming a commonwealth, the Northern Mariana Islands received considerable benefits[36] and retained greater autonomy[37] than most of the United States territories.[38] One of the benefits granted by the Covenant to the

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Islands." *See* CNMI COVENANT, *supra* note 8, art. I, § 102.

[31] At the heart of the negotiations, and reverberating in the agreement, is the U.S. need for military security. *See* LEARY, *supra* note 22, at 9.

[32] The Covenant also illustrates the Northern Marianas' desire for economic development. *See id. See generally* Herald, *supra* note 15, at 137 (stating that one of the Covenant's goals was to change the Northern Marianas' stagnant economic situation). "A basic objective of the Covenant was to encourage economic growth and achievement of a standard of living comparable to that enjoyed in the United States." *Id.* at 138.

[33] *See* LEARY, *supra* note 22, at 9. The Covenant grants U.S. commonwealth status to the Northern Marianas. *See* CNMI COVENANT, *supra* note 8, art. I, § 101. It provides that "[the CNMI] will become a self-governing commonwealth to be known as the 'Commonwealth of the Northern Mariana Islands', in political union with and under the sovereignty of the United States of America." *Id.*

[34] *See* CNMI COVENANT, *supra* note 8, art. I, § 104.

[35] *See* CNMI COVENANT, *supra* note 8, art. I, § 103. "The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." *Id.*

[36] *See* LEARY, *supra* note 22, at 21. An example of a benefit the Covenant gives the CNMI is the power to rebate local territorial income tax. *See* CNMI COVENANT, *supra* note 8, art. VI, § 602. A congressional study showed that the CNMI has the most favorable income tax rate among the individual states and U.S.-affiliated entities. *See Study: N. Marianas' Taxes Favor Rich*, HONOLULU STAR-BULLETIN, June 19, 1992, at A12. The Covenant also grants the Northern Marianas direct financial assistance from the United States. *See* CNMI COVENANT, *supra* note 8, art. VII, §§ 701-704.

[37] *See* LEARY, *supra* note 22, at 21. An aspect of the CNMI's considerable power for self-government is Article I, § 105, where Congress relinquishes some of its plenary authority over territories, granted in the United States Constitution. *See id.* at 16. *Compare* U.S. CONST. art. IV, § 3, (granting Congress power to control the territories) *with* CNMI COVENANT, *supra* note 8, art. I, § 105 (limiting Congress' authority regarding the enactment of certain legislation). When Congress agreed to relinquish its plenary power, it prevented the CNMI from claiming it has a "residual sovereignty" not constrained by the express terms of the Covenant. *See* LEARY, *supra* note 22, at 23. If the agreement was negotiated on an equal basis, it can be assumed that the Northern Marianas had sovereign standing and relinquished some of it when they agreed to the Covenant. *See id.*; *see also* Herald, *supra* note 15, at 128.

[38] *See* LEARY, *supra* note 22, at 21. Other territories are governed by their organic acts, and Congress can, at its discretion, change the acts' terms. *See id.* at 21. With respect to the CNMI, however, the United States agreed to limit its authority and respect the CNMI's right to self-government by requiring mutual consent of both the U.S. and CNMI governments when changing fundamental sections of the Covenant. *See* CNMI COVENANT, *supra* note 8, art. I, § 105. Article I, § 105 of the CNMI Covenant reads:

people of the CNMI[39] is United States citizenship.[40] The Covenant also grants special privileges unique to the CNMI.[41] For example, only people of the Northern Marianas descent can own real property in the CNMI.[42] The Covenant restricts the alienation and acquisition of land in recognition of cultural and traditional values and "to protect [the people] against exploitation and to promote their economic advancement and self-sufficiency".[43]

> In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant . . . may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

Id.

In addition, Congress must specifically state that the laws apply to the Northern Marianas to make legislation applicable to the CNMI. *See* CNMI COVENANT, *supra* note 8, art. I, § 105. "The United States may enact legislation . . . but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective[.]" *Id.*

[39] The population of Saipan is approximately 59,000. *See Asian Workers Abused in U.S. Pacific Territory: Report*, AGENCE FRANCE-PRESSE, Apr. 24, 1997, *available in* 1997 WL 2102488 [hereinafter *Asian Workers*]. In the Marianas, there are two different indigenous groups, Chamorros and Carolinians. *See* King, *supra* note 16, at 481.

[40] *See* CNMI COVENANT, *supra* note 8, art. III, §§ 301-304. As U.S. citizens, the people of the Northern Marianas are entitled to "all privileges and immunities of citizens in the several States of the United States." CNMI COVENANT, *supra* note 8, art. III, § 304.

[41] The Covenant explicitly lists which parts of the United States Constitution are pertinent to the islands and what legislation needs the approval of both the United States and the Northern Marianas' governments to be applicable to the CNMI. *See* CNMI COVENANT, *supra* note 8, art. V, § 501(a). Often, it is unclear whether certain provisions of the Constitution apply to unincorporated territories. *See* LEARY, *supra* note 22, at 16-17. Listing specific applicable sections in the Covenant reduces this ambiguity. *See id. See generally* CNMI COVENANT, *supra* note 8, art. V, §§ 105, 501(a) (explaining the applicability of U.S. legislation to the Northern Marianas). Article V, § 501(a) of the CNMI Covenant reads:

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, section 9, Clauses 2, 3, and 8; Article I, section 10, Clauses 1 and 3; Article IV, section 1 and section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law.

CNMI COVENANT, *supra* note 8, art. V, § 501(a).

[42] *See, e.g.*, CNMI COVENANT, *supra* note 8, art. VIII, § 805 (stating that only persons of Northern Marianas descent may own land in the CNMI). Cultures in most of Micronesia, including the Northern Marianas, value the ownership of land with symbolic and cultural significance, beyond that of mere economic importance. *See* LEARY, *supra* note 22, at 10.

[43] CNMI COVENANT, *supra* note 8, art. VIII, § 805.

The Covenant also grants some unusual exemptions from federal law.[44] These exemptions have caused tension between the United States and the CNMI.[45] For example, the CNMI is exempted from United States immigration and minimum wage laws.[46]

It is often difficult to determine whether federal or CNMI law applies to a particular situation, particularly if federal legislation or agency regulations intrude upon CNMI statutory provisions enacted pursuant to the Covenant. While the Covenant fails to provide any suggestion on how to resolve conflicts between federal and local laws, it establishes that all federal laws applicable to the CNMI must specifically state that they apply to the Northern Marianas.[47] Laws passed before the enactment of the Covenant apply to the CNMI if the federal legislation applied to Guam and the several states.[48] However, the Covenant fails to spell out what happens when federal laws that "apply" to the CNMI contradict the Covenant and/or local laws established under the Covenant's authority.[49] The Covenant lacks answers to questions concerning (1) which law takes precedence when there is a conflict between

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[44] *See e.g.*, CNMI COVENANT, *supra* note 8, art. V, § 503(a) (granting the CNMI power over its immigration), § 503(c) (providing the CNMI with control over its minimum wage laws), art. VIII, § 805 (restricting land ownership to persons of Northern Marianas descent).

[45] *See* Saipan Hotel Corp. v. NLRB, 114 F.3d 994 (9th Cir. 1997)(deciding that the NLRA is applicable to the CNMI even if it conflicts with local labor and immigration laws and the Covenant grants the Northern Marianas control over its labor and immigration), *cert. denied*, 118 S.Ct. 1034 (1998); Northern Mariana Islands v. Atalig, 723 F.2d 682 (9th Cir.)(determining that jury trials are not required in all CNMI criminal prosecutions when the Covenant specifically does not require trial by jury and indictment by grand jury), *cert. denied*, 467 U.S. 1244 (1984). *See generally* CNMI COVENANT, *supra* note 8, art. V, §§ 501(a) (jury trials), 503(a) (immigration), 503(c) (minimum wage).

[46] *See* CNMI COVENANT, *supra* note 8, art. V, § 503(a), (c). The Covenant specifically states that the immigration and naturalization laws and minimum wage provisions of the United States will not apply to the Northern Marianas unless made applicable to them by Congress. *See id.* Art. V, § 503 reads:

> The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, *will not apply* to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:
>
> (a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;
>
> . . .
>
> (c) the minimum wage provisions . . . .

CNMI COVENANT, *supra* note 8, art. V, § 503(a), (c) (emphasis added).

[47] *See* CNMI COVENANT, *supra* note 8, art. I, § 105.

[48] *See* CNMI COVENANT, *supra* note 8, art. V, § 502(a)(2).

[49] *See generally* CNMI COVENANT, *supra* note 8, art. V (explaining the applicability of U.S. laws to the CNMI).

federal and local laws, and (2) whether federal laws apply to the CNMI when the CNMI is not specifically named therein.[50]

III. THE CONTROVERSIAL GARMENT INDUSTRY IN THE CNMI

The controversy over the CNMI garment industry illustrates the tension the CNMI currently faces as a direct result of its negotiated political association with the United States.[51] Among the numerous goals of the Covenant, the CNMI has focused on developing the islands' economy.[52] Controlling its immigration policies has been one of the largest contributors to the CNMI's economic growth.[53] The Covenant specifically grants the CNMI authority to control immigration as a means of preserving its social, cultural, and political structure.[54] Ironically, the CNMI's open-door immigration policies have instead created social, political, and environmental problems within the islands, as well as tension with the United States.[55] These problems are demonstrated in the controversy surrounding the garment industry's alleged labor abuses and human rights violations.[56] The local garment industry is supported by alien workers, who were permitted to enter the Northern Marianas according to the CNMI's power, granted by the Covenant, to enact and implement its own immigration laws.[57]

The garment industry is one of the mainstays of the CNMI's economy.[58] Since 1994, United States newspapers have reported labor abuses and human rights violations in the CNMI garment factories.[59] Although the Covenant grants the Northern Marianas control over its own immigration and labor laws,[60] the United States government has threatened a federal takeover of

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[50] *See generally* CNMI COVENANT, *supra* note 8, art. I, § 105, art. V, § 502(a)(2) (describing the applicability of U.S. legislation to the CNMI).

[51] *See* Greg Holloway, *The Effort to Stop Abuse of Foreign Workers in the U.S. Commonwealth of the Northern Mariana Islands*, 6 PAC. RIM L. & POL'Y J. 391, 391-92, 400 (1997); McCarthy, *supra* note 12, at 1.

[52] *See* Herald, *supra* note 15, at 128.

[53] *See id.*; Zaldy Dandan, *House Adopts Resolution Denouncing Federal Gov't*, MARIANAS VARIETY, Jan. 18, 1999, at 1.

[54] *See* Herald, *supra* note 15, at 128. *See generally* CNMI COVENANT, *supra* note 8, art. V, § 503(a) (granting the CNMI authority to control its immigration).

[55] *See* Herald, *supra* note 15, at 128.

[56] *See* Holloway, *supra* note 51, at 391-92, 400; McCarthy, *supra* note 12, at 1.

[57] *See* McCarthy, *supra* note 12, at 1.

[58] *See* Herald, *supra* note 15, at 145. Since the foreign garment factories have moved into the CNMI, Saipan's revenues have been increased from 224 million dollars in 1985 to 2 billion dollars in 1997. *See* McCarthy, *supra* note 12, at 1.

[59] *See* McCarthy, *supra* note 12, at 1; Holloway, *supra* note 51, at 391-92, 400.

[60] *See* CNMI COVENANT, *supra* note 8, art. V, § 503(a) (immigration); 503(c) (minimum wage).

these two areas.[61] The federal government believes that local policies contribute to the labor abuse in the Northern Marianas, and a federal takeover would protect workers.[62] The CNMI, on the other hand, argues that maintaining control over immigration and labor laws fulfills the Covenant's fundamental purpose in granting the Northern Marianas control over their internal political and social development.[63]

If the allegations of labor abuse and human rights violations[64] in the CNMI garment factories[65] prove to be true, these "sweatshops," if subject to United States law, would likely violate the Thirteenth Amendment[66] and the United States Federal Labor Standards Act ("FLSA").[67] Nevertheless, even if the

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[61] *See* Holloway, *supra* note 51, at 392; Moore, *supra* note 13, at 1.

[62] *See* Holloway, *supra* note 51, at 392, 401.

[63] *See id.* at 396.

[64] *See Abuses in N. Marianas*, HONOLULU STAR-BULLETIN, Mar. 27, 1995, at A-10. An official from the Interior Department's Office of Territorial and International Affairs stated that these violations "have no place in a place that flies the U.S. flag." *Id.*

[65] *See* Holloway, *supra* note 51, at 391-92, 400; D'Jamila Salem-Fitzgerald, *Wage Abuse in Marianas Alleged Workplace: Unions are Urging Congress to Force U.S. Territory to Comply with Labor Laws*, L.A. TIMES, Apr. 25, 1997, at D5.

A one billion dollar class action lawsuit was recently filed against the United States' largest apparel suppliers and retailers and CNMI garment manufacturers for engaging in a conspiracy and forcing "thousands of foreign garment workers into indentured servitude." *See* Mar-Vic C. Munar, *US Class Action Suit Looms over 'Garment Labor Abuse'*, MARIANAS VARIETY, Jan. 11, 1999, at 1; Mar-Vic C. Munar, *Some 22 Saipan Garment Firms Named in Case Filed at US Court*, MARIANAS VARIETY, Jan. 15, 1999. Some of the companies include Ralph Lauren, Tommy Hilfiger, Gap, Inc., J.C. Penny, Sears, Crew Nordstrom, and Oshkosh. *See id.* This lawsuit may prove to be disastrous for the local garment manufacturers. *See* Zaldy Dandan, *Manglona Fears Impact of $1-B Class Suit on Garment Industry*, MARIANAS VARIETY, Jan. 18, 1999, at 7. The garment factories denied the allegations and called the accusations "part of a political propaganda." *See* Rene P. Acosta, *Lawyer in Sweatshop Suit: Big Battle Ahead*, MARIANAS VARIETY, Jan. 18, 1999, at 1.

[66] U.S. CONST. amend. XIII, § 1 reads, "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Some compare the CNMI garment workers to indentured laborers. *See* McCarthy, *supra* note 12, at 1. Take for example, the "recruitment fee" that garment workers need to pay to come to the CNMI from China. The garment factories are willing to loan money to cover the fee of $2,800; however, once in the Northern Marianas, the workers must stay until they can pay off the loan. *See id.*

[67] 21 U.S.C. §§ 201-219 (1988). Although some parts of FLSA are applicable to the CNMI, the minimum wage sections do not apply. For example, under FLSA, farm workers and domestic maids in Puerto Rico and the Virgin Islands are paid minimum wage. *See* 29 U.S.C. § 206(a)(5) (1994). The CNMI, on the other hand, exempts these types of jobs from the minimum wage requirements. *See* 4 N. MAR. I. CODE § 9223(a)(9), (10) (1997). It is not uncommon to find these occupations filled by nonresidents working full-time for $200 a month. *See also* Herald, *supra* note 15, at 151 (stating that wages for construction workers begin at $1.35 and $1.75 an hour, and live-in maids are typically paid only $150 to $200 a month).

allegationsof abuse are true, the garment factories have not violated CNMI immigration[68] and labor laws.[69] The CNMI sets its own minimum wage and exempts certain classes of workers from these wage laws.[70] The low minimum wages and wage exemptions attract garment industries to the CNMI.[71] Congress' threat to remove some of the power granted to the CNMI in the Covenant and to impose its own labor standards upon the CNMI has increased the friction between the CNMI and the United States.[72]

The CNMI has been called an "economic mirage" because of its unique financial success, dependent on purportedly exploited foreign labor.[73] Unlike other Micronesian islands that are dependent on foreign aid, the CNMI has become nearly self-sufficient.[74] The garment industry is one[75] of the CNMI's two biggest sources of revenue.[76]

The CNMI provides an ideal situation for garment factory owners.[77] Factors such as low minimum wages,[78] open door immigration policies,[79]

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[68] *See generally* N. MAR. I. CODE, Title 3, Division 4 (immigration)(1997). The CNMI and American Samoa are the only two U.S. jurisdictions that have their own immigration laws and do not apply federal minimum wage. *See Bill Would Impose New Federal Controls over Mariana Islands*, ASSOCIATED PRESS, June 2, 1997, *available in* 1997 WL 2525807; *see also* CNMI COVENANT, *supra* note 8, art. V, § 503(a) (immigration), 503(c) (minimum wage).

[69] *See generally* N. MAR. I. CODE, tit. 3, div. 4 (immigration)(1997) and tit. 4, div. 9 (labor)(1997).

[70] *See* 4 N. MAR. I. CODE § 9223(a)(9), (10) (1997); Herald, *supra* note 15, at 151; Holloway, *supra* note 51, at 397.

[71] *See* Herald, *supra* note 15, at 144-45; Greg McDonald, *Conservative Lawmakers Flocking to Pacific Island*, HOUS. CHRON., Dec. 24, 1997, at 1 (describing the CNMI's ideal conditions for garment factories).

[72] *See* Pete Pichaske, *Abuses Amid Marianas' Success Spur Bill for Control*, HONOLULU STAR-BULLETIN, Apr. 25, 1997, at A-20. A bill in Congress has proposed to take authority over immigration and minimum wage laws away from the CNMI government. *See* S. 1052, 106th Cong. (1999).

[73] *See* Kevin Galvin, *Northern Marianas Called America's Sweatshop Islands*, HONOLULU ADVERTISER, Apr. 25, 1997, at B8.

[74] *See* Froilan Tenorio, *A Covenant that Works*, WASH. TIMES, Aug. 10, 1997, at B5.

[75] The CNMI's other main source of revenue is tourism. *See* Herald, *supra* note 15, at 144.

[76] *See id.* at 144-45. The CNMI garment factories now export over 625 million dollars annually in apparel shipments. *See* Joanna Ramey, *U.S. Seeking to Reform Mariana's Apparel Industry*, WOMENSWEAR, July 23, 1997, at 22. It is estimated that the garment factories bring in at least 50 million dollars a year in revenue to the CNMI. *See* Al Hulsen, *Garment Industry Says Mandate Could Destroy It*, PAC. MAG., Nov./Dec. 1997, at 9. The revenue is sufficient to cover over one-third of the government's salaries. *See id.*

[77] *See generally* McDonald, *supra* note 71, at 1.

[78] *See* Holloway, *supra* note 51, at 397. The minimum wage for workers in the CNMI is $3.35 an hour, $1.80 below the U.S. minimum wage. *Compare* 29 U.S.C. § 206(a)(1) (1994), *with* 4 N. MAR. I. CODE § 9221 (1997). For maids, farmers, and other exempted categories, the minimum wage is even less. *See* 4 N. MAR. I. CODE § 9223 (1997). In addition to receiving a lower minimum wage, money is often deducted from their salaries for rent and food. *See* Mc-

access to cheap labor,[80] and the right to ship articles of clothing made in the CNMI to the United States quota- and tariff-free carrying "Made in the U.S.A." labels,[81] induce foreign investors to build garment factories in the Northern Marianas.[82] In addition, CNMI employers face no significant limits in hiring foreign labor.[83]

The open-door immigration policy has contributed to a large alien-based population in the Northern Marianas.[84] Currently, aliens in the CNMI occupy ninety-one percent of jobs in the private sector.[85] The alien workers now outnumber the local population.[86] However, the lack of political representation of the aliens in the CNMI government has contributed to the emerging basic human rights problems.[87]

Reported human rights violations[88] affect both the working and living conditions of the garment workers.[89] There have been allegations of employment contracts that prevented the workers from exercising their rights to attend church, date, ask for raises, or join unions.[90] The barracks where

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Donald, *supra* note 71, at 1; *Senators Listen to Horror Stories About Rota Island*, HONOLULU ADVERTISER, Sept. 23, 1994, at B5. However, the minimum wage is high enough to attract workers from poorer countries, such as the Philippines. *See id.*

[79] *See* Herald, *supra* note 15, at 128.

[80] *See Senators Listen*, *supra* note 78. The majority of the CNMI's foreign workers come from the Philippines, China, and Bangladesh. *See Asian Workers*, *supra* note 39.

[81] *See* McCarthy, *supra* note 12, at 1.

[82] *See* McDonald, *supra* note 71, at 1.

[83] *See* Holloway, *supra* note 51, at 396. "NMI immigration laws essentially create a free entry policy by allowing employers to use foreign labor with few restrictions." *Id.*

[84] *See* Herald, *supra* note 15, at 148-49.

[85] *See* Mar-Vic C. Munar & Aldwin R. Fajardo, *US Will Not Continue Justifying NMI's Rights Record-Stayman*, MARIANAS VARIETY, Jan. 18, 1999, at 1.

[86] *See* Zaldy Dandan, *Bills Headed to Governor*, MARIANAS VARIETY, Jan. 18, 1999, at 7.

[87] *See* Herald, *supra* note 15, at 129.

[88] *See* Holloway, *supra* note 51, at 391. Froilan Tenorio, former governor of the CNMI, was quoted, "[w]orkers have been cheated, paid less than the minimum wage, forced to live in subhuman conditions, locked in during non-work hours, and even beaten and raped." *Senators Listen*, *supra* note 78. Some of the alleged human rights violations include "waitresses forced into prostitution and nude dancing, housemaids who were beaten, raped and locked in rooms, and farm laborers treated as slaves." *Id.*

[89] *See Northern Marianas*, HONOLULU STAR-BULLETIN, Oct. 16, 1997, at A12. Reports describe barracks with curls of barbed wire atop six-foot high concrete walls. *See id.* Abuse allegations include illegal recruitment, battery, rape, child labor, and forced prostitution. *See* Ramey, *supra* note 76, at 2.

[90] *See* Sarah Jackson-Han, *US to Crack Down Asian Garment Factories in Pacific*, AGENCE FRANCE-PRESSE, Oct. 4, 1997, *available in* 1997 WL 13408187; *see also* McDonald, *supra* note 71, at 2.

workers live have been described as unsanitary, with many workers squeezed into a small, cramped room.[91]

A. The Debate over a Federal Takeover of CNMI Immigration

Due to reports of purported labor abuse and human rights violations, a bill[92] has been proposed in the United States Congress, which would make United States immigration law and the federal minimum wage applicable to the CNMI.[93] The bill applies the federal Immigration and Nationality Act to the CNMI, replacing the current local immigration laws passed under the Covenant.[94] The bill also increases the CNMI's minimum wage to the federal minimum wage standard.[95] Moreover, the bill makes garments, produced in factories lacking a sufficient number of United States employees, subject to tariffs.[96] President Clinton[97] has publicly supported the bill[98] because it

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[91] *See* McCarthy, *supra* note 12, at 1.

> At night she and 700 other workers were locked up in company barracks infested with rats and equipped with just one outside toilet for every 50 people. The residents were allowed out only on Sundays for a maximum of one hour. When she complained about conditions, . . . she and another female worker were beaten by factory foremen wielding heavy dressmaking scissors.

Id.

[92] The bill, the Northern Marianas Covenant Implementation Act, is now in the U.S. Congress, proposed by Rep. George Miller (D-California), Sen. Daniel Akaka (D-Hawai'i) and Sen. Frank Murkowski (R-Alaska) and supported by President Clinton. *See* S. 1052, 106th Cong. (1999); Moore, *supra* note 13, at 1; *Akaka Co-Sponsors Bill to Halt Worker Abuse in N. Marianas*, HONOLULU STAR-BULLETIN, Oct. 14, 1997, at A-14; McDonald, *supra* note 71, at 1.

[93] *See Showdown Coming in U.S.-NMI Controversy*, PAC. MAG., Jan./Feb. 1998, at 1. Art. V § 503 of the Covenant states that U.S. immigration and naturalization and minimum wage laws do not apply in the CNMI "except in the manner and to the extent made applicable to them by the Congress by law," thereby, granting Congress the authority to enact legislation affecting these areas. *See* CNMI COVENANT, *supra* note 8, art. V, § 503.

[94] *See* Galvin, *supra* note 73.

[95] *See id.* The CNMI's minimum wage is currently set at $3.95 per hour, while the current federal minimum wage standard is $5.15 an hour. *See* 29 U.S.C. § 206(a)(1) (1994); 4 N. MAR. I. CODE § 9221(d) (1997).

[96] *See Akaka Co-Sponsors*, *supra* note 92. Sen. Akaka added this requirement to the bill. *See id.*

[97] President Clinton wrote a letter to Governor Froilan Tenorio stating that he would not tolerate abuse of workers in U.S. territories. *See Clinton Vows to Fight Against Northern Mariana Islands Sweatshops*, ASSOCIATED PRESS, June 2, 1997, *available in* 1997 WL 2529402. He said that the labor practices were "inconsistent with our country's values." *See id.*

[98] *See Clinton Vows*, *supra* note 97. The two conflicting views over the bill are largely divided between the Democrats, who are concerned with human rights violations from the alleged labor abuse, and the Republicans, who view the circumstances as ideal for economic development. *See id.*; *see also* Lawrence J. Goodrich, *Where, oh Where has Congress Gone? For Many Lawmakers, Recess is a Time to Hit the Road-Both in the U.S. and Abroad*,

furthers his goal of cracking down on both foreign and domestic sweatshops.[99]

The proponents of the bill are concerned that current CNMI labor and immigration laws have created a two-tiered labor system, with the lower tier developing into a slave-labor class.[100] In addition to exploiting the workers, the bill's supporters fear that the CNMI garment industry benefits foreign garment industries while lowering employment opportunities within the United States.[101] The bill's proponents argue that the CNMI should comply with United States labor laws since goods manufactured in the CNMI carry the "Made in the U.S.A." label.[102]

The CNMI fears that a federal takeover of immigration will have disastrous effects on the local economy, which heavily relies on cheap alien workers.[103] The CNMI is concerned that the demise of garment factories will affect its economic success.[104] The CNMI argues that the United States should have foreseen the consequences of allowing it to retain control over its own immigration and labor, when both nations agreed on the issues during the Covenant negotiations.[105] The CNMI believes that if their garment industry is destroyed, all of the jobs will transfer to the Asian market, so the Untied States will not secure any employment gain.[106]

The Republicans in Congress are also opposed to Miller's bill and support the CNMI, praising its success.[107] They view the CNMI as a perfect example

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CHRISTIAN SCI. MONITOR, Jan. 13, 1998, at 4; Moore, *supra* note 13, at 1-3; Dana Rohrabacher, *The Debate over the Northern Mariana Islands Rages on*, WASH. TIMES, July 27, 1997, at B2.

[99] *See* Salem-Fitzgerald, *supra* note 65.

[100] *See Showdown Coming*, *supra* note 93, at 1.

[101] *See id.*

[102] *See* Galvin, *supra* note 73.

[103] *See U.S. May Take Over Northern Marianas Immigration to Stem Crime, Health Woes*, HONOLULU STAR-BULLETIN, Aug. 29, 1997, at A4.

[104] *See* Hulsen, *Garment Industry*, *supra* note 76, at 9. If the bill passes, it is highly probable that the garment factories will move out of the CNMI. However, some people argue that, within the next seven years, the garment factories will leave the Northern Marianas, regardless of whether the CNMI is able to maintain control over their own immigration. *See* Aldwin R. Fajardo, *Garment Pull-Out to Hike Shipping Costs*, MARIANAS VARIETY, Jan. 11, 1999, at 1. They point to the North American Free Trade Agreement ("NAFTA") as the incentive that will influence garment factory manufacturers to move to Mexico to avoid the high shipping costs that come with the territory of manufacturing on an island 6,000 miles from the mainland United States. *See generally id.* (explaining that the reductions in tariffs combined with the United States phasing out its garment quota system will eliminate the CNMI's advantages for garment manufacturers).

[105] *See* Tenorio, *supra* note 74; *see also* CNMI COVENANT, *supra* note 8, art. V, § 503(a) (immigration), 503(c) (minimum wage). *See generally* N. MAR. I. CODE, tit. 3, div. 4 (immigration)(1997) and tit. 4, div. 9 (labor)(1997).

[106] *See* Hulsen, *supra* note 76, at 9.

[107] *See* Goodrich, *supra* note 98. Rep. Thomas DeLay (R-Texas) visited Saipan in December 1997 and praised the ingenuity of the islands. *See id.*

of free-market capitalism at its best.[108] The Republican Party believes the workers also profit from the situation because they make more money than they would in their homelands.[109] Therefore, according to the Republicans, it is a win-win situation, because the economy is booming and everyone, including the workers, is enjoying the benefits.[110]

B. *Avoiding a Federal Takeover by Taking Other Remedial Measures*

A complete federal takeover of CNMI immigration may be unnecessary at this time. Examining alternative compromises between maintaining CNMI control over its immigration and implementing a federal takeover will be helpful. Some doubt whether the Republicans will expand federal control over the islands by voting for the bill.[111] While the Democrats are concerned about the human rights violations, the Republicans view the situation as an excellent opportunity to promote capitalism.[112] Since the two political parties are unlikely to resolve their differences,[113] it is important to examine other remedial measures, thereby offering reasonable alternatives to correct the situation.[114]

One remedy would be to have the CNMI strictly enforce its criminal laws.[115] The CNMI criminal code prohibits all of the deplorable acts, such as battery and rape, allegedly taking place in the garment factories.[116] If the Northern Mariana Islands want to keep the advantages of having sovereign control over their immigration laws, then they must address the problems of

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[108] *See id.* Rep. DeLay has promoted the system in the 50 states "where particular companies can bring Mexican workers in [at] whatever the wage market will bear." *Id.*

[109] *See* Rohrabacher, *supra* note 98, at B2.

[110] *See id.* The Republicans believe that they are "bettering the lives of those people who are able to send money home and improve the lives of their families." McDonald, *supra* note 71, at 3.

[111] *See* Pichaske, *supra* note 72. Currently, the Republicans are the majority in Congress. *See* Mit Spears, *High Tech's Power Play,* UPSIDE, Nov. 1, 1999.

[112] *See* Goodrich, *supra* note 98. "Where Republicans see a thriving free-market economy with growth rates that outpace their neighbors, Democrats see exploited workers and deplorable conditions in the island's garment factories." Moore, *supra* note 13, at 1.

[113] *See* Pichaske, *supra* note 72.

[114] *See generally* Holloway, *supra* note 51, at 391 (explaining that a "balanced effort of prosecutions by both governments under U.S. federal labor law and NMI criminal law is needed to protect the well being of foreign workers in the NMI").

[115] *See id.*

[116] *See id.* at 409; *see also, e.g.*, 6 N. MAR. I. CODE §§ 1201-1204 (assault and related offenses), 1301-1305 (sexual offenses), 1341-1348 (prostitution), 1421 (kidnapping), 1431 (criminal coercion)(1997).

human rights abuses more vigorously.[117] By aggressively prosecuting abusive employers under CNMI criminal laws, the CNMI can help alleviate the exploitation of foreign labor.[118] In addition, the CNMI could promote garment factory workers' awareness of their rights.[119] With increased awareness, workers will be able to report abuse to the proper authorities, specifically the police and the Department of Labor.[120]

Relying on the CNMI to strictly enforce its criminal laws expressly against garment factories may be unreasonable. Criminal laws preventing the alleged labor abuses already exist in the Commonwealth Code.[121] Unfortunately, the Northern Marianas is currently not aggressively punishing criminal behavior in the garment sector.[122]

Another solution to this problem, without implementing a federal takeover, may be to hire more United States citizens in CNMI garment factories.[123] Currently, the law mandates that twenty percent of the workforce be Americans.[124] Garment factories that do not comply with this new statutory requirement would face stiff penalties, such as having their merchandise taxed.[125]

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[117] *See* Holloway, *supra* note 51, at 409-10 (explaining that the CNMI should "take responsibility for the safety of its foreign workers and prosecute abusive employers"). There have been allegations that reports about mistreatment and abuse are ignored and not prosecuted. *See Asian Workers*, *supra* note 39. Many of the workers fail to report "battery and rape, unsanitary living barracks, illegal wage withholdings, long hours, or violations of their work contract" because they fear deportation and the loss of their wages. *See id.* There would be less pressure for a federal takeover if the CNMI had not reneged on its promise to steadily increase its minimum wage in segments, until it reaches federal minimum wage limits. *See* Galvin, *supra* note 73, at B8. *See generally* 4 N. MAR. I. CODE §§ 9221 (1997)(increasing the minimum wage by thirty to thirty-five cents every year). Insular Affairs Director Allen Stayman is cynical about the CNMI's reform efforts. *See* Munar, *US Class Action*, supra note 65, at 1. For example, the alien hiring moratorium law is not really a reduction, but rather a temporary freeze. *See id.* A bill waiting for the governor's signature, S.B. 11-93, amends the moratorium law and allows a garment factory to bring in more workers. *See* Dandan, *supra* note 86. The lone CNMI House Representative who opposed the bill argued that it would be wrong to increase the alien workers' population when the local unemployment rate is at 14%. *See id.*

[118] *See* Holloway, *supra* note 51, at 409.

[119] *See* Pichaske, *supra* note 72. "[F]oreign workers lack the financial resources and cultural knowledge to initiate actions against abusive employers." *See* Holloway, *supra* note 51, at 409.

[120] *See generally* Pichaske, *supra* note 72 (explaining that the garment workers do not speak the local language and are not aware of their rights).

[121] *See* 6 N. MAR. I. CODE §§ 1201-1204 (assault and related offenses), 1301-1305 (sexual offenses), 1341-1348 (prostitution), 1421 (kidnapping), 1431 (criminal coercion)(1997).

[122] *See* Salem-Fitzgerald, *supra* note 65.

[123] *See Akaka Co-Sponsors*, *supra* note 92.

[124] *See* 3 N. MAR. I. CODE § 4411(b) (1997).

[125] *See Akaka Co-Sponsors*, *supra* note 92.

Hiring more United States citizens, a solution that is acceptable to some Democrats who support a federal takeover, would force the garment factories to spend more money on wages.[126] Only higher wages will attract more Americans to the CNMI garment industry.[127] Increasing the number of United States citizen employees will appease those opposed to the CNMI labor conditions.[128] Nevertheless, the minimum wage exceptions will still attract garment manufacturers to the Northern Marianas.[129]

A third suggestion is to boost the CNMI's economy, and consequently reduce its dependence on the garment industry, by having the CNMI take better economic advantage of its geographical location. If the CNMI does not rely on the garment industry as one of its mainstays, it may be more willing to take an active role in ending the alleged abuse without fear of retaliation.[130] The CNMI government should capitalize on its unique position as a United States commonwealth easily accessible to the Asian market.[131] Since the Northern Marianas are the closest American entity to Asia, there are many business opportunities available for economic development.[132] The CNMI should be open to investing in areas such as international telecommunications, banking, and trade.[133]

The controversial garment industry in the CNMI is standing on shaky ground.[134] Both the United States and the Northern Marianas should examine alternatives, other than a federal takeover of immigration and labor, to solve the problem.[135] As long as the Northern Marianas remains a United States commonwealth, conflicts between federal and CNMI laws will continue to surface. Before changing the Covenant provisions, other options that may help resolve the tension should be considered.

IV. TENSION BETWEEN CNMI AND FEDERAL LAWS

Two recent Ninth Circuit decisions examine the issue of when it is necessary to apply federal law to the CNMI and when the CNMI laws, enacted

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[126] *See id.*

[127] *See* Herald, *supra* note 15, at 198-200.

[128] *See Akaka Co-Sponsors*, *supra* note 92.

[129] *See* Herald, *supra* note 15, at 158; Holloway, *supra* note 51, at 397; *see also supra* text accompanying note 67.

[130] *See* Herald, *supra* note 15, at 144-45; Hulsen, *supra* note 76, at 9.

[131] *See* Al Hulsen, *Delegation to NMI Finds 'Unhealthy' Situation*, PAC. MAG., Nov./Dec. 1997, at 9.

[132] *See id.*

[133] *See id.*

[134] *See Akaka Co-Sponsors*, *supra* note 92.

[135] *See* Pichaske, *supra* note 72.

pursuant to the sovereignty granted in the Covenant, take precedence.[136] The first case, *Saipan Hotel Corp. v. NLRB*,[137] considered whether a federal act has priority over CNMI legislation when the requirements of the two laws cannot be reconciled.[138] The second case, *Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs*,[139] resolved the issue of whether a federal statute is applicable to the CNMI in the absence of governing local laws.[140]

A. *Saipan Hotel Corp. v. NLRB:*[141] *If Federal and CNMI Laws Clash, Which Law Controls?*

In *Saipan Hotel*,[142] the court was asked to decide whether the National Labor Relations Act ("NLRA")[143] should apply to nonimmigrant alien contract workers in the CNMI.[144] This Act conflicts with local CNMI law, enacted pursuant to the CNMI's sovereign authority granted by the Covenant over its immigration matters.[145] Although federal law permits all workers in the United States to form unions,[146] the CNMI laws do not permit the unionization

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[136] *See* Saipan Hotel Corp. v. NLRB, 114 F.3d 994 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1034 (1998); Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717 (9th Cir. 1998). The CNMI is under the Ninth Circuit's jurisdiction. *See* CNMI COVENANT, *supra* note 8, art. IV, § 401.

[137] 114 F.3d 994 (9th Cir. 1997).

[138] *See id.* at 996, 998.

[139] 133 F.3d 717 (9th Cir. 1998).

[140] *See id.* at 726.

[141] 114 F.3d 994 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1034 (1998).

[142] *Saipan Hotel* is actually comprised of two related cases; however, the dispositive issues are the same for both cases. *See* Petition for Writ of Cert. at 5-6, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720). The first case is a representation case in which the Petitioner argues that the NLRB does not have jurisdiction over nonimmigrant workers. *See id.* at 4, 7. The second case involves a series of unfair labor practice charges alleging that the Petitioner violated the NLRA in neglecting to renew the contracts of its nonresident employees. *See id.* at 5. All of the unfair labor practice charges were consolidated into a single complaint and processed separately from the representation case. *See id.*

[143] 29 United StatesC. §§ 151-69 (1998).

[144] *See* Petition for Writ of Cert. at 2, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[145] *See id.* at 2-3. *See generally* 3 N. MAR. I. CODE § 4411(a), (b) (1997)(stating the policy of the Nonresident Workers Act ("NWA") to give preference to residents in employment); 29 United StatesC. §§ 151-69 (1998)(encompassing the NLRA).

[146] *See* Sure-Tan v. NLRB, 467 United States 883, 888 n.1 (1984).

of nonresident[147] workers.[148]

The Petitioner operated a large hotel and restaurants on Saipan, hiring both resident[149] and nonresident[150] employees.[151] In 1994, a CNMI labor organization filed a joint petition for representation with the National Labor Relations Board ("NLRB").[152] The union hoped to be the exclusive bargaining representative for both resident and nonresident employees of the Petitioner.[153] The Petitioner objected to the formation of the union, and argued that the NLRB had no jurisdiction over CNMI nonresident workers.[154] The NLRB maintained that the NLRA applied because the definition of employee[155] covered nonresident workers.[156]

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[147] *See* 3 N. MAR. I. CODE § 4412(i), (n) (1997). Nonresident is a term used to refer to workers in the CNMI who are nonimmigrant alien contract workers. *See id.*; *see also infra* note 150 and accompanying text.

[148] *See* 3 N. MAR. I. CODE § 4411(a), (b) (1997). The NWA forbids the unionization of nonimmigrant workers. *See id.* Combining both resident and nonresident workers into a single unit for collective bargaining purposes infringes with the NWA's policy of resident preference. *See* Petition for Writ of Cert. at 14, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720). In addition, the NWA restricts nonresident employment contracts to one year. *See id.* Nevertheless, applying the NLRA to nonresidents will enable them to bargain for permanent employment. *See id.* The NLRB even admitted that a contract's duration is a "mandatory subject of bargaining" and any limitations would be an "impermissible intrusion" and consequently preempted. *See id.* at 14 n.6.

[149] *See* 3 N. MAR. I. CODE § 4412(n) (1997). Section 4412(n) defines resident workers as:

> [A]ny available individual who is capable of performing services or labor desired by an employer, and who is a *citizen or national of the United States* as defined in the Constitution of the Northern Mariana Islands or . . . who is *legally residing without restrictions as to employment in the Commonwealth.*

Id. (emphasis added).

[150] *See* 3 N. MAR. I. CODE § 4412(i) (1997). Nonresident workers are defined as "any available individual . . . who is capable of performing services or labor desired by an employer and who is *not a resident worker.*" *Id.* (emphasis added). This category does not include any United States citizens or their immediate relatives, spouses, or children. *See id.* Essentially, the category is used to refer to nonimmigrant, alien contract workers in the CNMI. *See id.*

[151] *See* Brief for the NLRB in Opposition at 3, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[152] *See* Petition for Writ of Cert. at 4, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[153] *See id.*; *see also supra* notes 149 and 150 for definitions of resident and nonresident workers.

[154] *See* Petition for Writ of Cert. at 4, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[155] *See* Sure-Tan v. NLRB, 467 United States 883, 884 (1984)(including undocumented aliens as employees under the NLRA).

[156] *See* Petition for Writ of Cert. at 7, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

The Petitioner contended that local laws, such as the Nonresident Workers Act ("NWA"),[157] enacted according to the CNMI's authority over immigration matters, made the NLRA inapplicable to nonresident workers.[158] The NWA requires employers to give hiring preference to resident workers.[159] Moreover, CNMI employers can hire nonresident workers temporarily only if no qualified resident workers are available.[160]

The NLRB Regional Director decided that nonresidents are employees under NLRA.[161] The Director also determined that the United States Supreme Court's decision in *Sure-Tan v. NLRB*[162] supported the determination that nonresident workers were covered under NLRA.[163] Finally, the Director saw nothing in the CNMI laws that prohibited the employer from bargaining with employees.[164] The Petitioners appealed the NLRB's decision to the United States District Court of the Northern Mariana Islands, which compelled the

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[157] 3 N. MAR. I. CODE § 4411(a), (b) (1997). The CNMI enacted the NWA to protect CNMI residents' wages and working conditions. *See id.* This Act ensures that residents are given employment preference. *See* 3 N. MAR. I. CODE § 4411(a) (1997). The legislature's purpose for enacting the Act was to create a balanced and stable economy, to meet the temporary need for alien labor necessary to promote economic development, and to enforce, control, and regulate nonresident workers. *See* 3 N. MAR. I. CODE § 4411(a), (b) (1997).

[158] *See* Petition for Writ of Cert. at 4, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[159] *See* 3 N. MAR. I. CODE § 4413 (1997). In the CNMI, if a resident and a nonresident, with equal qualifications, education, and experience, both apply for a job, the employer must comply with the NWA and hire the resident applicant. *See* 3 N. MAR. I. CODE §§ 4411, 4413 (1997). *See also supra* note 149 and accompanying text; *infra* text accompanying note 160.

[160] *See* 3 N. MAR. I. CODE § 4413 (1997). Section 4413 of the Northern Marianas Code provides:

> Resident workers shall be given preference in employment in the Commonwealth. Nonresident workers shall be employed only as necessary to supplement the available labor force. No employer shall hire, employ, or otherwise engage for compensation any nonresident worker to perform services or labor in the Commonwealth except in strict accordance with the provisions of this Chapter and any rule or regulation issued under this Chapter.

Id.

To extend a nonresident employment contract, the CNMI government must approve the renewal. *See* Petition for Writ of Cert. at 9, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720). Requiring the government's approval helps the CNMI strictly regulate and limit the terms and conditions of nonresident employment. *See id.*

[161] *See Saipan Hotel*, 37 N.L.R.B. 3687 (1995), *reprinted in* Petition for Writ of Cert. app. at 115, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)((No. 97-720).

[162] 467 United States 883, 884 (1984).

[163] *See Saipan Hotel*, 37 N.L.R.B. 3687 (1995), *reprinted in* Petition for Writ of Cert. app. at 115, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)((No. 97-720).

[164] *See id.*

Petitioner to rehire nineteen nonresident workers[165] whose employment contracts had expired.[166]

The Ninth Circuit affirmed the NLRB's orders in two[167] separate opinions.[168] In the published decision (*"Saipan Hotel"*)[169] the representation case,[170] the court chose not to address Petitioner's jurisdictional issue regarding the Covenant and, instead, treated the case as a jurisdictional challenge

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[165] The Court did not order Saipan Hotel to rehire Vicente Perez, a nonresident, whose position was filled by a resident. *See* Saipan Hotel Corp. v. NLRB, No. 95-0012, 1995 WL 583631 (D. N. Mar. I. June 9, 1995), *reprinted in* Petition for Writ of Cert. app. at 54, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)((No. 97-720).

[166] *See* Petition for Writ of Cert. at 5, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720). The United States District Court of the Northern Mariana Islands specifically did not decide whether the Covenant vested ultimate control over nonresident workers with the CNMI or with the NLRB. *See* Saipan Hotel Corp. v. NLRB, No. 95-0012, 1995 WL 583631 (D. N. Mar. I. June 9, 1995), *reprinted in* Petition for Writ of Cert. app. at 44-45, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[167] One opinion, *Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1034 (1998), was published and the other decision, *Saipan Hotel*, Nos. 96-70403, 96-70483, slip op. (9th Cir. May 6, 1997), *reprinted in* Petition for Writ of Cert. app. at 15-20, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720), was unpublished. There seems to be some confusion over why one opinion was published and one was not. The dispute centers around the last paragraph in the unpublished opinion. The paragraph reads:

> Although we hold that the remediation the NLRB ordered in this case did not violate the CNMI's immigration law, we do note that potential for conflict does exist between some remedies available under the NLRA and the CNMI's immigration law and policies. The NLRB should be careful, as it apparently was in this case, to respect the CNMI's sovereign control over its immigration matters.

Saipan Hotel, Nos. 96-70403, 96-70483, slip op. (9th Cir. May 6, 1997), *reprinted in* Petition for Writ of Cert. app. at 15-20, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

The CNMI Office of the Attorney General requested that the memorandum opinion be published, to "aid in future interpretations of the Court's intent." Letter from Robert Dunlap II, Attorney General (Acting), CNMI Office of the Attorney General, to Clerk, United States Court of Appeals for the Ninth Circuit (Aug. 8, 1997)(on file with author). The NLRB, on the other hand, objected to publishing the opinion, unless the above-mentioned paragraph was omitted. *See* Letter from David A. Fleisher, Senior Attorney, Office of the General Counsel, National Labor Relations Board, to Cathy A. Catterson, Clerk, United States Court of Appeals for the Ninth Circuit (Aug. 15, 1997)(on file with author). The NLRB suspected that the CNMI wanted the opinion published so it could cite that paragraph "as authority for the proposition that CNMI law should prevail" if there was another conflict between an NLRB order and CNMI law. *See id.* The NLRB's position is, if such conflict arises in the future, it should be resolved in their favor. *See id.*

[168] *See* Petition for Writ of Cert. at 7, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[169] *See Saipan Hotel Corp. v. NLRB*, 114 F.3d 994 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1034 (1998).

[170] *See supra* note 142 and accompanying text.

under the NLRA.[171] The court concluded that the NLRB did have jurisdiction over nonresidents because the NLRA did not distinguish between resident and nonresident workers.[172] The court affirmed and enforced the NLRB's order that Petitioner bargain with the union, because it saw no conflict between the NWA and the NLRA.[173] In the unpublished memorandum decision ("*Saipan Hotel II*"),[174] the court decided that the NLRB's order did not require the Petitioner to violate the NWA and ordered back pay to the reinstated nonresident workers.[175]

B. Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs:[176] *How to Determine When Federal Laws Apply to the CNMI?*

A recent Ninth Circuit case, *Saipan Stevedore*, addresses the issue regarding the conflict between federal and state laws.[177] In *Saipan Stevedore*, the court was asked to decide whether the federal Longshore and Harbor Workers' Compensation Act[178] ("LHWCA") is applicable to the CNMI.[179] According to the Covenant, "the Northern Mariana Islands must be specifically named [in a federal law] for it to become effective in the Northern Mariana Islands" if the legislation is not applicable to the several states.[180] Although the LHWCA applies to the "several States and Territories,"[181] it was enacted prior to the signing of the Covenant.[182] Thus, it appears that the Act should not apply to the CNMI. Despite appearing inapplicable to the CNMI, a Covenant provision requires that any laws already in existence at the time the Covenant was signed and "applicable to Guam and . . . the several States" apply to the CNMI.[183]

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[171] *See Saipan Hotel*, 114 F.3d at 996.

[172] *See id.*

[173] *See id.*

[174] *See Saipan Hotel*, Nos. 96-70403, 96-70483, slip op. (9th Cir. May 6, 1997), *reprinted in* Petition for Writ of Cert. app. at 15-20, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[175] *See id.*

[176] 133 F.3d 717 (9th Cir. 1998).

[177] *See* Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717 (9th Cir. 1998).

[178] 33 U.S.C. §§ 901-903 (1994).

[179] *See Saipan Stevedore*, 133 F.3d at 719.

[180] CNMI COVENANT, *supra* note 8, art. I, § 105.

[181] *See* 33 U.S.C. §§ 901-903 (1994).

[182] *See Saipan Stevedore*, 133 F.3d at 720.

[183] *See* CNMI COVENANT, *supra* note 8, art. V, § 502(a)(2).

In *Saipan Stevedore*, an employee was injured while unloading a container on a ship that was docked in the CNMI.[184] The employee filed under LHWCA for workers' compensation benefits.[185] The appellant argued that the Act did not apply to the CNMI because the Act applies to the "several States and Territories"[186] and the use of the proper noun ("Territories") indicates that Congress did not intend that the Act apply to unincorporated territories.[187] The Ninth Circuit disagreed with the appellant's interpretation and held that the Act did apply to the CNMI.[188]

The court first looked at the plain language of the Act and determined that it was clear from the statutory language and the Act's historically broad interpretation that Congress intended the Act to apply to all territories within the jurisdictional reach of the United States, including the CNMI.[189] Before applying a federal rule to territories acquired after the statute was enacted,

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[184] *See Saipan Stevedore*, 133 F.3d at 719.

[185] *See id.* At that time, the CNMI did not have a general compensation law. *See id.* However, now the CNMI does have such a law. *See* 4 N. MAR. I. CODE § 9302 (1997). This law does not have a specific provision for admiralty claims. *See id.* at § 9305.

[186] *See* 33 U.S.C. § 902(9) (1998).

[187] *See Saipan Stevedore*, 133 F.3d at 724. The Insular Cases and their progeny introduced the doctrine of "territorial incorporation," which makes the distinction between incorporated and unincorporated territories. *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir.) *cert. denied*, 467 U.S. 1244 (1984); *see also infra* notes 237 and 238 (discussing the Insular Cases and their progeny). Unincorporated territories are U.S. territories that are clearly not marked for statehood, as opposed to incorporated territories, those destined for statehood. *See Atalig*, 723 F.2d at 688; Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 75 (1997). Under the United States Constitution, incorporated territories are treated as equal with the other states because they are already such an "integral part of the United States." *See id.* at 75. *See generally Atalig*, 723 F.2d at 688 (stating that the entire Constitution applies to incorporated territories). Legislation for unincorporated territories is limited by the United States Constitution's "'general prohibitions' . . . protecting the liberty and property of people." *See* Terrasa, *supra*, at 189 (quoting Downes v. Bidwell, 182 U.S. 244, 294 (1901)(White, J., concurring)). Justice White claimed these restrictions were not merely regulating Congress' power, but were "an absolute denial of all authority under any circumstances or conditions." *See id.* Only fundamental constitutional rights apply to unincorporated territories. *See Atalig*, 723 F.2d at 688. *See generally* Balzac v. Porto Rico, 258 U.S. 298 (1922)(holding that the Sixth Amendment jury trial provision does not apply to Puerto Rico, an unincorporated territory); Ocampo v. United States, 234 U.S. 91 (1914)(determining that the constitutional right to jury does not apply to the Philippines, an unincorporated territory); Dorr v. United States, 195 U.S. 138 (1904)(stating that the Sixth Amendment right to jury trial does not apply in the Philippines); *Downes*, 182 U.S. 244 (deciding that provisions about revenue in United States Constitution are inapplicable in Puerto Rico).

[188] *See Saipan Stevedore*, 133 F.3d at 726.

[189] *See id.* at 722.

courts must determine that Congress would have changed the statute's language if it had foreseen the procurement of the territory.[190]

C. The Consequences of Federal Law Overriding CNMI Law

1. CNMI loses a piece of its self-governing power, granted to it by the Covenant

The Ninth Circuit's decision in *Saipan Hotel* is a prime example of how federal law can override CNMI law.[191] The *Saipan Hotel* decision to uphold the NLRB's order, regardless of whether or not it violated the CNMI law, seriously undermines the sovereignty granted to the CNMI in the Covenant.[192] The Covenant specifically gives the people of the Northern Marianas the right to govern themselves.[193] Applying federal law, without considering local law, ignores the CNMI's right to sovereignty.[194] Both the NLRB and the Ninth Circuit disregarded the NWA's role in executing the CNMI's sovereign power to set its own immigration policy.[195]

The Covenant specifically grants the CNMI control over its own immigration matters.[196] Pursuant to this authority, the Northern Marianas implemented the NWA.[197] The inadequate supply of labor makes it necessary to recruit workers from outside of the CNMI.[198] The limited land size and meager

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[190] *See id.* at 723.

[191] *See Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 996 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1034 (1998).

[192] *See* CNMI COVENANT, *supra* note 8, art. I, § 103 (granting the CNMI people the right to govern their own internal affairs), art. I § 105 (stating that Congress agrees to limit its legislative power); *Saipan Hotel*, 114 F.3d at 996; *see also* discussion *supra* section IV.A.

[193] *See* CNMI COVENANT, *supra* note 8, art. I, § 103 (stating that the "people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption."); *see also Northern Mariana Islands v. Atalig*, 723 F.2d 682, 687 (9th Cir.) (stating that the CNMI possesses a right of self-government), *cert. denied*, 467 U.S. 1244 (1984).

[194] *See generally* CNMI COVENANT, *supra* note 8, art. I, §§ 103, 105 (declaring that the CNMI has the right of local self-government and that the United States will respect this right by limiting its legislative authority); *supra* note 38 and accompanying text and *infra* text accompanying note 281.

[195] *See* Petition for Writ of Cert. at 10, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[196] *See* CNMI COVENANT, *supra* note 8, art. V, § 503(a).

[197] 3 N. MAR. I. CODE §§ 4411-13 (1997).

[198] *See id.* at § 4411(a). § 4411(a) reads:

> The Legislature finds and declares that it is essential to a balanced and stable economy in the Commonwealth that residents be given preference in employment and that any necessary employment of nonresident workers in the Commonwealth not impair the wages and working conditions of resident workers.

natural resources of the islands induced the CNMI legislature to impose certain restrictions, such as the NWA, on the nonimmigrant alien workforce.[199] The legislature hoped that these measures would help control overpopulation and ensure an adequate infrastructure.[200] In addition, the NWA requires employers to give CNMI residents preferential hiring treatment in order to ensure that CNMI residents are not pushed out of the workforce.[201] The NWA policy statement states that it is necessary to discriminate against nonresidents to preserve a balanced and stable economy.[202] The Ninth Circuit's decision in *Saipan Hotel* did not take any of these factors into consideration.[203]

With the signing of the Covenant, Congress purposely limited the exercise of its legislative power to respect the CNMI's right of self-government.[204] Thus, when federal law supersedes a conflicting CNMI law, the CNMI loses some of its self-governing authority.[205] The Ninth Circuit's decision in *Saipan Hotel* demonstrates this attack on the CNMI's sovereignty by disregarding the CNMI's immigration and labor policies bargained for in the Covenant.[206]

2. *Commonwealth is a deceptive status, concealing what lies beneath: a territory*

If federal law is allowed to predominate over CNMI law in all cases, "commonwealth" becomes a misleading term. Underneath the commonwealth

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> The Legislature recognizes the need for alien labor at the present state of economic development but finds that the employment of nonresident workers should be temporary and generally limited to the duration of the specific job or employment for which the alien was recruited.

Id.

[199] *See id*; *see also supra* note 198 and accompanying text.

[200] *See* 3 N. MAR. I. CODE § 4411(a) (1997).

[201] *See id.*

[202] *See id.*

[203] *See generally* Saipan Hotel Corp. v. NLRB, 114 F.3d 994, 997 (9th Cir. 1997)(stating that there is no conflict between the NLRA and the NWA and treating the NWA's policy as "essentially the same as the purposes" of U.S. immigration laws), *cert. denied*, 118 S.Ct. 1034 (1998).

[204] *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 686-87 (9th Cir.)(granting the CNMI legislature the power to enact legislation according to local conditions and experience), *cert. denied*, 467 U.S. 1244 (1984). The court in *Atalig* stressed the importance of section 105 of the Covenant and acknowledged the CNMI's right to self-government. *See id.*

[205] *See generally* CNMI COVENANT, *supra* note 8, art. § I, § 105 (declaring that the CNMI has the right of self-government regarding internal affairs).

[206] *See generally id.* at art. I, § 103 (stating that the CNMI has the power to regulate internal matters), art. V, § 503(a), (c) (granting the CNMI power to regulate immigration and minimum wage laws); *Saipan Hotel*, 114 F.3d 994 (holding that the NLRA does not conflict with the NWA).

designation lies a territory disguised as an independent government.[207] Treating the CNMI akin to a territory runs contrary to the underlying principles behind the Covenant negotiations. "A territory is merely part of the United States Government and is subject to the direction of the Congress and Executive Branch of the government. The Northern Mariana Islands government will be an independent government, like that of the states."[208] One of the main differences between a commonwealth and a territory is that the political status of commonwealths are developed through negotiations and cannot be altered *unilaterally* be Congress.[209] A territory, on the other hand, is governed by Congress' legislation and subject to its discretion.[210]

In *Atalig*, the Ninth Circuit used the CNMI's political status to distinguish the Northern Marianas from a territory.[211] The court explained that a territory, like Guam, is subject to Congress' plenary power and, therefore, has "no inherent right to govern itself."[212] The CNMI, on the other hand, retains the right of self-government, provided by the Covenant.[213] If federal laws take priority in every situation where a conflict exists, then the CNMI laws do not derive their power from the CNMI's authority to self-govern. Instead, the CNMI's laws remain effective simply because no overriding federal law opposes them.[214] The CNMI essentially becomes an entity subordinate to

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[207] *See* Marianas Political Status Commission, Section-By-Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands (1975), *reprinted in Hearing to Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands", Before the Subcomm. on Territorial and Insular Affairs of the House Committee on Interior and Insular Affairs*, 94th Cong. 1st Sess. 376, 629 (1975) [hereinafter Section-By-Section Analysis]. *But see* S. REP. NO. 94-596, at 2 (1976), which states:

> Although described as a commonwealth, the relationship is territorial in nature with final sovereignty invested in the United States and plenary legislative authority vested in the United States Congress. The essential difference between the Covenant and the usual territorial relationship, . . . is the provision in the Covenant that the Marianas constitution and government structure will be a product of a Marianas constitutional convention . . . .

S. REP. NO. 94-596, at 2 (1976).

[208] Section-By-Section Analysis, *supra* note 207, at 629.

[209] *See* Van Dyke, *supra* note 28, at 452 (emphasis added).

[210] *See* Section-By-Section Analysis, *supra* note 207, at 629. With territories, Congress can exercise broad power, granted by the Territory Clause of the United States Constitution. *See* U.S. CONST. art. IV, § 3; *see also* Van Dyke, *supra* note 28, at 452.

[211] *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 687 (9th Cir.)(differentiating between the CNMI as a commonwealth and Guam as a territory), *cert. denied*, 467 U.S. 1244 (1984).

[212] *Id.*

[213] *See id.*

[214] *Cf. Commonwealth of the Northern Mariana Islands, Hearings Before the Committee on Foreign Relations on H.R.J. Res. 549*, 94th Cong. 165 (1975), *reprinted in* A&E Pac. Constr. Co. v. Saipan Stevedore Co., Inc., 888 F.2d 68 (9th Cir. 1989). The court in *A&E* stated that the "authoritative" Senate Committee report declares that "[f]ederal law will control in the case

Congress' power and supremacy, comparable to a territory.[215] The sovereignty granted to the CNMI in the Covenant is essential to the continued relationship between the islands and the United States.[216] Otherwise, the inhabitants of the Northern Marianas become third-class citizens, with no voting power in federal elections, no elected representative in Congress, and "sovereignty" over their internal affairs only if no federal laws contradict the local legislation.[217]

It would be unrealistic to assume that all federal laws take precedence if there is friction with local CNMI laws. In *Atalig*, the court found that the CNMI statutory provisions which do not require jury trials for all trials did not violate the United States Constitution.[218] By analogy, if a fundamental Constitutional right, such as jury trials, can be dispensed of in some situations,[219] other federal laws may also be inappropriate for the Northern Marianas.[220]

The Covenant specifically reserved some issues to be determined by the CNMI legislature.[221] The flexibility permitted the local legislature to determine which procedures would be compatible with local conditions and experience.[222] Allowing federal statutes to supersede any conflicting local legislation defeats the Covenant's goal of providing a mechanism for considering local circumstances and practices.[223]

The relationship between the United States and the CNMI is theoretically

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of a conflict between local law (even a state's constitution) and a valid federal law." *Id.* at 71 n.4 (citations omitted).

[215] *See generally* Section-By-Section Analysis, *supra* note 207, at 629 (explaining that territories are governed by their organic acts which can be unilaterally changed by Congress, whereas the Covenant grants the CNMI the guarantee of local self-government, a right that can only be changed with the mutual consent of the CNMI and the United States).

[216] *See generally* CNMI COVENANT, *supra* note 8, art. I, §§ 103, 105 (granting the CNMI the right of self-government and requiring that the United States respect this right by limiting some of its legislative authority).

[217] Third-class citizens are classified as those who cannot vote in federal elections and have no elected representative in Congress. *See* Dandan, *supra* note 53. Second-class citizens cannot vote in federal elections, but they have a non-voting delegate to Congress. *See id.* First-class citizens are categorized by their power to vote in federal elections and representation in Congress. *See id.*

[218] *See Atalig*, 723 F.2d at 690; *see also supra* note 11 and accompanying text for case description.

[219] *See* CNMI COVENANT, *supra* note 8, art. V, § 501. Section 501 states that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law." *Id.*

[220] *See, e.g., Atalig*, 723 F.2d at 690.

[221] *See id.* at 686.

[222] *See id.*; Section-By-Section Analysis, *supra* note 207, at 639-40.

[223] *See Atalig*, 723 F.2d at 686; Section-By-Section Analysis, *supra* note 207, at 639-40.

unparalleled to any other political status in United States history.[224] The Covenant guarantees the CNMI a federal relationship placed "somewhere on the spectrum between that of a state and a territory."[225] Judicial decisions and practical experience can only determine whether or not the Covenant relationship is truly different from that of the United States and the United States territories.[226]

V. A RECOMMENDED TEST TO DETERMINE WHETHER FEDERAL OR CNMI LAW APPLIES

A. Development of the Proposed Test

Past cases addressing conflicts between federal and CNMI laws have failed to set forth a clear test for resolving such conflicts. To ensure predictability and consistency, it is vital that courts have a test to apply in these types of cases. A two-part test, used on a case-by-case basis, could effectively aid courts in determining which law governs by giving them general guidelines. First, courts must determine whether both the federal and the CNMI laws are in accordance with the overriding principles and purposes of the Covenant.[227] If the laws meet this threshold, courts must then balance the federal and the CNMI interests involved.[228] The United States goals and values should be weighed against the CNMI's interest in sovereignty and internal autonomy.[229]

The first step in the analysis must begin with the Covenant, the document governing the relationship between the United States and the CNMI, because only the Covenant's provisions can determine the boundaries of that association.[230] The Ninth Circuit in *Fleming v. Department of Public Safety*[231]

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[224] *See Atalig*, 723 F.2d at 687 (stating that the CNMI has a "unique political status"); Herald, *supra* note 15, at 134. The Ninth Circuit stated that there is merit to the argument that the CNMI's political status differs from other unincorporated territories, including Puerto Rico. *See Atalig*, 723 F.2d at 691 n.28. Only the CNMI has been granted a right to self-government guaranteed by mutual consent provisions in the Covenant. *See* CNMI COVENANT, *supra* note 8, art. I, § 105; *Atalig*, 723 F.2d at 691 n.28; Section-By-Section Analysis, *supra* note 207, at 631.

[225] *See* Herald, *supra* note 15, at 135. *See generally Atalig*, 723 F.2d at 687 n.15 (stating that territories are "merely part of the United States Government" and subject to Congress' regulation, while the CNMI "will be an independent government, like that of the states").

[226] *See* Herald, *supra* note 15, at 134.

[227] *See* United States v. De Leon Guerrero, 4 F.3d 749, 754 (9th Cir. 1993).

[228] *See id.* at 755.

[229] *See id.*

[230] *See De Leon Guerrero*, 4 F.3d. at 754.

[231] 837 F.2d 401 (1988).

stated that it was important to look at the rights reserved to the territories and those possessed by the federal government.[232] In doing so, the court first examined the Covenant to determine the "precise nature of the Commonwealth's governance."[233] Courts can measure the limits of Congress' legislative power only by the Covenant because any "authority of the United States towards the CNMI arises solely under the Covenant."[234]

If both the federal and the CNMI laws pass muster under the Covenant threshold, the second prong of the test requires that the federal interests served by the legislation be balanced against the degree of intrusion into the CNMI's control over internal matters.[235] The court in *United States v. De Leon Guererro* stated that the United States could apply certain legislation to the CNMI only if there was an identifiable United States interest.[236] The United States Supreme Court acknowledged in the Insular Cases[237] and their progeny[238] that United States procedures may be inappropriate in territories

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[232] *See id.* at 404.

[233] *See id.*

[234] *See De Leon Guerrero*, 4 F.3d at 754 (*citing* Hillblom v. United States, 896 F.2d 426, 429 (9th Cir. 1990)).

[235] *See id.* at 755.

[236] *See id.* at 754.

[237] Armstrong v. United States, 182 U.S. 243 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); Goetze v. United States, 182 U.S. 221 (1901). Justice Brown designated the cases, where the Supreme Court examined whether the Constitution applied to the new territories, collectively as the "Insular Tariff Cases." *See De Lima*, 182 U.S. at 2. The Insular Cases have been characterized as the "longest standing constitutional aberration" in the U.S. Supreme Court's history because they legitimized under the Constitution "the existence of a second class of citizens not entitled to all the protections afforded other citizens on the mainland." Terrasa, *supra* note 187, at 56-57. These cases have been grouped with other aberrant cases, such as *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944). *See id.* at 57. See *id.* at 69-79, for a more detailed discussion on the Insular Cases.

[238] Following the Insular Cases decisions in May 1901 until April 1922, the U.S. Supreme Court heard approximately ten cases involving the new territories' status and addressing which constitutional protections applied to the territories' inhabitants. *See* Terrasa, *supra* note 187, at 79. These ten cases include: *Porto Rico v. Muratti*, 245 U.S. 639 (1918); *Porto Rico v. Tapia*, 245 U.S. 639 (1918); *Ocampo v. United States*, 234 U.S. 91 (1914)(determining that the constitutional right to trial by jury does not apply to the Philippines); *Rassmussen v. United States*, 197 U.S. 516 (1905)(holding that the Sixth Amendment right to a jury trial does apply in Alaska, an incorporated territory); *Dorr v. United States*, 195 U.S. 138 (1904)(stating that the Sixth Amendment right to a jury trial does not apply in the Philippines); *Gonzalez v. Williams*, 192 U.S. 1 (1904)(determining that the inhabitants of Puerto Rico are not alien immigrants); *Hawaii v. Mankichi*, 190 U.S. 197 (1903)(holding that the Fifth and Sixth Amendments are applicable to Hawaii, an incorporated territory); *The Diamond Rings v. United States*, 183 U.S. 176 (1901)(stating that items brought from the Philippines into the United

with diverse cultures, traditions, and institutions.[239] The Covenant requires Congress to consider the specific circumstances in the CNMI.[240] Accordingly, in considering the CNMI's interests, the courts should give special attention to local culture, customs, and traditions, as well as to the size and geographical location of the Northern Marianas.[241] In addition to looking at the CNMI's cultural concerns, the courts should also consider the right of the Northern Marianas to self-government.[242]

It is helpful to apply the proposed test to an actual case to demonstrate its practical usage. In *A&E Pacific Construction Co. v. Saipan Stevedore Co., Inc.*,[243] a group of individuals brought an antitrust action against the Commonwealth Ports Authority ("CPA") and others[244] who were involved in the lease of a Saipan dock to Saipan Stevedore Company.[245] The plaintiffs were upset with the CPA's newly proposed tariff increases and wanted to block the higher rates.[246] The defendants argued that the Shipping Act of 1984,[247] which excludes agreements and activities monitored by the Federal Maritime Commission from federal antitrust laws, prevented the plaintiffs

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States were not imported from a foreign country within the meaning of the tariff act); *Dooley*, 182 U.S. 222 (determining that goods imported into Puerto Rico from the United States are only subject to duties imposed by Congress); *Balzac v. Porto Rico*, 258 U.S. 298 (1922)(holding that the Sixth Amendment right to a jury trial does not apply to Puerto Rico). The Insular Cases and their progeny limit Congress's legislative power towards the unincorporated territories by the Constitutional provisions that guarantee "fundamental rights 'indispensable to a free government'." *See* Terrasa, *supra* note 187, at 88 (quoting *Downes*, 182 U.S. at 282-83).

[239] *See Dorr*, 195 U.S. at 148; *Balzac*, 258 U.S. at 310; *see also* Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

[240] *See* CNMI COVENANT, *supra* note 8, art. I, § 105; *De Leon Guerrero*, 4 F.3d at 754. The United States agreed that the purpose of section 105 of the Covenant was to "prevent any inadvertent interference by Congress with the internal affairs of the Northern Mariana Islands to a greater extent than with those of the several States." Section-by-Section Analysis, *supra* note 207, at 385.

[241] *See* Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717, 721 (9th Cir. 1998).

[242] *See* CNMI COVENANT, *supra* note 8, art. I, § 103.

[243] 888 F.2d 68 (9th Cir. 1989).

[244] The CPA, a public corporation, owns and operates Saipan's commercial port. *See id.* at 70. Another defendant was Saipan Stevedore Company, Inc., the exclusive operator of Saipan's port harbor facilities. *See id.* Saipan Stevedore has leased the dock from CPA since 1966. *See id.*

[245] *See id.* at 68.

[246] *See id.* at 70.

[247] 46 U.S.C. app. §§ 1701-20 (1984).

from bringing an antitrust action.[248] The issue was whether the Shipping Act applied to the CNMI.[249]

Using the two-part test, the first step is to determine if the law in question conforms to the overriding principles and purposes of the Covenant.[250] The Covenant specifically states that federal laws applicable to the CNMI, along with the United States Constitution and treaties, are the supreme law of the Northern Mariana Islands,[251] as long as the CNMI's "fundamental provisions" of the Covenant respecting its right of self-government are not violated.[252] The Shipping Act comports with the overriding principles and purposes of the Covenant since it is expressly made applicable to the CNMI and does not violate Section 105 of the Covenant.[253]

Since the Shipping Act meets the Covenant threshold, the courts must then weigh the competing interests of the CNMI and federal government.[254] The CNMI has a strong desire to promote and protect self-government and autonomy.[255] The Shipping Act, in and of itself, does not severely restrict the Northern Marianas' control over its shipping regulations, nor does it hinder the CNMI's culture and traditions.[256] The identifiable federal interest in the Shipping Act is to encourage, develop, and create shipping commerce in the United States.[257] In addition to promoting interstate commerce, the Shipping Act's purpose is to "embody congressional policy against discriminatory rates."[258]

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[248] *See* 46 U.S.C. app. § 1706(a) (1984); H.R. REP. NO. 98-53, at 3 (1983), *reprinted in* 1984 U.S.C.C.A.N. 167, 168; *A&E*, 888 F.2d at 71.

[249] *See A&E*, 888 F.2d at 69. Another issue the Ninth Circuit had to decide was whether the Federal Maritime Commission had original and exclusive jurisdiction over the dispute. *See id.* at 70.

[250] *See id.*

[251] *See* CNMI COVENANT, *supra* note 8, art. I, § 102. The specific language of the Covenant reads:

> The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

Id.

[252] *See id.* art. I, § 105.

[253] *See* 46 U.S.C. app. § 1702(27) (1984); *A&E Pac.*, 888 F.2d at 71.

[254] *See generally* United States v. De Leon Guerrero, 4 F.3d 749, 755 (9th Cir. 1993)(stating that is necessary to "balance the federal interest to be served by the legislation at issue against the degree of intrusion into the internal affairs of the CNMI").

[255] *See* CNMI COVENANT, *supra* note 8, art. I, § 103.

[256] *See generally A&E*, 888 F.2d at 71 (stating that nothing in the Act violates the Covenant).

[257] *See* 46 U.S.C. app. § 801 note 4 (1984).

[258] 46 U.S.C. app. § 801 note 3 (1984).

Under Section 105 of the Covenant, the CNMI has already consented to the federal government implementing laws affecting the CNMI as long as the statute specifically includes the Northern Marianas.[259] The United States has an interest in controlling shipping commerce, not only to prevent unfair and deceptive trade practices within the states and U.S. territories, but also to protect against adverse foreign abuse within its commerce.[260] Thus, the federal interests of promoting interstate commerce clearly outweigh any interests the CNMI may have in prohibiting the application of the Shipping Act.

B. Application of the Proposed Test to Saipan Hotel Corp. v. NLRB *and* Saipan Stevedore v. Director, Office of Workers' Compensation Programs

1. Application of the proposed test to Saipan Hotel Corp. v. NLRB

As illustrated above, when courts are faced with a conflict between federal law and CNMI law, as demonstrated in *Saipan Hotel*, a two-tier test can be applied to assist them in determining which law is controlling. The first step in the analysis is to determine whether both the federal and CNMI laws comport with the overriding principles and purposes of the Covenant.[261] The purpose of allowing the CNMI sovereignty over its own immigration was to ensure the preservation of the CNMI's culture and traditions.[262] The NWA was enacted to balance the competing interests - the necessity of a temporary nonresident labor force and the protection of the indigenous customs and heritage.[263] Both of these purposes are in accordance with the Covenant's essential principles of self-government, autonomy, and recognition of the unique cultures in the CNMI.[264]

The federal NLRA conflicts with the NWA and the underlying self-governing policy of the Covenant. The NLRA does not distinguish between nonresident and resident workers.[265] This discrimination is vital to the application

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[259] *See* CNMI COVENANT, *supra* note 8, art. I, § 105.

[260] *See* 46 U.S.C. app. § 801 notes 3 & 4 (1984).

[261] *See generally* CNMI COVENANT, *supra* note 8, art. I (describing the CNMI-United States political relationship, governed by the Covenant); Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717, 721 (9th Cir. 1998)(stating that "[t]he Covenant governs the relationship between the United States and the Commonwealth").

[262] *See* Petition for Writ of Cert. at 13, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[263] *See* 3 N. MAR. I. CODE § 4411(a) (1997); Petition for Writ of Cert. at 13, *Saipan Hotel*, 114 F.3d 994 (9th Cir. 1997)(No. 97-720).

[264] *See Saipan Stevedore*, 133 F.3d 717.

[265] *See Saipan Hotel Corp. v. NLRB*, 114 F.3d 994, 996-7 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1034 (1998).

and use of the NWA.[266] In failing to pass muster under the threshold step, the courts would not move on to the second tier and CNMI local law would control. However, when conflicting CNMI and federal laws both comport with the Covenant, the courts should apply the second part of the analysis, which involves balancing the competing CNMI and United States goals and values.

2. *Application of the proposed test to* Saipan Stevedore v. Director, Office of Workers' Compensation Programs

An application of the test to previous cases may help show how the conflicts can be resolved with consistency and predictability. In *Saipan Stevedore*, the court should have first looked to the Covenant to determine if the LHWCA applies to the Northern Marianas.[267] While the Covenant requires all federal laws that apply to the CNMI to specifically state that they are applicable to the Northern Marianas, it also provides an exception to this rule.[268] The exception permits federal legislation that was passed before the Covenant was enacted to apply to the CNMI if it applied to Guam and the several states.[269] Although the LHWCA was passed in 1929, long before the CNMI became a Commonwealth, it still applies to the Northern Marianas since it applies to the states and territories (including Guam).

If the law passes muster under the Covenant threshold, the federal interests, served by the legislation, must be balanced against the degree of intrusion into the CNMI's internal matters.[270] *De Leon Guererro* held that for certain legislation to apply to the CNMI, there must be an identifiable federal interest.[271] The LHWCA was passed to protect longshoremen who were injured while working on the docks.[272] State workers' compensation laws did not extend to these workers because the work involved admiralty and maritime matters.[273] Clearly, Congress had an identifiable interest in insuring longshoremen and protecting them if injured.[274]

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[266] *See generally* 3 N. MAR. I. CODE § 4411(a) (1997)(giving residents preference in employment over nonresidents).

[267] *See Saipan Stevedore*, 133 F.3d 717; *see also* United States v. De Leon Guerrero, 4 F.3d 749, 754 (9th Cir. 1993); Northern Mariana Islands v. Atalig, 723 F.2d 682, 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

[268] *See* CNMI COVENANT, *supra* note 8, art. I, § 105.

[269] *See id.* art. V, § 502(a)(2).

[270] *See De Leon Guerrero*, 4 F.3d at 755.

[271] *See id.* at 754.

[272] *See Saipan Stevedore*, 133 F.3d at 721.

[273] *See id.*

[274] *See id.*

The Covenant also requires Congress to consider the particular circumstances in the CNMI.[275] At the time the suit was filed, no local law competed with or contradicted the LHWCA.[276] In addition, nothing in the Act, itself, conflicts with the CNMI's sovereignty, culture, or traditions.[277] The LHWCA actually benefits the CNMI by providing protection for its employers and employees and furthers the Covenant's goals of encouraging self-sufficiency.[278] Under the proposed test, the Act passes muster and should be applicable to the CNMI.

VI. CONCLUSION

The CNMI's unique commonwealth status derives from the political link between two sovereign nations.[279] When the United States and the Northern Marianas entered into the commonwealth negotiations, both were willing to make some concessions in developing the CNMI's new political status.[280] Along with the new association, the two countries bargained away some of their autonomous rights and sovereign interests.[281] The nations must find some middle ground to help determine how to choose between competing laws, as the CNMI and federal laws will continue to clash in the future.[282]

A current example of the tension arising from the conflicts between United States and local laws centers on the garment industry. The federal takeover of immigration will have a drastic impact on the CNMI's future.[283] While it is important that the United States and the CNMI address the allegations of labor abuse and human rights violations, it is advisable that all other alternatives are

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[275] *See De Leon Guerrero*, 4 F.3d at 754. *See generally* CNMI COVENANT, *supra* note 8, art. I, § 105 (requiring legislation to specifically state that it applies to the Northern Marianas).

[276] *See Saipan Stevedore*, 133 F.3d at 719.

[277] *See id.* at 725. *See generally* 33 U.S.C. §§ 901-3 (1998)(encompassing the LHWCA).

[278] *See Saipan Stevedore*, 133 F.3d at 725.

[279] *See* CNMI COVENANT, *supra* note 8, art. I, § 101.

[280] *See* CNMI COVENANT, *supra* note 8, art. I, § 104, art. III, §§ 301-04, art. V. § 503(a), (c), and art. VII; Herald, *supra* note 15, at 135. The United States protected its interest in the islands' military value due to its strategic location. *See* Herald, *supra* note 15, at 135. *See generally* CNMI COVENANT, *supra* note 8, art. I, § 104 (granting the United States sole responsibility and authority in CNMI matters pertaining to foreign affairs and defense). The CNMI received U.S. citizenship for its citizens and U.S. financial aid, and maintained control over its immigration and labor laws. *See id.* art. III, §§ 301-04 (U.S. citizenship), art. V, § 503(a) (immigration), 503(c) (minimum wage), art. VII (financial aid).

[281] *See* CNMI COVENANT, *supra* note 8, art. I, § 101. Article I, section 103 reads: "The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." *Id.* at art. I, § 103.

[282] *See* Herald, *supra* note 15, at 136.

[283] *See U.S. May Take Over*, *supra* note 103; Hulsen, *supra* note 76.

considered before resorting to a federal takeover.[284] A federal takeover is a drastic step that seriously impinges on the CNMI's right of self-government.[285] Opening its door to other business opportunities arising from the CNMI's essential location, strictly implementing its criminal laws to punish wrongdoers, increasing workers' awareness of their rights, and hiring more United States citizens in the garment factories are all suggestions that will lessen the CNMI's reliance on garment manufacturers and strengthen its control over these factories.[286]

The friction between federal and CNMI laws is not a series of isolated incidents.[287] As long as the CNMI remains a U.S. Commonwealth, courts will have to determine which laws apply to the islands and which law takes priority. The proposed two-part test may help provide some predictability by guiding courts in deciding which law has precedence when there is a conflict.[288] If the courts first determine that both the federal and CNMI laws meet the threshold requirement of corresponding with the Covenant's principles and purposes, they can then balance the two competing interests.[289] Although the courts will have to deal with the conflicting laws on a case-by-case basis, the test will provide a basis for resolving the conflicts.[290] If federal laws invariably take precedence over local laws, the Northern Marianas lost all of its sovereignty with the signing of the Covenant.[291]

Gretchen Kirschenheiter[292]

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[284] *See* Pichaske, *supra* note 72.

[285] *See* CNMI COVENANT, *supra* note 8, art. V, § 503(a) (immigration), 503(c) (minimum wage).

[286] *See* Holloway, *supra* note 51, at 391, 409; *Asian Workers*, *supra* note 39; *Akaka Co-Sponsors*, *supra* note 92; Hulsen, *supra* note 131; Pichaske, *supra* note 72.

[287] *See, e.g.*, Saipan Hotel Corp. v. NLRB, 114 F.3d 994 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1034 (1998); Saipan Stevedore Co. v. Director, Office of Workers' Compensation Programs, 133 F.3d 717 (9th Cir. 1998).

[288] *See* discussion *supra* section V.A.

[289] *See generally* United States v. De Leon Guerrero, 4 F.3d 749, 755 (9th Cir. 1993)(stating that is necessary to balance the federal interest against the "intrusion into the [CNMI's] internal affairs"); *supra* section V.A (discussing the proposed test).

[290] *See* discussion *supra* section V.A.

[291] *See* discussion *supra* section IV.C.

[292] Class of 1999, William S. Richardson School of Law. I dedicate this article to my parents, Ronald and Gayle Kirschenheiter, who inspired and encouraged me throughout its creation.

Privacy Outside of the Penumbra: A Discussion of Hawai'i's Right to Privacy After *State v. Mallan*

I. INTRODUCTION

Contraceptives,[1] abortion,[2] homosexual sodomy,[3] pornography,[4] prostitution,[5] homosexual marriage[6] - the line of cases dealing with the right to privacy is no stranger to controversy. For that reason, it seems fitting that *State v. Mallan*,[7] as a case addressing the limits of the right to privacy as it exists in Hawai'i, involves colorful facts.[8] *Mallan* adds to the list of controversies the use and possession of marijuana for personal use, which is itself a contested issue across the nation.[9] Notwithstanding its contribution to the national

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[1] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965)(holding that a statute forbidding the use of contraceptives violates the right of marital privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)(declaring a statute preventing married or single people from acquiring contraceptives unconstitutional).

[2] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 166 (1973)(holding that a statute prohibiting all abortions except those for the purpose of saving the pregnant woman's life is unconstitutional).

[3] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 189, 196 (1986)(rejecting a lower court's application of privacy precedents to a case involving homosexual sodomy statute).

[4] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 568 (1969)(upholding the possession of pornography in the privacy of one's own home on privacy grounds); State v. Kam, 69 Haw. 483, 496, 748 P.2d 372, 380 (1988)(finding a correlative right to sell pornography under the privacy right guaranteed in the Hawai'i State Constitution).

[5] *See, e.g.*, State v. Mueller, 66 Haw. 616, 630, 671 P.2d 1351, 1360 (1983)(refusing to recognize a fundamental right to practice in-house prostitution protected by the right to privacy).

[6] *See, e.g.*, Baehr v. Lewin, 74 Haw. 530, 557, 852 P.2d 44, 57 *reconsideration granted in part*, 74 Haw. 650, 875 P.2d 225 (1993)(finding no fundamental right to same-sex marriage under the right to privacy).

[7] 86 Hawai'i 440, 950 P.2d 178 (1998).

[8] *See id.* at 442, 950 P.2d at 180.

[9] *Mallan* offers the following cases to demonstrate that where other states have addressed the issue of whether the possession and use of marijuana is protected under the right to privacy, courts have uniformly found that it is not:

> Ravin v. State, 537 P.2d 494 (Alaska 1975); Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Gain, 100 Cal. App. 3d 586, 161 Cal. Rptr. 181 (1979); Kreisher v. State, 319 A.2d 31 (Del. 1974); Laird v. State, 342 So.2d 962 (Fla. 1977); Blincoe v. State, 204 S.E.2d 597 (Ga. 1974); State v. Kelly, 678 P.2d 60 (Idaho App. 1984); State v. Chrisman, 364 So.2d 906 (La. 1978); Marcoux v. Attorney Gen., 375 N.E. 2d 688 (Mass. 1978); People v. Williams, 355 N.W.2d 268 (Mich. App. 1984); State v. Kells, 259 N.W.2d 19 (Neb. 1977); People v. Shepard, 409 N.E.2d 840 (N.Y. 1980); Miller v. State, 458 S.W.2d 680 (Tex. Crim. App. 1970); State v. Smith, 610 P.2d 869 (Wash. 1980).

Mallan, 86 Hawai'i at 450-51, 950 P.2d at 188-89.

debate over marijuana possession and use statutes, *Mallan* is most significant because it represents the Hawai'i Supreme Court's attempt to define the very nature of the right to privacy protected by the Hawai'i State Constitution.

Article I, section 6 of the Hawai'i State Constitution explicitly recognizes the right to privacy.[10] By adopting this provision, the people of Hawai'i articulated a guarantee of privacy in both a "personal autonomy" and "informational sense."[11] The Hawai'i Supreme Court has stated that this explicit provision enables Hawai'i's courts to carve out an expansive understanding of privacy that could provide greater protection than the right which the United States Supreme Court recognizes as emanating from the "penumbras" of the Bill of Rights of the federal constitution.[12] However, twenty years after the passage of article I, section 6, the Hawai'i Supreme Court has yet to clarify what that explicit guarantee of privacy covers. In *State v. Mueller*,[13] the supreme court embraced federal case law that spoke to the right to privacy,[14] and declined to extend the scope of article I, section 6

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[10] Article I, section 6 of the Hawai'i State Constitution provides: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right." HAW. CONST. art. I, § 6. *See generally infra* note 12.

[11] *See Mallan*, 86 Hawai'i at 443, 950 P.2d at 181 and n.4.

[12] Regarding the protections of the state constitution in general, the *Mallan* court stated, "we are not limited to the federal interpretation of constitutional rights and have often extended the protections of the Hawai'i Constitution beyond those of the United States Constitution." *Mallan*, 86 Hawai'i at 447-48, 950 P.2d at 185-86 (citing State v. Bowe, 77 Hawai'i 51, 57, 881 P.2d 538, 544 (1994); State v. Lessary, 75 Haw. 446, 453-57, 865 P.2d 150, 154-55 (1994); State v. Quino, 74 Haw. 161, 170, 840 P.2d 358, 362, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992), *cert. denied*, 507 U.S. 1031 (1993); State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974); State v. Texeira, 50 Haw. 138, 142 n.2, 433 P.2d 593, 587 n.2 (1967)).

Specifically regarding the scope of the right to privacy under article I, section 6 of the state constitution, the Hawai'i Supreme Court indicated, "[t]he Hawai'i Constitution article I, section 6, though, affords much greater privacy rights than the federal right to privacy, so we are not bound by the United States Supreme Court precedents." State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988). Justice Levinson relied upon this understanding in the *Mallan* dissent:

> article I, section 6 of the Hawai'i Constitution . . . has given an express and more expansive local home to the proposition – theretofore residing, for the most part, within the 'penumbra' emanating from the federal Bill of Rights – that '[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.

Mallan, 86 Hawai'i at 455, 950 P.2d at 193 (Levinson, J., dissenting)(second alteration in original).

[13] 66 Haw. 616, 671 P.2d 1351 (1983).

[14] *See id.* at 620, 671 P.2d at 1354. The Hawai'i Supreme Court indicated in *State v. Mueller*, "[w]e begin our analysis by examining the sources and scope of the federally established right to personal privacy." *Id.*

beyond the protections established in those cases.[15] In *State v. Kam*,[16] the court held that the protection of the right to privacy offered by the Hawai'i Constitution could be extended beyond the scope recognized by the United States Supreme Court.[17] However, in extending the scope of the privacy right, the *Kam* court appeared to rely on a recognized federal right (the right to view pornography in one's own home) to find a correlative right under state law (the right to sell pornography) rather than recognizing a right wholly without relation to federal precedent.[18]

Instead of clarifying the scope of the right to privacy in Hawai'i after *Mueller* and *Kam*, the court in *Mallan* obscures its boundaries. The facts of *Mallan* make it a clumsy vehicle for defining limits to the right to privacy.[19] The court's reliance on the intent of the framers of article I, section 6 fails to provide a useful structure for understanding the express right to privacy under the Hawai'i Constitution. This note argues that the scope of Hawai'i's privacy right remains largely undefined and that a practical guideline for determining whether particular conduct is encompassed within this right remains unavailable. Part II summarizes the history of federal and state privacy protections and Part III explores the *Mallan* decision. Part IV assesses the state of the right to privacy in Hawai'i after *Mallan* and concludes that, although article I, section 6 freed the right to privacy in Hawai'i from the bounds of federal law, the Supreme Court has yet to provide a clear interpretation of the right's parameters.

II. PRIVACY PRIOR TO *MALLAN*: A BRIEF SUMMARY OF FEDERAL AND HAWAII PRIVACY LAW

A. *The Evolving Federal Right to Privacy*

To appreciate the state of the right to privacy in Hawai'i after *State v. Mallan*, an exploration of the federal basis for the right to privacy is instructive for several reasons. First, the framers of article I, section 6 referenced the framework for the right to privacy established by the United

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[15] *See id.* at 626, 671 P.2d at 1358. The *Mueller* court looked to the intent of the framers of article I, section 6 to determine the provision's scope, and noted that the framers cited federal case law as a model. *See id.*; *see also infra* notes 73, 78 and accompanying text. The court concluded, "[t]hus we are led back to *Griswold*, *Eisenstadt*, and *Roe* and appear to have come full circle in our search for guidance on the intended scope of the privacy protected by the Hawaii Constitution." *Mueller*, 66 Haw. at 626, 671 P.2d at 1358.

[16] 69 Haw. 483, 748 P.2d 372 (1988).

[17] *See id.*

[18] *See id.* at 495, 748 P.2d at 380.

[19] *See infra* note 306 and accompanying text.

States Supreme Court as key to understanding that provision.[20] Second, the analysis of the right to privacy under federal law played a central role in Hawai'i privacy right decisions before *Mallan*, and may continue to do so.[21]

Unlike the Hawai'i State Constitution, the United States Constitution does not mention the word "privacy."[22] The federal constitution—by explicitly protecting the rights of freedom of speech, of the press, of assembly, and of participation in trials—focuses primarily upon civic, not personal, life.[23] Rather, the United States Supreme Court has found a right to privacy implied from the Constitution's text.[24]

The Supreme Court first considered the constitutional right of privacy in a personal autonomy sense[25] in *Poe v. Ullman*.[26] In *Poe*, a married couple and

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[20] *See* COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978 (1980)[hereinafter I PROCEEDINGS OF 1978]. "This right is similar to the privacy right discussed in cases such as Griswold v. Connecticut, Eisenstadt v. Baird, Roe v. Wade, etc." *Id.* at 1024 (citations omitted).

[21] *See, e.g.*, State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983); Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

[22] *See, e.g.*, Willaim C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 744 (1995).

[23] *See id.* at 739.

[24] *See* Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1093 (1998). Rao describes the "amorphous right to privacy" as having been:

> variously located in the Due Process Clause of the Fourteenth Amendment, the Ninth Amendment, and the penumbras and emanations surrounding several other specific provisions of the Bill of Rights. This right of privacy is not to be confused with the expectation of privacy in one's home and person provided by the Fourth Amendment . . . .

Id.

[25] The constitutional right to privacy in a personal autonomy sense includes, according to the Committee on Bill of Rights, Suffrage and Election of the Constitutional Convention of Hawaii of 1978:

> the right of an individual to tell the world to 'mind your own business.' . . . It gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy.

STAND. COMM. REP. No. 69, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 674. As such, privacy in a personal autonomy sense is distinguished from the expectation of privacy in one's home and person ensured by the Fourth Amendment, and from the freedom from unwanted publicity provided for in tort law. *See* Rao, *supra* note 24, at 1093 (citing Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring)).

[26] 367 U.S. 497 (1961). It has been posited that the Supreme Court actually recognized the origins of an implied right to privacy prior to *Poe* in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *See generally* Rao, *supra* note 24, at 1094 (stating that *Meyer* and *Pierce* addressed the right of parents to educate their children). In *Meyer*, the Court stated that the liberties of the Due Process Clause of the Fourteenth Amendment included, "not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . . ." *Meyer*, 262 U.S. at 399.

their doctor challenged the constitutionality of a Connecticut statute that prohibited the use of contraceptives as well as any counseling pertaining to such use.[27] The Court dismissed the case because the law had not been enforced in over eighty years,[28] but the dissenting opinions of Justices Harlan and Douglas were a precursor of how the Court would later define the right of privacy.[29] Justice Harlan declared the statute "an intolerable and unjustifiable invasion of privacy in conduct of the most intimate concerns of an individual's personal life."[30] In his dissent, Justice Douglas described privacy as a right that "emanates from the totality of the constitutional scheme under which we live."[31] He intimated that the purpose of the right to privacy is to protect intermediate institutions, such as the family, which exist between the individual and the state.[32]

Justice Douglas' concept of a right to privacy that "emanates" from the "constitutional scheme" became the basis for his majority opinion in *Griswold v. Connecticut*.[33] It was in *Griswold* that the Supreme Court first recognized privacy as a constitutional right.[34] The right to privacy afforded the Court the basis for striking down as unconstitutional the same statute that was challenged in *Poe*.[35] The Court found that the statute was unconstitutional because it intruded on a married couple's privacy right to use contraceptives.[36] *Griswold* identified two different sources of privacy rights: the specific provisions of the Bill of Rights and the unenumerated rights retained by the people through the Ninth Amendment of the United States Constitution.[37] The majority opinion, authored by Justice Douglas, described the right to privacy as emanating from the "penumbras" of the First, Third, Fourth, Fifth, and

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Similarly, in *Pierce*, the Court found that due process rights protected the liberty of parents to control the rearing and education of their children. *See Pierce*, 268 U.S. at 534-35. These cases, however, are distinguished from *Poe* because they "were premised primarily upon the right of teachers and schools to engage in their chosen occupation, and not upon the family's right to privacy." *See* Rao, *supra* note 24, 1093-94.

[27] *See Poe*, 367 U.S. at 497, 508.

[28] *See id.*

[29] *See Rao, supra* note 24, at 1094.

[30] *Poe*, 367 U.S. at 539 (Harlan, J., dissenting).

[31] *Id.* at 521 (Douglas, J., dissenting).

[32] *See Rao, supra* note 24, at 1094 (citing *Poe*, 367 U.S. at 521 (Douglas, J., dissenting)).

[33] 381 U.S. 479 (1965).

[34] *See Griswold*, 381 U.S. at 485-86; *see also* David Helscher, *Griswold v. Connecticut and the Unenumerated Right of Privacy*, 15 N. ILL. U. L. REV. 33, 33 (1994).

[35] *See Griswold*, 381 U.S. 479; *see also* Jana Nestlerode, *Re-"Righting" the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law*, 41 CLEV. ST. L. REV. 59, 65 (1993).

[36] *See Griswold*, 381 U.S. at 485-86.

[37] *See* Helscher, *supra* note 34, at 33.

Ninth Amendments.[38] Thus, the marital relationship "l[ies] within the zone of privacy created by [these] several fundamental constitutional guarantees."[39]

The two concurring opinions in *Griswold*, authored by Justices Goldberg and Harlan, similarly recognized an implicit right to privacy embedded in the Constitution, but differed in identifying the source of that right.[40] Justice Goldberg viewed the right to privacy as emanating from the Ninth Amendment,[41] but, like the majority, he found that the Due Process Clause of the Fourteenth Amendment "protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[42] In contrast to both the majority and Justice Goldberg, Justice Harlan viewed the Due Process Clause of the Fourteenth Amendment alone as sufficient to protect the core values "implicit in the concept of ordered liberty," such as privacy.[43]

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[38] *See Griswold*, 381 U.S. at 484; *see also* Julienne C. Scocca, *Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage*, 2 SETON HALL CONST. L.J. 719, 731 (1992).

[39] *Griswold*, 381 U.S. at 485 (alterations added).

[40] *See id.* at 486 (Goldberg, J., concurring), 500 (Harlan, J., concurring); *see also* Scocca, *supra* note 38, at 730. Justice Goldberg was joined in his concurrence by Chief Justice Warren and Justice Brennan. *See Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

[41] Referring to the Ninth Amendment, Justice Goldberg stated:

> [t]he language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

Griswold, 381 U.S. at 488 (Goldberg, J., concurring).

[42] *Id.* at 487 (Goldberg, J., concurring)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Justice Goldberg, despite differing regarding which amendments of the Bill of Rights were incorporated through the Fourteenth Amendment, stated, "[a]lthough I have not accepted the view that 'due process' as used in the Fourteenth Amendment includes all of the first eight Amendments . . ., I do agree that the concept of liberty protects those personal rights that are fundamental . . . ." *Id.* at 486 (Goldberg, J., concurring)(citations omitted).

[43] *Id.* at 500 (Harlan, J., concurring). Like Justices Douglas and Goldberg, Justice Harlan also looked to the Fourteenth Amendment to locate a constitutional right to privacy, though he found that neither the Bill of Rights nor the Ninth Amendment was the source of that right. *See id.* Justice Harlan saw the "incorporation doctrine" as limiting the broad power's inherent in the Fourteenth Amendment:

> 'incorporation' doctrine may be used to restrict the reach of the Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the 'incorporation' approach to impose upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. . . . In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.'

In sum, *Griswold* recognized that a fundamental right to privacy protects certain personal conduct.[44] Such rights are deeply rooted in the "traditions and [collective] conscience of our people,"[45] and they require heightened judicial protection.[46] Whether a right is found to be fundamental or not is crucial because that finding determines the level of scrutiny with which a court must examine any statute that allegedly infringes on a fundamental right.[47] To pass constitutional muster, the government need only show that legislation impinging upon a nonfundamental right is "rationally related" to the furtherance of a legitimate governmental interest.[48] In contrast, the government must demonstrate a compelling state interest to impair a fundamental right.[49] Since privacy was recognized as a fundamental right in *Griswold*, courts are required to invalidate legislation involving government interference with decisions of personal autonomy unless strict judicial scrutiny reveals a compelling state interest supporting such legislation.[50]

Id. (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)(finding a state statute allowing the state to appeal acquittals in criminal cases to be consistent with the Fourteenth Amendment)).

[44] Although in *Griswold* the Court did not find a single source of right to privacy, it "demonstrated that in the proper case [it] was prepared to venture beyond a strict interpretation of text, and protect what it considered to be fundamental constitutionally secured rights against infringement by the state." Scocca, *supra* note 38, at 733 (quoting Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 530 (1989)).

[45] *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring)(quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *See also* Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 687 (1992). "Fundamental rights are those the Court deems to be either 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' so that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* (citing Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) and *Palko*, 302 U.S. 319, 325, 326)).

[46] *See* Allen, *supra* note 45, at 687 (citing Bowers v. Hardwick, 478 U.S. 186, 191 (1985)(finding that consensual sodomy between homosexuals is not a fundamental right)).

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id. Griswold* focused chiefly on privacy as applied to a married couple's right to use contraception, however, the Court peppered its discussion with broader words and phrases such as "relationship," *Griswold*, 381 U.S. at 486, "sacred precincts of marital bedrooms," *id.*, and "marital privacy" *id.* at 497 (Goldberg, J., concurring). While the case directly addressed matters of contraception and family planning, it became the precedent for extending relatively broad protection to intimate individual decisions outside of the marital relationship. *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977)(extending privacy right to minors in regard to contraceptives and abortion); Roe v. Wade, 410 U.S. 113 (1973)(finding that the right to privacy encompasses abortion rights); Eisenstadt v. Baird, 405 U.S. 438 (1972)(extending the right to use contraceptives to unmarried persons). *See also* Scocca, *supra* note 38, at 733 (citing Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 530 (1989)). The *Griswold* decision is significant not only because it defined a right to privacy, but also because it defined a right to engage in certain private sexual activities. *See* Heffernan,

B. The Right to Privacy in Hawai'i

1. The 1978 Constitutional Convention and the adoption of article I, section 6

Unlike the United States Constitution, the Hawai'i State Constitution explicitly guarantees the right to privacy.[51] Article I, section 6, of the Hawai'i State Constitution allows Hawai'i's courts the potential to provide greater protection for privacy rights than that afforded by the federal courts.[52] This understanding of the right to privacy in Hawai'i as an expansive one is the product of relatively recent history. The 1950 Hawai'i State Constitution provided protection against unreasonable searches and seizures in article I, section 5,[53] a state counterpart to the Fourth Amendment of the United States Constitution.[54] The delegates at the 1968 state Constitutional Convention amended this provision, now numbered article I, section 7,[55] by adding the

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supra note 22, at 737. "Indeed, . . . the Supreme Court, it could be argued, used the term 'privacy' as camouflage for the quite extraordinary right it was recognizing – not simply a constitutional right to have sex, but a constitutional right to have sex for pleasure." *Id.*

[51] Article I, section 6 of the Hawai'i State Constitution provides: "[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." HAW. CONST. art. I, § 6.

[52] Regarding the scope of the right to privacy under article I, section 6 of the state constitution, the Hawai'i Supreme Court indicated, "[t]he Hawai'i Constitution article I, section 6, though, affords much greater privacy rights than the federal right to privacy, so we are not bound by the United States Supreme Court precedents." State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988). *See also supra* note 12.

[53] Article I, section 5 of the 1950 Hawai'i State Constitution provided:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things seized.

HAW. CONST. art. I § 5 (1950).

[54] The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[55] Article I, section 7 of the Hawai'i State Constitution provides:

> The right of people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or

phrases: "invasion of privacy" and "communications sought to be intercepted" to the existing section.[56] The delegates intended to expand the protection of the right to privacy through the inclusion of this language.[57]

Despite the delegates' intentions to broaden the right to privacy, the Hawai'i Supreme Court narrowly construed the 1968 amendment when it addressed claims of infringement of the right to privacy after the amendment's enactment.[58] Hawai'i state courts thereafter rejected claims that the provision even protected the right to privacy in a personal autonomy sense.[59] Directly responding to the narrow construction of the right to privacy under the 1968 constitution, the 1978 constitutional convention proposed a second and freestanding constitutional guarantee of privacy:[60] article I, section 6. This new section was intended to eliminate confusion over the scope of the right to privacy, and to establish privacy as a fundamental right in the informational and personal autonomy sense.[61]

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the communications sought to be intercepted.

HAW. CONST. art. I, § 7.

[56] *See* Marilyn M. L. Chung et al., *The Protection of Individual Rights Under Hawaii's Constitution*, 14 U. HAW. L. REV. 311, 346 (1992).

[57] *See id.* at 346 n.256. The Committee on Bill of Rights, Suffrage and Elections stated:

> [y]our Committee is of the opinion that inclusion of the term 'invasion of privacy' will effectively protect the individual's wishes for privacy as a legitimate social interest. The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of the areas of a person's life which are defined as necessary to insure 'man's individuality and human dignity.'

STAND. COMM. REP. No. 55 (Majority), *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 233-34 (1973).

[58] *See* John Devlin, *Privacy and Abortion Rights Under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State?*, 51 LA. L. REV. 685, 732 n.59.

[59] *See id.* Two years after the 1968 amendment to article I, section 5, of the state constitution, the Hawai'i Supreme Court heard the appeals of Richard Barry Rocker and Joseph Cava who were convicted for creating a common nuisance in connection with their nude sunbathing on a secluded beach on Maui. *See* State v. Rocker, 52 Haw. 336, 475 P.2d 684 (1970). On appeal, the court asked whether the right of privacy extends to nude sunbathing on a public beach. *See id.* at 343, 475 P.2d at 689. The court cited *Griswold* and found that Hawai'i recognizes the right of the individual to be "let alone," but it held that the right to privacy only "protects a person from any unreasonable governmental search, seizure or invasion of privacy, but this right does not entitle an individual to do as he pleases in violation of the rights of others." *Id.* at 344, 475 P.2d at 690. Because the beach was a public place, the defendants were not protected from government intrusion, and their subsequent arrest did not violate the defendants' constitutional right to privacy. *See id.* at 345, 475 P.2d at 690.

[60] *See* Devlin, *supra* note 58, at 731 n.59.

[61] *See* Chung et al., *supra* note 56, at 347 n.257. The Report of the Committee on Bill of Rights, Suffrage and Elections provided:

> [i]n 1968 the Constitution was amended to include the prohibition against unreasonable invasions of privacy, but its inclusion within a section patterned after the Fourth Amendment right against unreasonable searches and seizures and the debate during the

2. *Shaping the scope of article I, section 6: Hawai'i case law on privacy*

The framers of article I, section 6 were clear that "personal autonomy" privacy enjoys explicit protection under the state constitution, and therefore, this right to privacy may not be infringed absent a showing of a compelling interest for doing so. The framers, however, left the specifics regarding what behavior enjoys protection under the right to privacy to the state courts and the legislature to define.[62] As one such case attempting to define this boundary, the *State v. Mallan* decision relies on three principal Hawai'i cases which have provided "meat"[63] to article I, section 6: *State v. Mueller*,[64] *State v. Kam*,[65] and *Baehr v. Lewin*.[66]

In the first of these cases, *State v. Mueller*, the Hawai'i Supreme Court held that a woman does not have a fundamental right under the state or federal constitution to engage in sex for a fee in her own home.[67] Defending the

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1968 constitutional convention have engendered some confusion as to the extent and scope of the right. . . . Thus it may be unclear whether the present privacy provision extends beyond the criminal area. Therefore, your Committee believes that it would be appropriate to retain the privacy provision in Article I, Section 5 [now Article I, section 7] but limit its application to criminal cases, and create a new section as it relates to privacy in the informational and personal autonomy sense.

STAND. COMM. REP. No. 69, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 674. *See also supra* note 25 for an explanation of privacy in the informational versus the personal autonomy sense.

[62] One delegate to the 1978 Constitutional Convention stated:

[t]here was some mention that I previously discussed a case-by-case method, as filling out and giving meat to the language of the committee proposal. . . . So it was the committee's intent to broaden this, broaden it by not laying out specifics; we have to leave that to the courts, I believe, and also to the legislature because I think the proposal says that the legislature shall look at it and begin the filling-in process. And each of us individually may at some time require this. Although it's broad, we may find the particular circumstances where we would want the right to privacy, and it'll be there in the Constitution in a separate section, not tied in or colored by the criminal procedure side, but a separate section that deals with civil rights. And you'll go into court and hopefully give meat to this provision.

I PROCEEDINGS OF 1978, *supra* note 20, at 361 (Statement of Delegate Weatherwax).

[63] *See id.*

[64] 66 Haw. 616, 671 P.2d 1351 (1983).

[65] 69 Haw. 483, 748 P.2d 372 (1988).

[66] 74 Haw. 530, 852 P.2d 44 (1993).

[67] *See Mueller*, 66 Haw. at 630, 671 P.2d at 1360. The *Mueller* court, in an opinion written by Justice Nakamura, held that there is no constitutionally protected right to engage in unsolicited prostitution in one's own home. *See id.*; *see also* Chung et al., *supra* note 56, at 350.

criminal charge of prostitution levied against her,[68] Lauren Mueller argued that "the activity's private setting and the absence of public solicitation set her case apart,"[69] and that her right to privacy protected her decision to have sex for a fee with a consenting adult companion.[70] Following a judgment of conviction by the district court, Mueller appealed.[71]

On appeal, the Hawai'i Supreme Court followed *Griswold*, *Eisenstadt*, and *Roe* and recognized that the right to privacy includes the right of individuals, whether married or single, to be free from government intrusion into their sexual activity.[72] Applying the "fundamental rights" analysis of *Palko v. Connecticut*,[73] the court determined that the decision to engage in prostitution was not a fundamental right recognized the by the United States Supreme Court,[74] as Mueller had not established that "a decision to engage in sex for hire at home should be considered basic to ordered liberty."[75] Therefore, Mueller's actions were not drawn into a federally protected zone of privacy.[76] However, the court did not stop its analysis at the federal constitution. It stated that it would also "consider the decision to have sex for a fee in the light of the special recognition accorded privacy by the Hawaii Constitution."[77]

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[68] Lauren Mueller was charged in state district court for "engag[ing] in, sexual conduct with another person, in return for a fee, in violation of Section 712-1200 of Hawaii Revised Statutes." *Mueller*, 66 Haw. at 618, 671 P.2d at 1354 (alteration added).

[69] *Id.* at 618-19, 671 P.2d at 1354.

[70] *See id.* Mueller claimed the right to privacy under both the federal and state constitutions. *See id.* at 620, 671 P.2d at 1354.

[71] *See id.* at 619, 671 P.2d at 1354.

[72] *See id.* at 626, 671 P.2d at 1358. "[T]he guaranteed freedom from intrusion extends to sexual activity among unmarried adult couples . . . ." *Id.*

[73] *See id.* at 621, 671 P.2d at 1355. The *Mueller* court stated, "[t]he [United States Supreme] Court observed that earlier decisions made 'it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy.'" *Id.* (quoting Roe v. Wade, 410 U.S. 113, 152 (1973) and Palko v. Connecticut, 302 U.S. 319, 325 (1937))(internal quotations and citations omitted).

[74] *See id.* at 626-27, 671 P.2d at 1358. In determining whether Mueller met her burden of demonstrating that there is a fundamental right to engage in consensual sex for money within one's own home the court found:

> every enactment of the legislature is presumptively constitutional, and a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt. . . . The defendant has not met this burden, for she has not demonstrated in a convincing manner that a decision to engage in prostitution has been recognized as a fundamental right.

Id. (citations omitted).

[75] *Id.* at 628, 671 P.2d at 1359.

[76] *See id.* at 629, 671 P.2d at 1360.

[77] *Id.*

The court looked to the intent of the framers of article I, section 6 for guidance and found that the framers viewed the privacy right under the provision as similar to the right discussed in *Griswold* and its progeny.[78] Because the *Griswold* line of federal cases subsumes the "fundamental rights" and "ordered liberty" language of *Palko* and requires that a right be ranked as fundamental, the *Mueller* court determined that the framers grafted this understanding onto article I, section 6.[79] Therefore, the Mueller court declared that conduct protected under article I, section 6 must be "'ranked as fundamental' in the concept of liberty that underlies our society."[80]

In effect, regardless of whether one approaches a constitutional privacy challenge under federal law or state law the analysis is the same: for a particular behavior to be protected, the court must determine if the right to practice the activity in question is a fundamental one.[81] No "talismanic" effect may be conferred by the invocation of privacy.[82] With respect to Mueller's criminal charge, the court found no evidence of a fundamental right to engage in in-house prostitution,[83] and, therefore, the state only needed to demonstrate that the enactment of the prohibitive statute was supported by some rational basis for it to be constitutional. The *Mueller* court accepted the framer's justification of "the need for public order,"[84] as reasonable and affirmed Mueller's conviction for prostitution.[85]

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[78] *See id.* at 630, 671 P.2d at 1360. The *Mueller* court cited the following from the report of the Committee of the Whole of the 1978 Constitutional Convention:

> [m]ore importantly, this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest. This right is similar to the privacy interest discussed in such cases as Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973) etc.

Id. at 625, 671 P.2d at 1357-58 (quoting COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 1024).

[79] *See supra* notes 73 and 78.

[80] *Mueller*, 66 Haw. at 630, 671 P.2d at 1360.

[81] *See id.*

[82] *See id.* "Thus, 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 the federal decisions." *Id.*; *see also* Chung et al., *supra* note 56, at 351. "The court refused, therefore, to infer 'a talismanic effect' from the privacy provision." *Id.*

[83] *See Mueller*, 66 Haw. at 630, 671 P.2d at 1360.

[84] *Id.* at 628-29, 671 P.2d at 1359-60. *See* Chung et al., *supra* note 56, at 350. "The Mueller opinion acknowledges that no strong reasons have been identified for criminalizing prostitution, but nonetheless refuses to rule that the right to privacy affords any protection to this activity." *Id.* (citing *Mueller*, 66 Haw. at 626-27 n.6, 671 P.2d at 1356 n.6).

[85] *See Mueller*, 66 Haw. at 630, 671 P.2d at 1360.

Five years after *Mueller*, the Hawai'i Supreme Court in *State v. Kam*[86] demonstrated a willingness to look beyond federal case law when exploring the "special recognition accorded privacy by the Hawaii Constitution."[87] In *Kam*, the court held that it was unconstitutional under article I, section 6 to prohibit the sale and distribution of pornography, thereby recognizing a right which did not exist under federal law.[88]

The *Kam* court began its analysis by turning to *Stanley v. Georgia*,[89] in which the United States Supreme Court held that possessing and viewing pornography in one's own home are fundamental privacy rights.[90] The *Kam* court also noted that in *United States v. 12 200-Foot Reels of Super 8mm Film*,[91] the Supreme Court ruled that the right to possess pornography in the privacy of one's home does not create a correlative right for someone else to sell it.[92] The *Kam* court accepted the reasoning of *Stanley*,[93] but rejected the

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[86] 69 Haw. 483, 748 P.2d 372 (1988).

[87] *Id.* at 629, 671 P.2d at 1360.

[88] *See* State v. Kam, 69 Haw. 483, 495-96, 748 P.2d 372, 380 (1988). The statute in question, Hawaii Revised Statutes [hereinafter HRS] § 712-1214(1)(a) provided:

> Promoting pornography. (1) A person commits the offense of promoting pornography if, knowing its content and character he:
>
> (a) Disseminates for monetary consideration any pornographic material . . .

HAW. REV. STAT. § 712-1214 (1972).

HRS § 712-1210, which defines the terms of HRS chapter 712:

> (6) "Pornographic." Any material or performance is "pornographic" if all of the following coalesce:
>
> (a) The average person, applying contemporary community standards would find that, taken as a whole, it appeals to the prurient interest.
>
> (b) It depicts or describes sexual conduct in a patently offensive way.
>
> (c) Taken as a whole, it lacks serious literary, artistic, political, or scientific value.

HAW. REV. STAT. § 712-1210 (1981).

[89] 394 U.S. 557 (1969).

[90] *Kam*, 69 Haw. at 489-90, 748 P.2d at 376. Because "the individual's right to read or observe what he pleases . . . is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." *Stanley*, 394 U.S. 557, 568; *see also* Chung et al., *supra* note 55, at 353 (citing *Kam*, 69 Haw. at 489, 748 P.2d at 376).

[91] 413 U.S. 123 (1973).

[92] *See Kam*, 69 Haw. at 490, 748 P.2d at 376. The Supreme Court stated in *United States v. 12 200-Foot Reels of Super 8mm Film*, "the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others." 413 U.S. at 128.

[93] *See Kam*, 69 Haw. at 494, 748 P.2d at 379. In recognizing the right to possess pornography under the Hawai'i State Constitution the court stated:

> [w]e accept the eloquent reasoning in *Stanley*: . . . 'If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.'

Id. (citing *Stanley*, 394 U.S. at 564-65); *see also State v. Mallan*, 86 Hawai'i 440, 444, 950 P.2d

reasoning of *12 200-Foot Reels*, analogizing the ban on selling pornography to the infringement on individual privacy rights caused by restrictions on family planning.[94] Since the right to possess pornographic material becomes meaningless without a correlative right to buy pornography,[95] the court recognized a fundamental right to sell pornographic material under article I, section 6.[96] Therefore, the state could ban the sale of pornography only upon demonstrating a compelling state interest.[97] The *Kam* court found no such interest,[98] and held that Hawai'i Revised Statutes ("HRS") § 712-1214(1)(a) was constitutionally infirm.[99]

Baehr v. Lewin[100] also considered the proper interpretation of article I, section 6. In *Baehr*, the Hawai'i Supreme Court held that persons of the same sex do not have a right to marry under article I, section 6.[101] The court began its analysis by recognizing that the federal privacy cases cited by the framers of article I, section 6, the constitutional convention's committee of the whole,

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178, 182 (1998).

[94] *See Kam*, 69 Haw. at 495, 748 P.2d at 379. This analogy alluded to *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), which invalidated a state law that restricted the sale of contraceptives to licensed pharmacists. *See id.*

[95] *See Kam*, 69 Haw. at 495, 748 P.2d at 379.

[96] *See id.* at 493, 748 P.2d at 378-79. "The personal decision, therefore, to read or view pornographic material in the privacy of one's own home must be afforded the protection of the Hawaii Constitution article I, section 6 from government interference." *Id.*; *see also Mallan*, 86 Hawai'i at 444, 950 P.2d at 182. "In *Kam* we accepted the reasoning of *Stanley*, but additionally based the right to read or view pornographic material within the home on article I, section 6." *Id.*

[97] *See Kam*, 69 Haw. at 495, 748 P.2d at 379.

[98] *See id.* The court rejected the claim that the state's legitimate interest in regulating commerce in obscene material was compelling, and stated that such an interest only met a "rational basis" analysis. *See id.* The court balanced this legitimate state interest with the finding that without "a correlative right to purchase such materials for this personal use . . . the underlying privacy right becomes meaningless" and held in favor of extending the right to privacy. *Id.* at 495, 748 P.2d at 380 (citing United States v. Orito, 413 U.S. 139, 146 (1973)(Brennan, J., dissenting), and United States v. Thirty-Seven Photographs, 402 U.S. 363, 381 (1971)(Black, J., dissenting)).

[99] *See id.*

[100] 74 Haw. 530, 852 P.2d 44 (1993).

[101] *See Baehr*, 74 Haw. at 556-57, 852 P.2d at 57. Writing for the majority, Justice Levinson stated, "we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising our of the right to privacy or otherwise." *Id.* However, the court did find that the applicable statute restricting marital relation to male or female established a sex-based classification. *See id.* at 572, 852 P.2d at 64. Therefore, the applicant couples were able to move forward with their equal protection claim. In the event of their success, the State of Hawai'i would no longer be permitted to refuse marriage licenses to such couples solely on their same-sex basis. *See id.* at 557, 852 P.2d at 556.

should guide the construction of the intended scope of that provision.[102] Therefore, at a minimum, article I, section 6 protects all of the fundamental rights that the United States Supreme Court recognizes.[103] Because the United States Supreme Court had held that the fundamental right to marry is part of the right to privacy,[104] the court reasoned that if that right to marry was to be extended to same-sex couples, article I, section 6 would be the appropriate vehicle to do so.[105] Thus, if such a protection were found under the right to privacy, same-sex marriage would then constitute a new fundamental right.[106]

The court turned to the privacy analysis employed in *Mueller* for guidance in determining if a fundamental right to same-sex marriage could be found,[107] and "found itself led back to 'the landmark United States Supreme Court cases in [its] search for guidance' on the issue."[108] Using the language of Justice Goldberg's concurrence in *Griswold*, the court asked whether a right to same-sex marriage is "so rooted in the traditions and collective conscience of our people that a failure to recognize it would violate the fundamental principles of liberty and justice" or whether such a right is "implicit in the concept of ordered liberty, such that the neither liberty nor justice would exist if it were sacrificed."[109] The court answered no to both questions, and held that there

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[102] *See id.* at 552, 852 P.2d at 44 (citing State v. Mueller, 66 Haw. 616, 626, 671 P.2d 1351, 1358 (1983)). *Griswold*, *Eisenstadt*, and *Roe* were the federal cases referenced by the Constitutional Convention's committee of the whole. *See* COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 1024.

[103] *See Baehr*, 74 Haw. at 552, 852 P.2d at 55.

[104] *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978). The United States Supreme Court recognized the right to marry and to bring up children in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and announced in *Skinner v. Oklahama ex rel. Williamson*, 316 U.S. 535 (1942) that marriage is "fundamental to the very existence and survival of the race." *Skinner*, 316 U.S. at 541. *Zablocki* clarified that "[m]ore recent decisions have established that the right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause." *Zablocki*, 434 U.S. at 384.

[105] *See Baehr*, 74 Haw. at 552, 852 P.2d at 55.

[106] *See id.* at 555, 852 P.2d at 57.

[107] *See id.*

[108] *Id.* (quoting State v. Mueller, 66 Haw. 616, 626, 671 P.2d 1351, 1358 (1983)).

[109] *Id.* at 556-57, 825 P.2d at 57. The *Baehr* court quoted *Griswold*:

> [j]udges "determining which rights are fundamental" must look not to "personal and private notions," but to the "traditions and [collective] conscience of our people to determine whether a principle is so rotted [there] . . . as to be ranked as fundamental. . . . The inquiry is whether a right evolved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."

Id. (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965)(Goldberg, J., concurring)) (brackets and ellipses in original)(citations and internal quotation marks omitted).

is no constitutional right to same-sex marriage protected by the right to privacy within the meaning of article I, section 6.[110]

III. *STATE V. MALLAN*

The Hawai'i Supreme Court granted certiorari in *State v. Mallan*[111] to review Lloyd Mallan's appeal of his conviction for using and possessing marijuana.[112] In his defense, Mallan claimed that the right to smoke marijuana was protected by his right to privacy under article I, section 6 of the state constitution.[113] While the *Mallan* decision clearly affirmed the appellant's conviction,[114] the case produced three distinct opinions; the plurality, the concurrence, and the dissent.[115] As a result, the precedential value of *Mallan* regarding the boundaries of the right to privacy in Hawai'i is unclear.

A. Factual and Procedural Background

Lloyd Mallan was arrested the night of October 20, 1990, in the public parking lot of the Waikiki Shell, an open-air auditorium, after the police followed the smell of marijuana to Mallan's car and found a partially burnt marijuana joint in the car.[116] Mallan was charged with promoting a detrimental drug in the third degree in violation of HRS § 712-1249.[117] Mallan did not deny that that he broke the law that night.[118] Instead, he explained that after attending a concert at the Waikiki Shell:

> I thought as commemoration of my listening to Keith Jarrett, I would smoke a joint or whatever I had left, which was minimal. And I was pursuing my sense of happiness and that it would enhance my appreciation of the music . . . I thought I was in privacy.[119]

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[110] *See id.*

[111] 86 Hawai'i 440, 950 P.2d 178 (1998).

[112] *See id.* at 441-42, 950 P.2d at 178-79.

[113] *See id.* at 442, 950 P.2d at 179.

[114] *See id.* at 454, 950 P.2d at 192.

[115] Justice Ramil and Chief Justice Moon comprised the plurality, Justices Klein and Nakayama made up the concurrence, while Justice Levinson dissented. *See id.* at 440, 950 P.2d at 178.

[116] *See id.* at 441, 950 P.2d at 179.

[117] *See id.* at 442, 950 P.2d at 180. HRS § 712-1249 provides in relevant part: "[p]romoting a detrimental drug in the third degree. (1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana . . . in any amount." HAW. REV. STAT. § 712-1249 (1993).

[118] *See Mallan*, 86 Hawai'i at 442, 950 P.2d at 180.

[119] *Id.*

Mallan filed a pretrial motion to dismiss challenging the constitutionality of HRS § 712-1249, and alleging that the right to privacy in article I, section 6 of the Hawai'i State Constitution protected his right to possess marijuana.[120]

At the hearing on Mallan's motion, the state and Mallan stipulated to the testimony of Mallan's expert witnesses, who would have stated their opinion that marijuana is neither harmful nor addictive and that the effects of the drug have not been definitively established.[121] The trial court ruled that the possession and use of marijuana are not protected under the right to privacy because they are not fundamental freedoms.[122] Therefore, in order to pass constitutional muster, the statute need only be supported by a rational basis, not a compelling state interest.[123] Recognizing the existence of controversy over the question of whether smoking marijuana results in harmful effects, the trial court found that HRS § 712-1249 satisfied the rational basis test, and was constitutional.[124]

Mallan was found guilty at his trial, and he appealed.[125] The Intermediate Court of Appeals ("ICA") affirmed the conviction based on a line of precedent holding that the possession of marijuana for personal use is not protected by the right to privacy.[126] Mallan appealed again to the Hawai'i Supreme Court, which affirmed the ICA's decision.[127]

B. The Plurality Opinion

A plurality of the court[128] noted initially that the precedent relied upon by the ICA in affirming Mallan's conviction for marijuana possession was inapplicable because it predated article I, section 6 of the Hawai'i State

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[120] *See id.*

[121] *See id.*

[122] *See id.*

[123] *See id.*

[124] *See id.*

[125] *See id.*

[126] *See id.*; *see also* State v. Bachman, 61 Haw. 71, 595 P.2d 287 (1979)(holding that the possession of marijuana for personal use is not protected by the right of privacy). *Bachman* was decided five months after article I, section 6 was ratified, but the appellate briefs were filed before ratification. *See Mallan*, 86 Hawai'i at 442, 950 P.2d at 180; *see also* State v. Renfro, 56 Haw. 501, 542 P.2d 366 (1975); State v. Baker, 56 Haw. 271, 535 P.2d 1394 (1975)(holding that the possession of marijuana for personal use is not protected by the right of privacy). *Renfro* and *Baker* were decided before article I, section 6 was added to the Hawai'i Constitution. *See Mallan*, 86 Hawai'i at 442, 950 P.2d at 180.

[127] *See Mallan*, 86 Hawai'i at 443, 950 P.2d at 181.

[128] Justice Ramil wrote the plurality's opinion in which Chief Justice Moon joined. *See id.* at 441, 950 P.2d at 179.

Constitution.[129] According to the plurality's reasoning, Mallan's challenge of HRS § 712-1249 turned on the question of whether article I, section 6 encompassed a constitutional right to possess and use marijuana.[130] The "initial step in the analysis" of article I, section 6, was the application of two established approaches to privacy rights, both of which had their genesis in federal law and which had been adopted by the Supreme Court of Hawai'i.[131]

The first of these approaches was applied by the Hawai'i Supreme Court in *State v. Mueller*[132] and *Baehr v. Lewin*.[133] Under the *Mueller/Baehr* approach, "only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy."[134] To decide what rights are fundamental, the plurality asserted:

> we must look to the traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental. The inquiry is whether a right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[135]

Under this test, if a right ranks as fundamental, then the government must demonstrate a compelling state interest to justify interfering with that right.[136] However, if a right is not fundamental, the government may abridge it simply upon a showing of a rational basis for doing so.[137]

To delimit the scope of article I, section 6, the *Mallan* plurality noted that the *Mueller/Baehr* approach had focused on "personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education."[138] In addition, the *Mueller* court had concluded that the federal cases cited by the framers of article I, section 6—*Griswold*, *Eisenstadt*,

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[129] *See id.* at 443, 950 P.2d at 181 "Initially, we note that although our prior cases addressing the constitutionality of our marijuana possession statutes did address the right to privacy, see *Bachman*, *Renfro*, *Baker*, those cases did not directly address article I, section 6." *Id.* (citations omitted); *see also supra* note 126.

[130] *See Mallan*, 86 Hawai'i at 443, 950 P.2d at 181.

[131] *See id.* at 448, 950 P.2d at 186.

[132] 66 Haw. 616, 671 P.2d 1351 (1983).

[133] 74 Haw. 530, 852 P.2d 44, *reconsideration granted in part*, 74 Haw. 650, 875 P.2d 225 (1983). *See Mallan*, 86 Hawai'i at 443, 950 P.2d at 181.

[134] *Mallan*, 86 Hawai'i at 443, 950 P.2d at 181 (citing *Mueller*, 66 Haw. at 628, 671 P.2d at 1359)(internal quotations omitted).

[135] *Id.* at 443, 950 P.2d at 181 (quoting *Baehr*, 74 Haw. at 556, 852 P.2d at 57)(citations omitted).

[136] *See id.* at 443, 950 P.2d at 181 (citing COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 1024).

[137] *See id.* (citing *Mueller*, 66 Haw. at 627, 671 P.2d at 1359).

[138] *Id.* at 444, 950 P.2d at 182 (citing *Mueller*, 66 Haw. at 627, 671 P.2d at 1359)(citations, internal quotation marks, and ellipses omitted).

and *Roe*[139]—should guide the construction of the intended scope of that provision.[140] Therefore, the plurality concluded that "while the outer limits of this aspect to privacy have not been marked,"[141] the framers and the court in prior decisions had emphasized the protection of intimate personal relationships.[142] Thus, a focus on such relationships should continue to guide the court's construction of the scope of article I, section 6.[143]

The plurality turned next to the second privacy approach[144]—the *Stanley/Kam* approach-which also originated from federal case law.[145] The conceptual basis of the *Stanley/Kam* approach originates from *Stanley v. Georgia*.[146] In *Stanley*, the United States Supreme Court held that the First Amendment protects the right to read or view pornography in the privacy of one's home.[147]

The *Mallan* plurality acknowledged that the Hawai'i Supreme Court adopted the reasoning of *Stanley* in *State v. Kam*,[148] but the *Kam* court also looked beyond *Stanley* and to find a "correlative right to purchase pornographic materials for personal use at home" that was protected under article I, section 6.[149] Because the Hawai'i State Constitution contains an explicit provision protecting privacy, the right to view pornographic material in one's home and the correlative right to purchase such material for home use cannot be interfered with unless the state demonstrates a compelling interest to do so.[150]

The plurality stressed two specific aspects of the *Stanley/Kam* approach. First, the approach focuses on the home as the "situs of privacy,"[151] as

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[139] *See id.* (citing COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 1024).

[140] *See id.* (citing *Baehr*, 74 Haw. at 552, 852 P.2d at 55).

[141] *Id.* at 444, 950 P.2d at 182 (quoting *Mueller*, 66 Haw. at 627, 671 P.2d at 1359)(citations omitted).

[142] *See id.*

[143] *See id.*

[144] *See id.*

[145] *See id.* "The second approach, adopted by this court in *State v. Kam*, 69 Haw. 483, 748 P.2d 372 (1988), is ultimately based on the United States Supreme Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969)." *Id.* (citations omitted).

[146] 394 U.S. 557 (1969).

[147] *See id.* at 568 (holding that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime).

[148] 69 Haw. 493, 748 P.2d 372 (1988).

[149] *Mallan*, 86 Hawai'i at 444, 950 P.2d at 182 (citing *Kam*, 69 Haw. at 495, 748 P.2d at 380)(alteration omitted).

[150] *See id.* (citing *Kam*, 69 Haw. at 495, 748 P.2d at 379).

[151] *Id.*

compared to the emphasis on the "intimate relationship" taken by the *Mueller/Baehr* approach.[152]

Second, the *Mallan* plurality observed that "freedom of speech and freedom of the press are strongly implicated"[153] under the *Stanley/Kam* approach because pornography deals with print or film.[154] Thus, First Amendment concerns are necessarily involved when pornography is at issue.[155] Although *Kam* ultimately grounded the protection of the right to read or view pornographic material within one's home in article I, section 6,[156] the *Mallan* plurality emphasized "that freedom of speech and freedom of the press are essential factors in the *Stanley/Kam* analysis."[157]

Having constructed a conceptual framework for analyzing the right to privacy under article I, section 6, the plurality proceeded to apply the two approaches to the facts of the case. Under the *Mueller/Baehr* analysis, the plurality found that smoking marijuana was not "a part of the traditions and collective conscience of the people."[158] Instead, laws against marijuana possession could not be said to violate the principles of liberty and justice underlying the state's civil and political institutions.[159] Based on these findings, the plurality reasoned that the right to possess and use marijuana cannot be considered a fundamental right implicit in the concept of ordered

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[152] *See id.* at 444-45, 950 P.2d at 182-83. The plurality identified four times when *Stanley* "repeatedly referred to the privacy of one's own home." *Id.* at 445, 950 P.2d at 183. To emphasize its reliance on the importance of the home in the *Stanley/Kam* approach further, the plurality quoted two cases decided after *Stanley*: "[t]he Constitution extends special safeguards to the privacy of the home . . . ." *Id.* (quoting U.S. v. Orito, 413 U.S. 139 (1973)). "The protection afforded by *Stanley* . . . is restricted to a place, the home." *Id.* (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973)).

Although the plurality acknowledged that this correlative right of purchase was practiced not at home, but in a store, it reasoned that the home was crucial in the *Stanley/Kam* approach because actual use of the pornographic materials would take place in the home. *See id.*

[153] *Id.*

[154] *See id.*

[155] *See id.*

[156] *See* State v. Kam, 69 Haw. 483, 495-96, 748 P.2d 372, 379-80 (1988).

[157] *Id.* It is curious that the *Mallan* court highlighted the nexus between pornography and the First Amendment in validating the extension of the right to privacy to the possession of such materials. Although the United States Supreme Court had done the same in *Stanley*, the Hawai'i Supreme Court in *Kam* did not discuss the role of the freedom of the press. Rather, the court emphasized the "much greater privacy rights" afforded by the Hawai'i Constitution and stated, "we are not bound by the United States Supreme Court precedents." *Id.* at 491, 748 P.2d at 377.

[158] *Mallan*, 86 Hawai'i at 445, 950 P.2d at 183 (internal quotations omitted).

[159] *See id.* at 445-46, 950 P.2d at 183-84.

liberty that necessitates the showing of a compelling state interest.[160] Therefore, HRS § 712-1249 need only survive rational basis scrutiny.[161]

Under a rational basis review, the plurality found that because scientists had not formed a consensus regarding the harmful effects of marijuana, a true controversy existed on the issue.[162] This evidence supplied a rational basis for creating the prohibition.[163] Therefore, Mallan had not sufficiently rebutted the presumption that HRS § 712-1249 was constitutional.[164]

Mallan's constitutional challenge also failed under the *Stanley/Kam* approach.[165] At the time of arrest, Mallan was in a public parking lot rather than in his home, and the activity he engaged in was possession and use of marijuana, not the sale of pornography.[166] Given these facts, Mallan's case did not implicate the right to privacy.[167] The plurality refused to extend the *Stanley/Kam* approach beyond the narrow boundaries of the home and pornography to encompass drug possession challenges.[168] To do so would create a "talismanic effect" to the term "in privacy," thus immunizing from government regulation any activity an individual deemed "private."[169]

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[160] *See id.* at 446, 950 P.2d at 184.

[161] *See id.* The Mallan plurality defined the rational basis test as an "inquiry [which] seeks only to determine whether any reasonable justification can be found for the legislative enactment." *Id.* (citing Estate of Coates v. Pacific Eng'g, 71 Haw. 358, 363-64, 791 P.2d 1257, 1260 (1990)). The burden of proof falls on the individual making the challenge, and, should he or she fail to demonstrate the lack of a rational basis, because the statute is presumed constitutional it is upheld. *See id.* "[W]e have long held that: '(1) legislative enactments are presumptively constitutional; (2) a party challenging a statutory scheme has the burden of showing unconstitutionality beyond a reasonable doubt; and (3) the constitutional defect must be clear, manifest, and unmistakable.'" *Id.* (quoting State Org. of Police Officers (SHOPO) v. Society of Prof'l Journalists – Univ. of Hawai'i Chapter, 83 Hawai'i 378, 389, 927 P.2d 386, 397 (1996))(citations omitted).

[162] *See id.* at 447, 950 P.2d at 185.

[163] *See id.* Finding that HRS § 712-1249 stood up to a rational basis review the court stated, "[i]t is well settled that when a substance has been proscribed as harmful, the presumption of constitutionality applies although there are conflicting scientific views as to its harmful effects." *Id.* (citing State v. Baker, 56 Haw. 271, 276, 535 P.2d 1394, 1397 (1975)). The plurality noted that although *Baker* was not controlling of the right on privacy issue, it still constituted valid authority as to the presumption of constitutionality. *See id.* at 447, 950 P.2d at 185 n.6.

[164] *See id.* at 447, 950 P.2d at 185.

[165] *See id.*

[166] *See id.* at 442, 447, 950 P.2d at 179, 185.

[167] *See id.* at 447, 950 P.2d at 185.

[168] *See id.*

[169] *Id.* The *Mallan* plurality observed:

> [i]n the present case, Mallan thought that he was 'in privacy' when he was sitting in an automobile in a public parking lot. We are not prepared to extend the right to privacy this far. To do so would give 'talismanic effect' to the phrase 'in privacy' – an approach we have rejected in the past.

Id. (citing Baehr v. Lewin, 74 Haw. 530, 555, 852 P.2d 44, 57 (1993); State v. Mueller, 66 Haw.

The plurality, however, did not end its analysis where the *Kam* court did, and expanded the inquiry that the *Mueller* court had initiated. The *Mallan* plurality noted that the Hawai'i Supreme Court "is not limited to federal interpretation of constitutional rights and [has] often extended the protections of the Hawai'i Constitution beyond those of the United States Constitution."[170] Thus, the court is free to adopt an approach to interpreting the right to privacy that is not based on federal case law.[171] Although the plurality declined to adopt a new approach to privacy in this case, it clarified that any such approach must develop on a "case-by-case basis, as different factual situations arise and new legal standards are formulated."[172]

Despite declining to articulate an explicit standard of privacy informed solely by the Hawai'i State Constitution, the *Mallan* plurality agreed with *Mueller* that the boundaries of the right to privacy must comport with the intent of the framers of article I, section 6. [173] However, whereas the *Mueller* court found that the framers intended for freedoms to be "ranked as fundamental" to enjoy protection,[174] the *Mallan* plurality did not circle back on this reasoning rooted in *Griswold* when it considered the right to privacy under the state constitution.[175] Instead, the *Mallan* plurality focused upon the fact that, "the delegates who spoke in favor of the privacy provision did so based on their understanding that the right to privacy would neither hinder law enforcement nor further criminal activity."[176] The plurality was therefore convinced that the delegates did not intend to legalize contraband drugs.[177]

Having dispensed with Mallan's claim that the protection of article I, section 6 extends to the possession and use of marijuana for recreational purposes,[178] the plurality turned to Mallan's suggestion that the court adopt the reasoning of the Alaska Supreme Court in *Ravin v. State*.[179] In *Ravin*, the

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616, 630, 671 P.2d 1351, 1360 (1983)).

[170] *Id.* at 447-48, 950 P.2d at 185-86; *see also Mueller*, 66 Haw. at 629, 671 P.2d at 1360.

[171] *See Mallan*, 86 Hawai'i at 448, 950 P.2d at 186.

[172] *Id.*

[173] *See id.* The plurality cited as authority *Convention Ctr. Auth. v. Anzai*, 78 Hawai'i 157, 890 P.2d 1197, (1995). *See id.*; *see also Mueller*, 66 Haw. at 630-31, 671 P.2d at 1360.

[174] *Mueller*, 66 Haw. at 630, 671 P.2d at 1360.

[175] *See* Griswold v. Connecticut, 381 U.S. 479, 493 (1965)(Goldberg, J., concurring).

[176] *Mallan*, 86 Hawai'i at 450, 950 P.2d at 188. The *Mallan* plurality relied specifically upon the statements of Delegates Hino, Chung, Kojima, O'Toole, and De Soto, which "reveal[ed] a sincere concern, perhaps even a strong fear, . . . that an express right to privacy might further impeded the battle against illegal drugs." *Id.* at 448-50, 950 P.2d at 187-88.

[177] *See id.* at 450, 950 P.2d at 188.

[178] *See id.*

[179] 537 P.2d 494 (Alaska 1975). *See Mallan*, 86 Hawai'i at 450, 950 P.2d at 188. Mallan had argued at trial that the Hawai'i Supreme Court should follow the example of the Alaska Supreme Court, which held in *Ravin* that the Alaska Constitution's explicit right to privacy protects the right to possess and use marijuana within the privacy of one's own home. *See id.*

court held that the right to use and possess marijuana in one's own home is protected under the right to privacy that is explicitly written into the Alaska Constitution.[180] Like the plurality in *Mallan*, the Alaska Supreme Court in *Ravin* first inquired whether privacy is a fundamental right and then focused on the nature of the home with respect to assertions of individual privacy.[181] While the Alaska court concluded that that possession and ingestion of marijuana is not a fundamental right, the court did find that, due to the "character of life in Alaska," the home "carries with it associations and meanings which make it particularly important as the situs of privacy."[182]

Despite the parallels between *Ravin* and *Kam*, the plurality rejected the *Ravin* analysis for five reasons.[183] First, *Ravin* is not binding upon Hawai'i courts because it is the law of another jurisdiction.[184] Second, *Ravin* turned on social and cultural factors unique to Alaska.[185] Third, the plurality refused to extend the *Stanley/Kam* approach beyond the particular facts of those cases.[186] Fourth, the plurality was concerned that Alaska alone had extended the right to privacy to protect the possession and use of marijuana.[187] Finally, because *Ravin* specifically based privacy on its connection with the home, Mallan's conviction would have been affirmed even if the court followed *Ravin*.[188]

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[180] *Ravin*, 537 P.2d at 504. Article I, section 22 of the Alaska Constitution provides: "Right of Privacy. The right of privacy shall not be infringed. The legislature shall implement this section." ALASKA CONST. art. I, § 22. The Alaska Supreme Court held:

> we conclude that citizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.

Ravin, 537 P.2d at 504.

[181] *See Mallan*, 86 Hawai'i at 450, 950 P.2d at 188.

[182] *Id.* (quoting *Ravin*, 537 P.2d at 503-04). The plurality quoted from *Ravin*:

> [o]ur territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyle which is now virtually unattainable in many of our sister states.

Id. (quoting *Ravin*, 537 P.2d at 504).

[183] *See id.*

[184] *See id.*

[185] *See id.*; *see also supra* note 182 and accompanying text.

[186] *See Mallan*, 86 Hawai'i at 450, 950 P.2d at 188.

[187] *See id.*

[188] *See id.* Mallan was sitting in his car in a public parking lot at the time of his arrest for possession. *See id.* at 442, 950 P.2d at 180.

C. The Concurring Opinion

While the plurality reserved the right to define a new standard of privacy under article I, section 6, the concurrence[189] insisted upon a new approach. According to the concurring justices, the right to privacy embodied in article I, section 6 is by itself a fundamental right that may be infringed only upon a showing of a compelling state interest.[190] This understanding of article I, section 6 negates the need to look to federal case law that "represents a search for protected, fundamental privacy rights not explicitly found in the federal constitution."[191] In contrast, the Hawai'i State Constitution explicitly protects the right to privacy, so Hawai'i courts are "relieved of the responsibility of casting about blindly in the 'penumbras' of our constitution to find rights protected as private."[192] Hawai'i courts need not adopt a constitutional calculus that necessitates the use of *Mueller* and *Kam*, which focused on a federal analysis.[193] Instead, the concurrence supported the creation and application of a "new approach" founded solely on the Hawai'i Constitution.[194] Under this new standard, the court must "analyze the conduct itself and the circumstances under which it is prohibited to determine whether it is reasonable to give the conduct constitutional protection."[195]

The concurrence also challenged the dissent's "broad" view of privacy, which the concurring justices saw as encompassing protection of the possession and use of marijuana or any contraband drug bought, sold, or used privately.[196] On this point, the concurrence agreed with the plurality that the framers of article I, section 6 did not intend to protect individuals from prosecution for possession and use of contraband drugs.[197] Therefore,

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[189] Justice Klein filed an opinion concurring in the result, in which Justice Nakayama joined. *See id.* at 510, 950 P.2d at 248 (Klein, J., concurring).

[190] *See id.* at 510, 950 P.2d at 248 (Klein, J., concurring).

[191] *Id.* (Klein, J., concurring). Federal case law, according to the concurrence, is applicable only where the United States Supreme Court has recognized a new fundamental right emanating from the Bill of Rights of the United States Constitution. *See id.* (Klein, J., concurring).

[192] *Id.* (Klein, J., concurring).

[193] *See id.* (Klein, J., concurring). In regard to the appropriate role of *Mueller* and *Kam*, the concurrence declared, "[n]either case is particularly instructional anymore and both should be dispatched as interesting historic footnotes." *Id.* (Klein, J., concurring).

[194] *See id.* (Klein, J., concurring).

[195] *Id.* (Klein, J., concurring).

[196] *See id.* (Klein, J., concurring).

[197] *See id.* (Klein, J., concurring). The concurrence specifically agreed with the "cogent" reasoning of the plurality as to its interpretation of the intent of the framers of article I, section 6:

> [t]hus, the delegates who spoke in favor of the privacy provision did so based on their understanding that the right to privacy would neither hinder law enforcement nor further criminal activity. Inasmuch as we are convinced that the delegates who adopted the

although the concurrence differed with the plurality regarding the fundamental nature of the right to privacy and adopted a different approach to privacy, it joined in the result and refused to extend the right to the use and possession of marijuana.[198]

D. The Dissenting Opinion

In a 110 page dissent, Justice Levinson focused on the interrelationship between article I, section 6, and the state's police power.[199] In Justice Levinson's view, both the plurality and concurrence incorrectly framed the issue.[200] According to the dissent, the question is "[w]hether, as a matter of constitutional law, the police power of the state extends to criminalizing mere possession of marijuana for personal use,"[201] rather than whether the express privacy provision in the Hawai'i Constitution encompassed the right to possess marijuana.[202]

The term "police power" refers to the conceptual limit of public interference upon private interests.[203] Justice Levinson identified the limits of the

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privacy provision did not intend to legalize contraband drugs, we also believe the voters who later ratified the privacy provision did not intend such a result.

Id. at 450, 950 P.2d at 188.

[198] *See id.* at 509-10, 950 P.2d at 247-48 (Klein, J., concurring). The concurrence further rejected what it interpreted as the dissent's position that in-house prostitution as well enjoyed protection from prosecution under article I, section 6. *See id.* at 510, 950 P.2d at 248 (Klein, J., concurring). Justice Klein stated, "[i]n my view, the dissent's apologia for the protection of contraband drugs (as well as other private activity including, presumably, in-house prostitution) from the ambit of law enforcement, cannot be justified as constitutionally protected under the right of privacy." *Id.* (Klein, J., concurring).

[199] *See id.* at 455, 950 P.2d at 191 n.1 (Levinson, J., dissenting). "[I]t is simply impossible to resolve the present appeal without facing up to the unavoidable interrelationship between the legitimate exercise of the state's police power and the parameters of article I, section 6 of the Hawaii Constitution (1978)." *Id.* (Levinson, J., dissenting). Where statutes are challenged under the right to privacy, Justice Levinson synthesized his proposed standard of judicial review as, "if challenged on police power/privacy grounds, [a statute] must pass constitutional muster under (1) the tests prescribed by *Territory v. Kraft*, 33 Haw. 397 (1935) . . . and (2)article I, section 6." *Id.* (Levinson, J., dissenting). According to Justice Levinson, *Kraft* "delineate[s] the boundaries of the sovereign police power . . . ." *Id.* at 456, 950 P.2d at 194 (Levinson, J., dissenting).

[200] *See id.* at 454-55, 950 P.2d at 192-93 (Levinson, J., dissenting). The dissent observed that a review of the limitations of the police power regarding the criminalization of marijuana possession "appear[ed] to escape the plurality and concurring opinions entirely." *Id.* (Levinson, J., dissenting).

[201] *Id.* at 454, 950 P.2d at 192 (Levinson, J., dissenting).

[202] *See id.* (Levinson, J., dissenting).

[203] *See id.* at 455, 950 P.2d at 193 (Levinson, J., dissenting)(quoting State v. Lee, 51 Haw. 516, 517, 465 P.2d 573, 575 (1970))(citations omitted).

police power as outlined in *Territory v. Kraft*,[204] which required that state show a "harm to others" to invoke the police power to criminalize conduct.[205] According to Justice Levinson, the harm to others principle limits the exercise of the state's police power independent of the constitutional right to privacy.[206]

Thirty-five years after *Kraft*, *State v. Lee*[207] augmented *Kraft*'s "harm to others" police power analysis and established a foundation for an express constitutional right to privacy.[208] According to Justice Levinson, the *Lee* majority heightened the harm to others standard, holding that the police power permitted only the proscription of conduct that "directly harm[s] others."[209] *Lee* also imposed limitations on when conduct that causes personal harm alone

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[204] *See id.* at 456, 950 P.2d at 194 (Levinson, J., dissenting). Justice Levinson acknowledged *Territory v. Kraft*, 33 Haw. 397 (1935), as "perhaps this court's earliest attempt to delineate the boundaries of the sovereign police power, . . ." yet maintained that it is still authoritative today. *Id.* (Levinson, J., dissenting). This statement appears to anticipate the plurality's argument that the Kraft "harm to others" principle is outmoded and inappropriate in a modern police power analysis. *See infra* note 281.

[205] *See Mallan*, 86 Hawai'i at 456, 950 P.2d at 194 (Levinson, J., dissenting). Under *Kraft*, the state's power to criminalize conduct is constrained by three tenets: (1) the police power may not be used to ban innocent, innocuous, or harmless conduct; (2) its reach is limited to proscribing conduct that imperils the public health, safety, or welfare; and (3) it may not be exercised in an arbitrary manner. *See id.* at 457, 950 P.2d at 195 (Levinson, J., dissenting). Justice Levinson emphasized the similarity between the harm to others principle in *Kraft* and that voiced by political philosopher John Stuart Mills. *See id.* (Levinson, J., dissenting). Mills wrote, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." *Id.* (Levinson, J., dissenting)(quoting JOHN STUART MILLS, ON LIBERTY 22, 135, 145-47 (The Legal Classics Library 1992)(1859)(emphasis in original)). Further, Justice Levinson clarified the harm to others principle by weaving the writing of Professor Joel Feinberg into his analysis. "[S]tate interference with a citizen's behavior tends to be morally justified when it is reasonably necessary . . . to prevent harm or the unreasonable risk of harm to parties other than the person interfered with." *Id.* (Levinson, J., dissenting)(quoting 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW 11-12 (Oxford Univ. Press 1984)).

[206] *See id.* at 459, 950 P.2d at 196 (Levinson, J., dissenting). Justice Levinson explained that the "bottom line" of his *Kraft* analysis is that the harm to others principle circumscribes the exercise of the police power in Hawai'i whenever criminalization of conduct is contemplated by the legislature. *See id.* (Levinson, J., dissenting). This limitation upon the police power exists "wholly separate and apart" from any consideration of the nature of the constitutional right to privacy. *See id.* (Levinson, J., dissenting).

[207] 51 Haw. 516, 465 P.2d 573 (1970)(holding that a law mandating the operator of a motorcycle to wear a safety helmet is a proper exercise of the police power).

[208] *See Mallan*, 86 Hawai'i at 459, 950 P.2d at 197 (Levinson, J., dissenting).

[209] *See id.* at 462, 950 P.2d at 200 (Levinson, J., dissenting).

can be found to generally affect the public interest.[210] Thus, Justice Levinson reasoned that when the police power is used to proscribe conduct that furthers a fundamental constitutional right, such as privacy, the statute in question must be subject to rigorous constitutional scrutiny.[211]

In his dissenting opinion in *Lee*, Justice Abe applied language associated with the right to privacy—the right to be let alone.[212] According to Justice Levinson, the "Abe Thesis"[213] holds that each individual enjoys a "right to be let alone" to determine what is in his or her best interest.[214] This right may be circumscribed by the police power only "where others are harmed or are likely to be harmed"[215] by the conduct in question. Legislative enactments "intended to compel *purely personal* safety, health, morals, or welfare, under pain of criminal punishment, constitute unreasonable exercises of the police power,"[216] and are thus unconstitutional.

The "Abe Thesis" resurfaced in *State v. Kantner*,[217] a case implicating the

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[210] *See id.* (Levinson, J., dissenting). *Lee* indicated that in situations that cause personal harm alone, the following conditions must be satisfied for application of the police power to be proper:

> (a) the legislature [must determine] that the conduct of a particular class of people recklessly affected their physical wellbeing; (b) there was (i) consequent physical injury and death (ii) that was so widespread as to be of grave concern to the public; and (c) the incidence and severity of the physical harm has been statistically demonstrated to the satisfaction of the court.

Id. (Levinson, J., dissenting)(emphasis added)(internal quotations and citations omitted).

[211] *See id.* (Levinson, J., dissenting). Justice Levinson extrapolated this understanding from the "significant caveat" the *Lee* majority made on the limitations outlined *supra*, note 210. "[W]here the conduct sought to be regulated is in furtherance of a specific constitutional right, a different situation arises." *Id.* (Levinson, J., dissenting)(internal citations omitted).

[212] *See Lee*, 51 Haw. at 578-80, 465 P.2d at 578-80 (Abe, J., dissenting); *see also Mallan*, 86 Hawai'i at 462-64, 950 P.2d at 200-02 (Levinson, J., dissenting).

[213] Justice Levinson titled this principle after the author of the *Lee* dissent, Justice Abe. *See id.* at 464, 950 P.2d at 202 (Levinson, J., dissenting).

[214] *See id.* (Levinson, J., dissenting). The "right to be let alone" is derived from the concept of "liberty" as expressly recognized in article I, section 2 of the Hawai'i Constitution. *See id.* (Levinson, J., dissenting).

[215] *Id.* (Levinson, J., dissenting). The "harm to others" principle necessarily operates within the arena of the "general welfare; . . . the preservation of public order, safety, health, morals, or welfare." *Id.* (Levinson, J., dissenting).

[216] *Id.* (Levinson, J., dissenting)(emphasis added). According to the "Abe Thesis," the government's determining what is in people's best interest and compelling them to follow that course of action under threat of criminal punishment, unreasonably infringes upon their fundamental liberty, i.e. the right to be let alone. This is so because the state may pass criminal legislation only where the general welfare is affected, i.e. where harm to others occurs or is likely to occur. *See id.* (Levinson, J., dissenting).

[217] 53 Haw. 327, 493 P.2d 306, *cert. denied* 409 U.S. 948 (1972)(affirming the constitutionality of HRS § 329-5, which criminalized the possession of narcotic drugs, as it applied to marijuana under a rational basis/due process analysis). *Kantner* generated four separate

statutory prohibition of possession of marijuana. According to Justice Levinson, the concurring and dissenting opinions in *Kantner* (amounting to three of the five justices on the *Kantner* court) both found that the state must:

> make a showing, as a precondition to the exercise of the state's police power to criminalize, (1) that the personal consumption of marijuana, per se, entail "direct

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opinions, each of which revealed a different ideological perspective on the constitutionality of criminalizing the possession of marijuana. *See Mallan*, 86 Hawai'i at 465, 950 P.2d at 203 (Levinson, J., dissenting). The *Kantner* plurality (composed of Chief Justice Richardson and Justice Marumoto) affirmed the constitutionality of the statute banning the possession of narcotics, as it related to marijuana, and rejected the argument that use of marijuana implicated a fundamental freedom. *See id.* at 466-67, 950 P.2d at 204-05 (Levinson, J., dissenting). Thus, the plurality found that under rational basis review, the statute did not violate either the due process or equal protection clauses of the state constitution. *See id.* (Levinson, J., dissenting). The *Kantner* plurality did not consider the scope of the police power in this regard because the appellants conceded that the state possessed the power to regulate possession of marijuana. *See id.* at 467, 950 P.2d at 205 (Levinson, J., dissenting).

Justice Abe filed a concurring opinion. Justice Levinson saw Justice Abe's concurring opinion in *Kantner* as expanding on Justice Abe's dissent in *Lee*. Quoting *Kantner*, Justice Levinson stated:

> "one does . . . enjoy a constitutional right to smoke marijuana," whether or not such conduct is harmful to the user, because "the state may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare — that is, where others are harmed or likely to be harmed."

Id. (Levinson, J., dissenting)(quoting *Kantner*, 53 Haw. at 334, 336-39, 493 P.2d at 311-13 (Abe, J., concurring)). However, Justice Abe concurred with the plurality in affirming Kantner's conviction because Kantner had conceded that the state may regulate the use of marijuana under the police power. Justice Abe indicated that due to appellant's concession, the state should not suffer a penalty for not meeting its burden of proving whether this was an appropriate use of the police power. *See id.* (Levinson, J., dissenting). Therefore, Justice Abe did not hold that the statute was presumptively constitutional, and he indicated that the state would typically bear the burden of proving that the prohibited conduct caused "harm to others" under a strict scrutiny review. *See id.* (Levinson, J., dissenting).

Justice Levinson, (not to be confused with the Justice Levinson of the *Mallan* court) filed a dissenting opinion in *Kantner* and would have reversed the appellants' convictions. *See id.* at 468-69, 950 P.2d at 207-08 (Levinson, J., dissenting). He questioned whether appellants waived the issue of the limits of the police power as it related to possession of marijuana, and found the ban to be an "impermissible infringement of the fundamental constitutional rights of 'personal autonomy' and privacy." *Id.* at 469, 950 P.2d at 207 (Levinson, J., dissenting) (footnote omitted)(quoting *Kantner*, 53 Haw. at 339-47, 493 P.2d at 313-18 (Levinson, J., dissenting)).

In a separate dissent, Justice Kobayashi differentiated between the use of the police power to regulate conduct, and the invocation of that power to criminalize private conduct. *See id.* at 473, 950 P.2d at 211 (Levinson, J., dissenting)(citing *Kantner*, 53 Haw. at 347, 493 P.2d at 218 (Kobayashi, J., dissenting)). In Justice Kobayshi's view, the regulation of marijuana by the state amounted to a valid exercise of the police power. However, the statute in question that classified marijuana as a narcotic was an "unconstitutionally arbitrary legislative declaration tantamount to an abuse of the state's police-power." *Id.* (Levinson, J., dissenting).

> harm to others," or, at the very least, (2) that a compelling demonstration could be made that a large class of individuals was recklessly affecting its physical well-being through conduct – which was so widespread as to be of grave concern to the public – causing physical injury and death . . . .[218]

Under the requirements of *Kantner*, the drug possession statute in *Mallan* could not permissibly have been applied to marijuana, and Mallan would have had the right to be left alone.[219]

In delineating the police power as it pertains to the prohibition against marijuana possession, the *Mallan* dissent focused on *State v. Baker*,[220] and the precedent that case set for the *State v. Renfro*[221] and *State v. Bachman*[222] decisions.[223] According to the *Mallan* dissent, *Baker* was only able to uphold the constitutionality of a ban against the possession of marijuana by ignoring the fact that conduct which causes "harm to others," not merely harm to self, is the proper subject of the police power.[224] *Renfro*[225] and *Bachman*[226]

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[218] *Id.* at 473-74, 950 P.2d at 211-12 (Levinson, J., dissenting). According to Justice Levinson, the disparate results of the concurrence and dissent turned upon the *Kantner* appellants' alleged concession that the state's police power properly extended to the possession of marijuana. *See supra*, note 217.

[219] *See Mallan*, 86 Hawai'i at 474, 950 P.2d at 212 (Levinson, J., dissenting).

[220] 56 Haw. 271, 535 P.2d 1394 (1975)(upholding the constitutionality of HRS § 712-1249 (Supp. 1974), the predecessor of the statute at issue in *Mallan*). During the time between the *Kantner* and *Baker* decisions, a majority of the Hawai'i Supreme Court retired. On December 28, 1973 Justices Marumoto and Abe retired, and were replaced by Justices Ogata and Menor. Justice Levinson retired on August 21, 1974, leaving the court's fifth seat vacant for ten months. During this vacancy, retired Justice Lewis rejoined the court for the limited purpose of hearing *Baker*. Thus, the "*Kantner* Trio" was no longer on the bench at the time *Baker* was decided. *See Mallan*, 86 Hawai'i at 474, 950 P.2d at 211 (Levinson, J., dissenting).

[221] 56 Haw. 501, 542 P.2d 366 (1975)(upholding the constitutionality of a prohibition against possession of 2.2 pounds or more of marijuana).

[222] 61 Haw. 71, 595 P.2d 287 (1979)(holding that the state's prohibition against the possession of marijuana was constitutional).

[223] *See Mallan*, 86 Hawai'i at 475, 950 P.2d at 213 (Levinson, J., dissenting). The *Mallan* plurality had declined to consider *Baker* and *Renfro* because they were decided before the passage of article I, section 6. *See supra* notes 126 and 129.

[224] *See Mallan*, 86 Hawai'i at 478, 950 P.2d at 216 (Levinson, J., dissenting). According to Justice Levinson, *Baker* avoided both the "Abe Thesis" and the fact that a majority of judges in *Kantner* had agreed that possession of marijuana for personal use was not within the scope of the police power. *See id.* at 479, 950 P.2d at 217 (Levinson, J., dissenting). By ignoring the limitations on the police power established by the harm to others principle, *Baker* caused a "deconstruction" and "reconstruction" of the court's jurisprudence that was "Orwellian in its scope and methodology." *Id.* at 478, 950 P.2d at 216 (Levinson, J., dissenting). To demonstrate this point, Justice Levinson declared the majority's reasoning "by the book" and drew detailed, literal comparisons of the decision to George Orwell's Nineteen Eighty-Four using the text of that novel. *See id.* at 478-81, 950 P.2d at 216-81 (Levinson, J., dissenting).

[225] According to the *Mallan* dissent, *Renfro* ignored the harm to others limitation on the police power, and regarded the right to privacy as being of such "non-fundamental importance"

followed precedent in "rote" fashion, looking solely to past holdings and ignoring the reasoning behind them to formulate their holdings.[227] Accordingly, after *Baker*, *Renfro*, and *Bachman*, the reasoning of *Kraft*, *Lee*, and *Kantner* was "[left] intact but [treated] as if they had never been written . . . ."[228] The court's application of the state's police power had expanded to obviate the "harm to others" principal and the implicit constitutional right to privacy had been significantly weakened.[229]

The dissent traced the cessation of the trend towards expanding the police power and limiting individual privacy rights to the enactment of article I, section 6.[230] In reviewing the legislative history of the 1978 Constitutional Convention,[231] Justice Levinson first looked to Standing Committee Report No. 69, and observed that the Committee on Bill of Rights, Suffrage and Elections ("CBRSE") gave "express approval and incorporation by reference"[232] to the "Abe Thesis."[233] Justice Levinson took this reference to the "Abe Thesis" to indicate the framers' intent to adopt the harm to others principle as a limitation on the state's police power to criminalize conduct.[234] Judge Levinson also credited the CBRSE as stating that the right to privacy under article I, section 6, is a fundamental right that cannot be infringed absent a compelling state interest.[235] The dissent characterized this proposition as signifying that:

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that "individual privacy was invariably obliged to 'give way'. . . to legislative whim and speculation." *Id.* at 483, 950 P.2d at 221 (Levinson, J., dissenting)(citing *Renfro*, 56 Haw. at 503, 542 P.2d at 369).

[226] Justice Levinson only reviewed briefly the holding and reasoning employed in *Bachman*, 61 Haw. 71, 595 P.2d 287. *See Mallan*, 86 Hawai'i at 483, 950 P.2d at 220 (Levinson, J., dissenting); *see also supra* notes 126 and 129.

[227] *See Mallan*, 86 Hawai'i at 482, 950 P.2d at 220 (Levinson, J., dissenting).

[228] *Id.* at 483, 950 P.2d at 221 (Levinson, J., dissenting).

[229] *See id.* (Levinson, J., dissenting).

[230] *See id.* at 483-84, 950 P.2d at 221-22 (Levinson, J., dissenting).

[231] *See id.* 484-91, 950 P.2d at 222-29 (Levinson, J., dissenting).

[232] *Id.* at 487, 950 P.2d at 225 (Levinson, J., dissenting). In particular, the CBRSE indicated:

> [a]s Justice Abe stated in his concurring opinion in *State v. Kantner* . . . each person has the "fundamental right of liberty to make a fool of himself as long as his act does not endanger others, and that the state may regulate the conduct of a person under pain of criminal punishment only when his actions affect the general welfare — that is, where others are harmed or likely to be harmed.

Id. at 486, 950 P.2d at 224 (Levinson, J., dissenting)(quoting STAND. COMM. REP. No. 69, *reprinted in* I PROCEEDINGS 1978, *supra* note 20, at 674-675).

[233] *See id.* (Levinson, J., dissenting).

[234] *See id.* (Levinson, J., dissenting).

[235] *See id.* at 489, 950 P.2d at 227 (Levinson, J., dissenting). Justice Levinson quoted the words of the CBSRE:

> [i]t should be emphasized that this right is not an absolute one[,] but, because similar to the right of free speech, it is so important in value [to society] that it can be infringed

> it is the right to be left alone, per se, that is fundamental and not any particular 'activity' subsumed within that right; thus, the constitutional question is never whether the particular activity falls within the protection of the fundamental constitutional right of privacy. [236]

Accordingly, because the privacy right codified in article I, section 6 is a fundamental right, any statute impinging upon that right is subject to strict scrutiny, not merely rational basis review.[237]

In addition to Standing Committee Report No. 69, Justice Levinson looked to the Committee of the Whole Report No. 15 for evidence of the framers' intent.[238] According to the dissent, the 1978 Constitutional Convention, sitting as a Committee of the Whole, intended to make clear that any law impinging upon the right to privacy contained in article I, section 6 would be subject to strict scrutiny review and cannot be presumed constitutional.[239] The Convention also recognized that the constitutional right to privacy and the limits imposed on the state's police power are intertwined.[240] Finally, the

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> upon only by the showing of a compelling state interest. If the State is able to show a compelling state interest, the right of the group will prevail over the privacy rights or the right of the individual. However, in view of the important nature of this right, the State must use the least restrictive means should it desire to interfere with the right.

Id. at 486, 950 P.2d at 224 (Levinson, J., dissenting)(quoting STAND. COMM. REP. No. 69, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 675)(first alternation in original)(second alteration added).

[236] *Id.* at 489, 950 P.2d at 227 (Levinson, J., dissenting). Justice Levinson referred to this mode of reasoning as the "fallacy of trivialization." *Id.* at 489, 950 P.2d at 227 n.44 (Levinson, J., dissenting). *See infra* note 245.

[237] *See Mallan*, 86 Hawai'i at 489, 950 P.2d at 227 (Levinson, J., dissenting)(quoting Baehr v. Lewin, 74 Haw. 530, 551, 852 P.2d 44, 55 (1993); State v. Kam, 69 Haw. 483, 493, 748 P.2d 372, 378 (1988)). Justice Levinson described this appropriate standard of review for a fundamental right as:

> [t]he strict scrutiny standard of review means that the government action is not entitled to the usual presumption of validity, that the government must carry a heavy burden of justification, that the government must demonstrate that its program has been structured with precision and is tailored narrowly to serve legitimate objectives[,] and that it has selected the least drastic means for effectuating its objectives.

Id. (Levinson, J., dissenting)(quoting McCloskey v. Honolulu Police Dept., 71 Haw. 568, 576, 799 P.2d 953, 957 (1990))(citations and internal quotation signals omitted)(some brackets added and some omitted).

[238] *See id.* at 490, 950 P.2d at 228 (Levinson, J., dissenting). In Justice Levinson's view, the Standing Committee and the report of the larger Committee of the Whole are consistent with each other. *See id.* (Levinson, J., dissenting).

[239] *See id.* at 491, 950 P.2d at 229 (Levinson, J., dissenting).

[240] *See id.* (Levinson, J., dissenting). Justice Levinson based this conclusion upon the Committee of the Whole's "repeating" that the right to privacy is to be "treated as a fundamental right subject to interference only when a compelling state interest is demonstrated." *Id.* (Levinson, J., dissenting)(quoting COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF

Committee did not necessarily limit its vision of the right to privacy under article I, section 6 to the rights established in federal precedent.[241] Justice Levinson concluded, based on his reading of the committee reports, that article I, section 6, had reincorporated the reasonings of *Kraft*, *Lee*, and the *Kantner* Trio,[242] causing *Baker*, *Renfro*, and *Bachman* to be superseded by the constitutional amendment.[243]

The dissent then analyzed *Mueller*, *Kam*, and *Baehr*. Justice Levinson rejected the approach of the *Mueller* court because it only recognized some activities that implicate privacy under article I, section 6 as "fundamental."[244] The holding in *Mueller* was the product of the "fallacy of trivialization," failing to recognize that it is the right to be left alone, per se, that is fundamental, not any particular activity subsumed within that right.[245] Further, the *Mueller* court wrongly presumed the statute in question to be constitutional, and thereby misplaced the burden of proof.[246] As such, the court erroneously employed a rational basis review rather than a strict scrutiny analysis.[247]

Justice Levinson argued that the *Kam* court correctly recognized the fundamental nature of the right to privacy, and explored its relationship to the police power, in contrast to what he perceived to be the flawed reasoning in

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1978, *supra* note 20, at 1024). According to the dissent, this repetition, "evinced its implicit awareness of the inextricable interrelationship between the state's police power . . . on the one hand, and the right to privacy, on the other." *Id.* (Levinson, J., dissenting).

[241] *See id.* (Levinson, J., dissenting). In reference to Committee of the Whole Report No. 15, Justice Levinson reasoned that because the framers of article I, section 6 stated that the right to privacy was "similar" to the right addressed in cases "such as" *Griswold*, *Eisenstadt*, and *Roe*, "etc.," these decisions were simply illustrative; they were not meant to indicate an exclusive list of the only possible applications of the fundamental right to privacy. *See id.* (Levinson, J., dissenting).

[242] *See id.* (Levinson, J., dissenting).

[243] *See id.* (Levinson, J., dissenting).

[244] *See id.* at 498, 950 P.2d at 236 (Levinson, J., dissenting).

[245] *See id.* (Levinson, J., dissenting). The "fallacy of trivialization" arises when one asks whether there is a "fundamental right" to engage in a particular activity. *See id.* at 489, 950 P.2d at 227 (Levinson, J., dissenting). The correct question, according to Justice Levinson, should be whether that activity falls within the protection of the fundamental constitutional right to privacy; the privacy, per se, is fundamental. *See id.* (Levinson, J., dissenting); *see also supra* note 236. In regard to *Mueller*, then, the plurality's asking whether the "decision to engage in sex for hire" was a fundamental right in the scheme of ordered liberty perpetuated this fallacy. *See Mallan*, 86 Hawai'i at 498, 950 P.2d at 236 (Levinson, J., dissenting). The dissent analogized that the decision to have sex for money in and of itself is no more a fundamental right in our scheme of ordered liberty than are the decisions to use contraceptives, distribute birth control, to seek an abortion, or sell or possess pornography, all activities which have been decriminalized under the right to privacy. *See id.* (Levinson, J., dissenting).

[246] *See Mallan*, 86 Hawai'i at 498-99, 950 P.2d at 236-37 (Levinson, J., dissenting).

[247] *See id.* (Levinson, J., dissenting).

Mueller.[248] *Kam* adhered to the harm to others principle articulated in the "Abe Thesis,"[249] while *Mueller*, followed the privacy rights analysis of *Baker*, *Renfro*, and *Bachman*, which was nullified by the passage of article I, section 6.[250] Having recognized that the police power did not extend to the selling of pornography, the *Kam* court properly subjected that prohibition to a strict scrutiny review.[251] In Justice Levinson's view, *Kam* correctly held that, despite the unprotected status of pornographic material under the First Amendment,[252] one's personal privacy interest in the possession and use of

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[248] *See id.* at 499, 950 P.2d at 237 (Levinson, J., dissenting). Justice Levinson characterized the issue in *Kam* as "what should take precedence: [the] State's police power to regulate obscene material versus an individual's fundamental privacy right to have pornography at home?" *Id.* at 500, 950 P.2d at 238 (Levinson, J., dissenting)(quoting State v. Kam, 69 Haw. 483, 490, 748 P.2d 372, 376 (1988))(some brackets added, some omitted). The dissent noted that this would be exactly how Justices Abe and Levinson would have framed the issue. The dissent attributed this to the privacy provision's incorporation of the Abe Thesis. *See id.* at 500, 950 P.2d at 238 n.61 (Levinson, J., dissenting).

Not surprisingly, the *Mallan* dissent asserted that no stasis exists between *Mueller* and *Kam*. *See id.* at 503, 950 P.2d at 241 (Levinson, J., dissenting). Justice Levinson argued that *Kam* "abandoned—indeed, renounced,—the *Mueller* analysis for purposes of resolving the issue before it." *Id.* (Levinson, J., dissenting). The dissent focused upon the statement in *Kam* that:

> *Mueller* . . . 1) accepted the rationale of Stanley; but 2) upheld the authority of the legislature to prohibit prostitution even in the privacy of one's own home, because prostitution was not protected by the right to privacy, and therefore the government was not required to prove a compelling state interest. The Hawaii Constitution article I, section 6, by contrast, encompasses the privacy right to read or view pornographic material in one's own home.

Id. at 502, 950 P.2d at 240 (Levinson, J., dissenting)(quoting *Kam*, 69 Haw. at 495-96, 748 P.2d at 380).

The *Mallan* dissent, however, noted that this "paragraph is cursory, dismissive, and framed almost as an afterthought[,]" and that its reasoning seemed circular. *Id.* at 503, 950 P.2d at 241 (Levinson, J., dissenting). To clarify its conclusion that *Kam* had indeed abandoned *Mueller*, the *Mallan* dissent rewrote this section of the *Kam* opinion twice; once somewhat in parody, as though *Kam* followed *Mueller*, and once as an instructive "paraphrase" of its own interpretation outlining *Mueller's* rejection. *See id.* at 503-05, 950 P.2d at 241-43 (Levinson, J., dissenting).

[249] *See id.* at 505, 950 P.2d at 243 (Levinson, J., dissenting). The dissent stated with approval in its paraphrase of the *Kam* decision: 1) "that the personal decision to read or view pornographic material in the privacy of one's own home is protected by article I, section 6 of the Hawai'i Constitution;" and 2) "that such activity does not affect the general welfare – i.e., the general public's rights – inasmuch as it does not harm other or create likelihood of harm." *Id.* at 504, 950 P.2d at 242 (Levinson, J., dissenting). This language echoes Justice Levinson's characterization of the "Abe Thesis." *See supra* note 216.

[250] *See Mallan*, 86 Hawai'i at 505, 950 P.2d at 243 (Levinson, J., dissenting).

[251] *See id.* (Levinson, J., dissenting). Justice Levinson explained in his paraphrase of *Kam* that because the right to privacy is fundamental, any statute impinging upon that right must be subjected to strict scrutiny review. *See id.* (Levinson, J., dissenting).

[252] *See id.* (Levinson, J., dissenting). This wording emphasized Justice Levinson's rejection of the premise that pornography's printed or filmed nature in some way implicates the First

pornography outweighs the state's interest in criminalizing its sale through the exercise of the police power.[253]

Finally, the dissent considered *Baehr v. Lewin*.[254] As the author of *Baehr*, Justice Levinson took exception to what he felt to be the plurality's misapplication and unfair linkage of *Baehr* to *Mueller*.[255] Unlike *Mueller*, the issue in *Baehr* did not involve whether the police power allowed criminalization of any particular conduct. Rather, *Baehr* addressed "affirmative access to a legal status,"[256] namely the right to marry a person of the same sex.[257] Justice Levinson explained that while a fundamental rights analysis was appropriate to determine whether a legal status should be extended to a new class of people, it is not an appropriate vehicle for determining whether a state is empowered to criminalize private conduct.[258]

Justice Levinson concluded by summarizing his view of the proper balance between the reach of the police power and Hawai'i's explicit right to privacy. First, separate from the consideration of the right to privacy, the state lacks the authority to criminalize activity pursuant to its police power where the activity causes no harm to others.[259] Second, article I, section 6 created a constitutional right to privacy that allows individuals to dictate their own lifestyle, confers upon them the right to be left alone, and further constrains the state's exercise of police power.[260] Third, since this right to privacy is fundamental, it may be abridged only if the government demonstrates that a compelling state interest exists, and that the right in question was infringed by a statute that worked a minimal intrusion on the right to privacy.[261]

Applying this line of reasoning to the facts in *Mallan*, the dissent declared that HRS § 712-1249 infringed upon Mallan's right to privacy.[262] In the trial court, the government failed to demonstrate that the statute furthered a

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Amendment and gives it special status under the right to privacy. *Compare supra* note 157.

[253] *See Mallan*, 86 Hawai'i at 505, 950 P.2d at 243 (Levinson, J., dissenting).

[254] 74 Haw. 530, 825 P.2d 44 (1993).

[255] *See Mallan*, 86 Hawai'i at 506, 950 P.2d at 244 (Levinson, J., dissenting).

[256] *Id.* at 507, 950 P.2d at 245 (Levinson, J., dissenting).

[257] *See id.* at 506, 950 P.2d at 244 (Levinson, J., dissenting).

[258] *See id.* at 507, 950 P.2d at 245 (Levinson, J., dissenting). Specifically, the dissent stated that a *Griswold* type analysis was appropriate to determine the "existence of a newly perceived and constitutionally fundamental right of affirmative access to a legal status that is within the state's exclusive power to regulate." *Id.* (Levinson, J., dissenting). Three concepts appear, then, to be key in the way that *Baehr* applied *Griswold*: 1) that the right in question was newly perceived; 2) that the right was argued to be fundamental; and 3) that the right was properly within the scope of the police power. *See id.* (Levinson, J., dissenting).

[259] *See id.* at 509, 950 P.2d at 247 (Levinson, J., dissenting).

[260] *See id.* (Levinson, J., dissenting).

[261] *See id.* (Levinson, J., dissenting).

[262] *See id.* (Levinson, J., dissenting).

compelling state interest and that it did so by the least restrictive means possible.[263] The dissent concluded that HRS § 712-1249 was an unconstitutional infringement of the right to privacy guaranteed by article I, section 6.[264] Thus, the dissent called for the reversal of the ICA's decision and the granting of Mallan's motion to dismiss.[265]

E. The Plurality's Response to the Dissent

The plurality decried the dissent's effective decriminalization of the use and possession of contraband drugs in all situations in which one believes he or she is "in privacy."[266] The plurality argued that such an approach "circumvents the natural development of the right to privacy" by removing from the process both the will of the people as expressed through the legislature, and the development of the right as undertaken by the courts.[267] The reasoning of the dissent conflicted with the intent of the framers of article I, section 6.[268]

In response to the dissent's charge that it had failed to consider the extent of the police power, the plurality countered that the issue was explored implicitly in the plurality's due process analysis.[269] The plurality noted that "[n]othing in the Hawai'i Constitution expressly mentions the police power as a restraint upon the legislature."[270] Rather, the police power doctrine is

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[263] *See id.* (Levinson, J., dissenting).

[264] *See id.* (Levinson, J., dissenting). It seems unusual under the reasoning provided that the dissent would reverse and vacate (and make a statement that protects the possession of marijuana), rather than remanding *Mallan* and allowing the state to demonstrate either harm to others or a compelling state interest in regulating the possession of the drug.

[265] See id. (Levinson, J., dissenting).

[266] *See id.* at 451, 950 P.2d at 198. Justice Levinson denied this characterization by replying that the plurality "misconstrued" his reasoning. He then summarized his analysis be stating that:

> one could fairly infer from this opinion that the criminalization of the use and possession, in and of themselves, of any given contraband drug (in the home or elsewhere), if challenged on police power/privacy grounds, must pass constitutional muster under (1) the tests prescribed by Territory v. Kraft, . . . and (2) article I, section 6. . . . The outcome of any particular challenge is by no means a foregone conclusion.

Id. at 455, 950 P.2d at 193 n.1 (Levinson, J., dissenting).

[267] *See id.* at 451, 950 P.2d at 189. According to the plurality, the framers of article I, section 6 did not intend to define the extent of the provision's scope, and entrusted that responsibility to the legislature and the courts. "Where possible, we should only state broad principles and goals, and let details develop through statute and case law. For this reason we added, 'The legislature shall take affirmative steps to implement this right.'" *Id.* (citing I PROCEEDINGS OF 1978, *supra* note 20, at 355 (Statement of Delegate Hino)).

[268] *See id.*

[269] *See id.*

[270] *Id.* Instead of being limited by the police power, per se, the power of the legislature is broad and is constrained only when it is inconsistent with either the federal or state constitutions. *See id.* This view returns the framing of the issue in *Mallan* to the constitutional

based on the Due Process Clause of the state constitution.[271]

The plurality explained that Hawai'i courts employ two tests under the Due Process Clause: a strict scrutiny review when fundamental rights are implicated, and a rational basis test in all other situations.[272] The plurality argued that the police power doctrine is embedded in the Due Process Clause and is an aspect of the rational basis test.[273] Analysis of police power and substantive due process are intertwined because under a minimal rationality analysis, a statue must be rationally related to the public health, safety, or welfare.[274] The plurality observed that modern courts consider legislative enactments presumptively constitutional, and thus afford great deferrence to policy judgments made by the legislature.[275] The burden of demonstrating that the statute lacks a rational basis falls on the party bringing the challenge.[276] Since the harmful effects of marijuana are still unclear, the plurality found that Mallan had failed to establish that HRS § 712-1249 lacked a rational basis.[277]

Rather than employ a rational basis due process analysis, the dissent applied a "harm to others" test.[278] The plurality characterized this test as outmoded, mirroring the "close scrutiny" test of the *Lochner* era.[279] This level of scrutiny was later replaced by rational basis review, which applies to social and economic regulation unless the regulation infringes on a fundamental right.[280] Since *Lochner*, courts have been careful not substitute their social and

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analyses of the plurality and concurrence.

[271] *See id.* The Hawai'i Constitution Due Process Clause provides: "no person shall be deprived of life, liberty or property without due process of law . . . ." HAW. CONST. art. I, § 5.

[272] *See Mallan*, 86 Hawai'i at 451, 950 P.2d at 189.

[273] *See id.* With respect to the relationship between the police power and the Due Process Clause, the plurality stated, "we believe that the police power doctrine is based on the Due Process Clause and should be regarded as an aspect of the rational basis test." *Id.* Under a rational basis review, a statute is in violation of substantive due process if the enacted statute is found to be clearly arbitrary and unreasonable. *See id.* (citing In re Applications of Herrick and Irish, 82 Hawai'i 329, 349, 922 P.2d 942, 962 (1996)). In connection with the police power, the statute must have a substantial relation to the public health, safety, morals, or general welfare. *See id.* Therefore, according to the plurality's reasoning, the rational basis test itself envelops the considerations of the police power. *See id.*

[274] *See id.* at 452, 950 P.2d at 190.

[275] *See id.*

[276] *See id.*

[277] *See id.* In other words, the ban against marijuana possession is rationally related to the public health, safety, or welfare, the three permissible areas of operation for the police power. *See id.*

[278] *See id.* (citing *id.* at 509, 950 P.2d at 247 (Levinson, J., dissenting)).

[279] *See id.*; *see also* Lochner v. New York, 198 U.S. 45 (1905). "The doctrine which prevailed in *Lochner*, . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature acted unwisely – had long since been discarded." *Mallan*, 86 Hawai'i at 453, 950 P.2d at 191.

[280] *Mallan*, 86 Hawai'i at 453, 950 P.2d at 191.

economic judgment for that of the elected legislature.[281]

IV. THE STATE OF PRIVACY IN HAWAI'I AFTER STATE V. MALLAN

The *Mallan* decision leaves a great deal of uncertainty regarding how the right to privacy should be construed under article I, section 6. *Mallan* represents a 4-1 split among the justices regarding the affirmation of Mallan's conviction.[282] However, as to the reasoning, a majority of the justices are evenly divided between the plurality and concurrence, with a lone justice dissenting.[283] One must parse through the fabric of the justices' reasoning and examine their logic to patch together an understanding of the construction of the right to privacy in Hawai'i today.

A primary concern in untangling the *Mallan* opinion is whether federal case law continues to be relevant to an analysis of article I, section 6 of the Hawai'i Constitution. Although the plurality and the *Kam* and *Mueller* courts applied approaches derived from federal law, it seems clear that the Hawai'i Supreme Court perceives article I, section 6 as creating a right to privacy with an identity separate from its federal counterpart. To understand the proper role of federal case law in regard to the explicit right to privacy, the manner in which each opinion in *Mallan* characterized the *Kam* decision is instructive.

The plurality viewed the privacy protection recognized in *Kam* as being limited by the narrow scope of the United States Supreme Court decision in

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[281] *See id.* To support its criticism of the dissent's reasoning, the plurality pointed to the dissent's reliance on *Territory v. Kraft*, 33 Haw. 397 (1935). *Kraft* was based on *Lochner* era precedents and applied the close scrutiny of legislation employed in *Lochner*. *See Mallan*, 86 Hawai'i at 454, 950 P.2d at 192. The plurality cautioned that demanding such close scrutiny works against the "carefully constructed constitutional system" where each branch of government has delineated responsibilities. *See id.* To this end, the court clearly stated, "[i]t is not within our role to usurp the responsibilities of the legislature." *Id.* Under this system of separation of powers, due process requires legislation to survive rational basis review only unless fundamental rights are infringed. *See id.*

Rational basis review contrasts with the dissent's call for a "harm to others" analysis, which would be required completely apart from any discussion of fundamental rights. *See supra* note 206. According to the plurality, the dissent's argument ignores that above all, neither the court's exercise of due process, nor the legislature's exercise of the police power, should be vehicles for importing a particular social philosophy into the constitution. *See Mallan*, 86 Hawai'i at 454, 950 P.2d at 192 (citing *Lochner*, 198 U.S. at 65-74 (Harlan, J., dissenting), 74-76 (Holmes, J., dissenting)). The plurality appears to caution that just as courts must hold the legislature to the proper exercise of police power (that it should be subsumed in the court's rational basis review), the courts must remember that due process is informed by the intent of the people as indicated by the framers of the constitution. *See id.*

[282] *See Mallan*, 86 Hawai'i at 454, 950 P.2d at 192; *see also id.* at 510, 950 P.2d at 248 (Klein, J., concurring).

[283] *See id.* 440, 950 P.2d at 178.

Stanley. Thus, the home as the situs of privacy and the fact that pornography arguably implicates First Amendment concerns became extremely relevant under the plurality's application of *Kam*.[284] Despite its reliance upon federal precedent, the plurality did not restrict the court to looking solely to federal case law; it reserved the right to look beyond federal standards in interpreting the right to privacy.[285] The plurality, then, left room for an interpretation of article I, section 6 that is independent of federal standards.

The concurrence discounted *Kam* altogether, and rejected the need for any reliance on federal case law or Hawai'i case law derived from federal precedent. Instead, the concurring justices called for a "new approach" to privacy analysis based solely upon article I, section 6.[286] In line with that approach, the concurrence dispatched *Kam* as "an interesting historic footnote."[287]

The dissent, in what would be a contradiction under the plurality's reasoning, rejected application of federal case law, but embraced the reasoning of *Kam*.[288] Such a construction is logical under the dissent's view

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[284] It is instructive that the *Kam* opinion actually makes only peripheral reference to the importance of the home and the consideration of First Amendment concerns. *See* State v. Kam, 69 Haw. 483, 494, 748 P.2d 378, 379 (1988)(quoting Stanley v. Gerogia, 394 U.S. 557 (1969)). Rather, it is the *Mallan* opinion that highlights these factors and makes them arguably dispositive issues under the *Kam* approach. *See Mallan*, 86 Hawai'i at 444-45, 447, 950 P.2d at 182-83, 185. Also, it is interesting that the *Mallan* plurality relies upon the nexus between the First Amendment and pornography to recognize a fundamental right to sell such material, however obscenity is not constitutionally protected speech under that amendment. *See id.*; *see also Kam*, 69 Haw. at 487-88, 748 P.2d at 375.

This heightened importance of the home and First Amendment concerns suggest strongly that the *Mallan* plurality will only support an application of the *Kam* approach in future cases where these factors are central issues.

[285] *See Mallan*, 86 Hawai'i at 448, 950 P.2d at 186.

[286] *See id.* at 510, 950 P.2d at 248 (Klein J., concurring).

[287] *Id.* (Klein, J., concurring).

[288] *See id.* at 504-05, 950 P.2d at 242-43 (Levinson, J., dissenting). At first glance, it would appear that a majority of justices, comprised of the plurality and dissent, endorse the reasoning and approach of *Kam*. *See id.* at 444-45, 447, 950 P.2d at 182-83, 185; *id.* at 504-05, 950 P.2d at 242-43 (Levinson, J., dissenting). However, upon closer review, the plurality and dissent characterize the reasoning of *Kam* in dramatically different ways. The dissent, in contrast to the plurality, applauds *Kam* for demonstrating the proper interplay between criminal statutes and the explicit right to privacy under the state constitution; *Stanley* and its facts are peripheral. *See id.* at 504-05, 950 P.2d at 242-43 (Levinson, J., dissenting). In addressing a constitutional challenge made pursuant to the right to privacy, the first step in the dissent's understanding of *Kam* is to identify whether the conduct in question presents a harm to others. *See id.* at 508-09, 950 P.2d at 246-47 (Levinson, J., dissenting). Absent a harm to others, the police power of the state is circumscribed. *See id.* (Levinson, J., dissenting). Second, since the "right to be left alone" is fundamental, only by showing a compelling state interest in prohibiting the conduct in question, achieved by the least restrictive means possible, can the state justify criminalizing private, individual conduct. *See id.* at 509, 950 P.2d at 247 (Levinson, J., dissenting). Clearly,

because the dissent, unlike the plurality, characterized *Kam* as acknowledging a right to privacy with an identity separate from that recognized under federal law.[289] *Kam* extended the right to privacy solely pursuant to article I, section 6, not under the First Amendment of the United States Constitution.[290] Thus, *Kam's* authority to recognize the correlative right to buy pornography did not flow as a pragmatic extension of the federal right to possess pornography in one's own home as recognized in *Stanley*, but was derived independently.

The *Kam* decision, then, appears to no longer be good law to the extent it stands for a federal approach regarding the right to privacy. However, the dissent argued that *Kam* retains precedential value in that it illustrates that article I, section 6 extends the right to privacy directly, without relying upon federal case law.[291] The *Kam* court declared that article I, section 6 on its own "encompasses the privacy right to read or view pornographic material in one's own home."[292] This assertion, coupled with the plurality's intimations of a new approach and the concurrence's requirement for a new approach, could suggest that article I, section 6 has created a right to privacy in Hawai'i independent of its federal counterpart.

Although the right to privacy in Hawai'i is arguably not subject to federal case law analysis, the question remains as to what activities are protected under article I, section 6. One approach to determining the provision's scope is to ascertain whether the right to privacy is fundamental. To answer this question, the *Mallan* plurality followed *Mueller*, which employed a fundamental rights analysis derived from federal case law.[293] However, if application of a federal fundamental rights analysis has been obviated (following the reasoning of the concurrence and dissent in *Mallan*), *Mueller* is of little value as to its federal, "implicit in ordered liberty" approach.

Both the concurrence and the dissent voice a belief that the right to privacy is fundamental per se.[294] This would suggest that because a majority of the *Mallan* court identifies privacy as a fundamental right, any infringement of

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while both the dissent and plurality recognize the precedential value of *Kam*, the decision does not stand for the same proposition as far as the justices are concerned.

[289] *See id.* at 505, 950 P.2d at 243 (Levinson, J., dissenting.)

[290] *See id.* (Levinson, J., dissenting.)

[291] *See id.* at 504-05, 507, 950 P.2d at 242-43, 247 (Levinson, J., dissenting).

[292] State v. Kam, 69 Haw. 483, 496, 748 P.2d 372, 380 (1988).

[293] *See* discussion *supra* section III.B. Under this federal framework, the right to privacy is deemed fundamental only where the activity to be protected is a part of the people's traditions and collective conscience, and where prohibiting the activity in question would violate the principles of liberty and justice underlying Hawai'i's political institutions. *See id.*

[294] *See Mallan*, 86 Hawai'i at 510, 950 P.2d at 248 (Klein, J., concurring); *id.* at 489, 950 P.2d at 227 (Levinson, J., dissenting).

that right by the state would necessitate strict scrutiny review.[295] Despite this apparent agreement on the fundamental nature of privacy, however, the dissent and the concurrence are not so easily harmonized.

In declaring privacy a fundamental right, the dissent set two clear boundaries on the scope of the right to privacy. First, Justice Levinson rejected regulation of personal, private conduct under the state's police power absent a showing that harm or likelihood of harm to others would occur.[296] Second, once the right to privacy is implicated, the protection afforded to the individual can only be impinged upon when the state demonstrates a compelling interest to do so, using the least restrictive means possible.[297] Beyond these requirements, the dissent established no further criteria to determine whether a particular personal activity is of the appropriate nature to implicate the right to privacy. Under this reasoning it is easy to imagine decriminalization of not only the private possession and use of marijuana, but also any number of activities previously prohibited under the legislature's general sense that the ban was in the public good, i.e., for the general health, safety, or welfare.

Because the dissent viewed conduct protected by the right to privacy in such expansive terms, the plurality and concurrence criticized its position as overly broad.[298] A defendant could arguably conjure up a shield of privacy and demand strict scrutiny review whenever he or she engaged in any prohibited activity of a personal nature by simply claiming that the activity

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[295] Strict scrutiny review is required where government seeks to impinge on a fundamental right. *See* Griswold v. Connecticut, 381 U.S. 479, 497 (1965)(Goldberg, J., concurring); *see also* discussion *supra* section II.A.

[296] *See* discussion *supra* section II.A. In the words of Justice Levinson, the "harm to others principle" limits the exercise of the state's police power "wholly separate and apart from any consideration of the constitutional right to privacy." *Mallan*, 86 Hawai'i at 459, 950 P.2d at 196 (Levinson, J., dissenting).

Regarding the dissent's application of the harm to other's principle in *Mallan*, Justice Levinson considered only the actual charge of possession and promotion of marijuana in determining there was no harm or potential harm to others. In so doing, the dissent appears to dismiss an obvious fact of the situation: that Mallan was sitting in a car in a public parking lot, presumably soon to drive. While the dissent could argue that it was held to the record below, which did not indicate that Mallan drove, it seems somewhat disingenuous to ignore the risk posed by operating a vehicle while under the influence of marijuana.

[297] *See* discussion *supra* section II.A.; *see also Mallan*, 86 Hawai'i at 484-91, 950 P.2d at 222-29 (Levinson, J., dissenting). While Justice Levinson's position regarding the fundamental nature of privacy rights under article I, section 6 appears clear in *Mallan*, he acknowledged that "the '*Roe* Principle' governs certain applications – not material here – of article I, section 6." *Id.* at 499, 950 P.2d at 237 n.58 (Levinson, J., dissenting).

[298] *See Mallan*, 86 Hawai'i at 451, 950 P.2d at 189; *id.* at 510, 950 P.2d at 248 (Klein, J., concurring).

was conducted "in privacy."[299] The plurality in particular warned that such an analytical framework would give "talismanic effect" to the words "in privacy."[300]

The concurrence, like the dissent, identified the right to privacy as fundamental.[301] However, the concurrence qualified the right by requiring courts to determine whether the conduct prohibited by law is entitled to privacy protection.[302] This call for an analysis of individual conduct substantially differentiates the approach of the concurrence from that of the dissent. According to the concurrence, whether behavior is entitled to protection under article I, section 6, hinges on the "reasonableness" of protecting the given conduct.[303] The concurring justices defined "reasonable" in terms of the requirement that protections under the right to privacy align with the intent of the framers of article I, section 6.[304] Thus, though both the concurrence and the dissent espouse a belief that the right to privacy is fundamental, the outcome of that belief differs significantly among the three justices; no majority exists among the concurring and dissenting justices regarding the effect of recognizing the "fundamental" nature of privacy.

Regardless of whether the right to privacy is classified as "fundamental" under Hawai'i law, both the plurality and concurrence, comprising a majority of the court, agree that any new standard under the privacy provision must comport with the intent of the framers of article I, section 6.[305] Any behavior that falls within the ambit of that provision could only be infringed upon the showing of a compelling state interest. This guide does not appear to be particularly helpful, as evidenced by the variety of interpretations of framers' intent found in the three *Mallan* opinions.[306] However, the concurring opinion specifically endorsed the plurality's discussion regarding the delegates of the

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[299] *See id.* at 447, 950 P.2d at 185.

[300] *See id.*

[301] *See id.* at 510, 950 P.2d at 248 (Klein, J., concurring).

[302] *See id.* (Klein, J., concurring).

[303] *See id.* (Klein, J., concurring).

[304] *See id.* (Klein, J., concurring).

[305] *See id.* at 448, 950 P.2d at 186; *id.* at 510, 950 P.2d at 248 (Klein, J., concurring); *see also supra* notes 173, 197 and accompanying text.

[306] *See Mallan*, 86 Hawai'i at 450, 950 P.2d at 188; *id.* at 487-91, 950 P.2d at 225-29 (Levinson, J., dissenting); *id.* at 510, 950 P.2d at 248 (Klein, J., concurring); *see also supra* notes 176, 177, 197, 232-35, 238-43 and accompanying text.

The facts of *Mallan* themselves do very little to help shed light upon the question of how the framers' intent should be interpreted. Mallan was arrested in his car in a public parking lot, not his home. Additionally, Mallan was arrested for possessing marijuana, not for behavior associated with a personal intimate relationship. Both the home and personal intimate relationships were factors emphasized by the plurality in their right to privacy analysis under article I, section 6. *See Mallan*, 86 Hawai'i at 447, 450, 950 P.2d at 185, 188; *see also supra* notes 168, 186, 188 and accompanying text.

constitutional convention.[307] Arguably, the intent of the framers as interpreted by the plurality has the support of the majority of the court.[308]

Notably, the plurality observed that the framers did not intend to legalize illicit drugs.[309] It follows that any prohibitions against drugs that were illicit at the time of the adoption of article I, section 6, are outside of the provision and constitutional. However, surely not every example of private conduct was considered in equal depth by the delegates. The *Mallan* opinions offer little direction as to how future courts should proceed if the committee did not address an allegedly protected act. The opinions do not indicate whether a "rule-in" policy (because the act was not explicitly approved, it is prohibited) or "rule-out" policy (because the act was not explicitly prohibited, it is protected) is applicable.

The plurality additionally concluded that the framers never intended to hinder law enforcement or to further criminal activity with the passage of article I, section 6.[310] The plurality inferred from this statement that legalizing contraband drugs would by its nature expand criminal activity.[311] This logic seems somewhat circular, as it ignores the fact that once an activity is decriminalized it is no longer "criminal activity." If the court meant to adopt this reasoning, it has effectively adopted a blanket ban against extending the privacy protection to decriminalize any activity that was illegal in 1978. Accordingly, protection under article I, section 6, can only be extended to activities criminalized after 1978, or to behaviors that are not currently illegal. Surely the court did not mean to endorse such an arbitrary standard.

Finally, the plurality noted the framer's statement that the right to privacy in Hawai'i is "similar to the privacy right discussed in such cases as *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*, etc."[312] Although a

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[307] *See Mallan*, 86 Hawai'i at 510, 950 P.2d at 248 (Klein, J., concurring); *see also supra* note 197.

[308] Only the intent of the framers as recognized by the plurality and implicitly endorsed by the concurrence appear to enjoy the sanction of the majority of the court. This begs the question of what is the proper role of the framer's statements that are not cited by the plurality - for example, approval of the harm to other's principle. *See* STAND. COMM. REP. No. 69, *reprinted in* I PROCEEDINGS 1978, *supra* note 20, at 674-678; *see also Mallan*, 86 Hawai'i at 486, 950 P.2d at 244 (Levinson, J., dissenting).

[309] *See Mallan*, 86 Hawai'i at 450, 950 P.2d at 188.

[310] *See id.*

[311] *See id.*

[312] *Id.* at 444, 950 P.2d at 182 (citing COMM. WHOLE REP. No. 15, *reprinted in* I PROCEEDINGS OF 1978, *supra* note 20, at 1024)(citations omitted). The *Mueller* court argued that this reference indicated that the privacy analysis under article I, section 6 necessarily mirrored the *Griswold* fundamental rights approach. *See* State v. Meuller, 66 Haw. 616, 625-26, 671 P.2d 1351, 1357-58 (1983). The *Mallan* court did not follow that interpretation. *See Mallan*, 86 Hawai'i at 444, 447-48, 950 P.2d 182, 185-86.

federal approach to the right to privacy was arguably rejected by the court, this language could be interpreted to mean that conduct that falls under the ambit of the privacy provision needs to be similar to that conduct challenged in those enumerated cases, i.e., conduct relating to relationships of a personal and intimate nature. Arguably, not only the conduct in *Kam* (use of pornographic material), but also the conduct in *Mueller* (in-house prostitution) properly fall within the scope of article I, section 6. The state could then only infringe on either activity upon the showing of a compelling interest where the means of infringement were narrowly drawn.[313] The framers' reference to *Griswold*, *Eisenstadt*, and *Roe* could additionally be interpreted as codifying into article I, section 6, the specific protections recognized in such federal cases, i.e. the right for both married and single couples to purchase contraception and the right to abortion. Thus, despite any future fate of these rights under federal law, each would be assured the protection of article I, section 6 in Hawai'i.

V. CONCLUSION

The divergence of opinions and vague guidelines suggested by the *Mallan* decision leave a great deal of guesswork when one attempts to articulate Hawai'i privacy law. Although not clearly indicated in the decision, *Mallan* appears to signify that a federal approach is no longer appropriate under article I, section 6. Future constitutional challenges brought under the right to privacy will be addressed under a "new approach." More amorphous, however, is the Hawai'i Supreme Court's vision of this approach and the reaches of protected private conduct under the privacy provision. While one can be sure that possession of illicit drugs will not be protected, any other limitations on privacy must be extrapolated on a case-by-case basis from the record of the 1978 Constitutional Convention. Unfortunately, as *Mallan*'s divergent opinions demonstrate, this record is expansive and often contradictory. Although certain statements of the delegates were emphasized by the plurality and implicitly endorsed by the concurrence, the Supreme Court did not provide a useful guide for their interpretation. In essence, in *State v. Mallan*, the court contented itself with defining the scope of article I, section 6 for Mr. Mallan alone. The rest of us will have to wait.

Julia B.L. Worsham[314]

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[313] Such an interpretation of the intent of the framers would likely overturn the result of *Mueller*, which employed only a rational basis review, and legalize in-house prostitution.

[314] Class of 2000, William S. Richardson School of Law.

1998 Hawai'i Legislation and Case Law Update

I. LEGISLATION

A. Criminal Law

1. Domestic violence amendments

The domestic violence amendments[1] broaden the definition of "family member" in Hawai'i Revised Statutes ("H.R.S.") section 586-1[2] to include "persons who have a child in common"[3] and provide stiffer penalties for offenders.[4] The amendments add mandatory jail time and a fine of not less than $150 but not more than $500 for first offenders.[5] For repeat offenders, the amendments require "immediate incarceration," upon conviction and a

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[1] Act 172, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 642.

[2] HAW. REV. STAT. § 586-1 (1997). Chapter 586 pertains to Domestic Abuse Protective Orders. Section 586-1 provides definitions used within Chapter 586. *See id.*

[3] *See id.*

[4] *See* Act 172, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 642.

[5] *See* Act 172, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 642-43.

fine ranging from $250 to $1000.[6] The new fine requirements will be deposited into a special fund for spouse and child abuse.[7] Furthermore, a person convicted of a third offense "within two years after a second misdemeanor" will be charged with a Class C Felony.[8]

The amendments also enact several procedural changes. Service is no longer required for protective orders if the respondent is present at the order to show cause hearing, because presence constitutes notice.[9] The amendments broaden police officers' grounds for taking action to prevent abuse of family members by deleting the "recent" requirement.[10] Thus, if an officer believes physical abuse or harm has been inflicted at any time, not just recently, they may take appropriate action, as defined in the statute.[11]

The amendments also change references to "treatment or counseling services" to "domestic violence intervention" throughout the statutes.[12] Furthermore, all references to the "cooling off period" have been changed to the "period of separation" to emphasize that the offender should be kept away from the victim during this time.[13]

2. *First degree robbery mens rea requirement*

The legislature amended H.R.S. section 708-840[14] of the penal code to include "knowingly" in the mens rea requirement for infliction or attempted infliction of serious bodily harm in subsection (a).[15] Prior to the amendment, only intentional or attempted infliction of bodily harm triggered subsection (a).[16] "Intentionally"[17] and "knowingly" have very similar meanings; however

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[6] *See* Act 172, § 2, *reprinted in* 1998 Haw. Sess. Laws at 643.

[7] *See id.* The proceeds from the special fund, which is administered and expended by the judiciary, are used for programs and services which support abuse victims or provide intervention or prevention of spouse or child abuse. *See* HAW. REV. STAT. § 601-3.6 (1997 & Supp. 1998).

[8] *See* Act 172, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 642, 647. The maximum length of imprisonment for a Class C Felony is five years. *See* HAW. REV. STAT. § 706-660 (1986). See H.R.S. § 706-606.5 (1997) for a list of Class C felonies.

[9] *See* Act 172, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 642, 647.

[10] *See* Act 172, § 2, *reprinted in* 1998 Haw. Sess. Laws 642, 645.

[11] *See id.*

[12] *See* Act 172, §§ 3, 4, 8, *reprinted in* 1998 Haw. Sess. Laws 642, 644, 647.

[13] *See* Act 172, § 8, *reprinted in* 1998 Haw. Sess. Laws 642, 646.

[14] HAW. REV. STAT. § 708-840 (1997). This section defines the elements of robbery in the first degree. *See id.*

[15] *See* Act 68, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* Haw. Sess. Laws 147.

[16] *See* HAW. REV. STAT. § 708-840 (a) (1997).

[17] Under H.R.S. § 702-206 (1997), "intentionally" is defined as follows:

> (a) A person acts intentionally with respect to his conduct when it is his conscious object to engage in such conduct. (b) A person acts intentionally with respect to attendant

"knowingly" has a slightly broader meaning. H.R.S. section 702-206 defines "knowingly" as follows:

> (a) A person acts knowingly with respect to his conduct when he is aware that his conduct is of that nature.
>
> (b) A person acts knowingly with respect to attendant circumstances when he is aware such circumstances exist.
>
> (c) A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.[18]

Thus, the amendment broadens the H.R.S. section 708-840 definition[19] of first degree robbery to include general as well as specific intent offenses.

3. Crime victim restitution

The legislature added a new section to H.R.S. Chapter 706[20] which provides for a criminal defendant's payment of restitution to crime victims.[21] Under the new chapter, courts have the discretion to award restitution in an amount "sufficient to reimburse any victim fully for losses[.]"[22] Losses may include, but are not limited to, the full value of stolen or damaged property, medical expenses, and funeral or burial expenses.[23] Restitution does not affect the victim's right to sue in tort "or recover . . . in any manner provided by law[,]" but the restitution award will be subtracted from the victim's civil damages.[24]

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circumstances when he is aware of the existence of such circumstances or believes or hopes that they exist. (c) A person acts intentionally with respect to a result of his conduct when it is his conscious object to cause such a result.

HAW. REV. STAT. § 702-206(1) (1997).

[18] HAW. REV. STAT. § 702-206(2) (1997).

[19] HAW. REV. STAT. § 708-840(1) (1997).

[20] HAW. REV. STAT. ch. 706 (1997). Chapter 706 applies to the disposition of convicted defendants. *See id.*

[21] *See* Act 268, *reprinted in* 1998 Haw. Sess. Laws 911.

[22] Act 268, §1, *reprinted in* 1998 Haw. Sess. Laws 911.

[23] *See id.* Section (1) of the Act reads:

> Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses including but not limited to: (a) Full value of stolen or damaged property, as determined by replacement costs of like property, or the actual or estimated cost of repair, if repair is possible; (b) Medical expenses; and (c) Funeral or burial expenses incurred as a result of the crime.

Id.

[24] *See id.*

4. Criminal injuries compensation

The new criminal injuries compensation section[25] of H.R.S. Chapter 351[26] is intended to eliminate the need for state general fund payments to crime victims. This self-sufficient crime victim compensation program relieves taxpayers of the burden of providing compensation to crime victims by shifting the responsibility to convicted defendants.[27] Thus, under the compensation program, "a criminal offender repays not only society, but also persons injured by the offender's act."[28] The compensation fee amount is tied to the seriousness of the crime: $100-$500 for a felony conviction; $50 for a misdemeanor conviction; and $25 for a petty misdemeanor conviction.[29] The court considers "all relevant factors"[30] in determining the compensation fee amount, including:

(1) The seriousness of offense;
(2) The circumstances of the commission of the offense;
(3) The economic gain, if any, realized by the defendant;
(4) The number of victims; and
(5) The defendant's earning capacity, including future earning capacity.[31]

The compensation fee is separate from fines imposed and restitution, and payment of compensation fees has priority over payment of fines.[32] Payment of restitution, however, has priority over payment of compensation fees.[33] A special fund has been established for the compensation fees, and the fees will be used for victim compensation and operating expenses of the special fund.[34] Every criminal defendant will be required to pay a compensation fee unless the court finds that the defendant cannot pay the fee.[35]

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[25] *See* Act 206, *reprinted in* 1998 Haw. Sess. Laws 717.

[26] HAW. REV. STAT. ch. 351 (1997 & Supp. 1998).

[27] *See* Act 206, §1, *reprinted in* 1998 Haw. Sess. Laws 717.

[28] Act 206, §1, *reprinted in* 1998 Haw. Sess. Laws 718.

[29] *See* Act 206, §2, *reprinted in* 1998 Haw. Sess. Laws 718.

[30] *Id.*

[31] *Id.*

[32] *See* Act 206, §4, *reprinted in* 1998 Haw. Sess. Laws 719.

[33] *See id.*

[34] *See* Act 206, §3, *reprinted in* 1998 Haw. Sess. Laws 719. The Act clarifies that ". . .not more than thirty percent shall be used for operating expenses and to fund positions as authorized by the legislature." *Id.*

[35] *See* Act 206, §4, *reprinted in* 1998 Haw. Sess. Laws 719.

B. *Employment/Workers Compensation*

1. *Job reference liability*

Act 182[36] added a new section to H.R.S. Chapter 663,[37] which applies to tort actions. The new section creates a presumption of good faith for employers who provide "prospective employer information or opinion about a current or former employee's job performance[.]"[38] Thus, employers are entitled to "qualified immunity from civil liability" for the disclosure, and the resulting consequences of disclosure, of current or former employees' job performance information.[39] The presumption is rebuttable by a "preponderance of the evidence" that the disclosed information or opinion was either "knowingly false," or "knowingly misleading."[40]

2. *Employer inquiries into conviction records*

The Legislature also added a new section to H.R.S. Chapter 378[41] to allow employers to inquire into and consider the conviction records of current and prospective employees when making employment decisions.[42] As long as "the conviction record bears a rational relationship to the duties and responsibilities of the position[,]" an employer may consider it "concerning hiring, termination, or the terms, conditions, or privileges of employment[.]"[43] However, employers may not inquire into or consider juvenile convictions and convictions older than ten years.[44] Employer inquiries into conviction records also were incorporated into the exceptions to discriminatory employment practices enumerated in H.R.S. section 378-3.[45]

3. *Workers' compensation mental stress claims*

The legislature amended H.R.S. section 386-3,[46] which defines the injuries covered by workers' compensation, by dividing the statute into subsections

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[36] Act 182, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 672 (1998).
[37] HAW. REV. STAT. ch. 663 (1997).
[38] Act 182, §1, *reprinted in* 1998 Haw. Sess. Laws 672.
[39] *See id.*
[40] *See id.*
[41] HAW. REV. STAT. ch. 378 (1997). This chapter applies to employment practices. *See id.*
[42] *See* Act 175, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 681.
[43] Act 175, § 1, *reprinted in* 1998 Haw. Sess. Laws 651.
[44] *See id.*
[45] Act 175, § 3, *reprinted in* 1998 Haw. Sess. Laws 652.
[46] HAW. REV. STAT. § 386-3 (1997).

and adding a new provision which is contained in subsection (c).[47] Prior to the amendment, the statute did not explicitly define the scope of workers' compensation coverage for mental stress claims.[48] The new subsection (c) disallows mental stress claims which result "solely from disciplinary action taken in good faith by the employer[.]"[49] The purpose of the act is to narrow the scope of possible workers' compensation claims in accordance with implementation of the "recommendations of the economic revitalization task force . . ."[50]

C. *Family Law*

1. *Child Protective Services amendments*

The legislature enacted extensive amendments[51] to the child protective services statutes[52] in response to the its finding that "child abuse has become a serious problem which requires broad-based community action[.]"[53] The amendments change the purpose of H.R.S. Chapter 587 which establishes and defines Child Protective Services. The previous purpose of Chapter 587 focused generally on: "safeguard[ing], treat[ing], and provid[ing] service and permanent plans for children who have been harmed or are threatened with harm."[54] The amended purpose reflects the legislative intent to insure that:

> [p]roviding a child with a safe home. . .[is] the ultimate concern, regardless of whether a safe home be the natural family, adoptive family, or foster family.[55]

Thus, the current purpose of H.R.S. section 587-1 is "to make paramount the safety and health of children[.]"[56]

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[47] Act 224, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 768, 768 (1998).

[48] *See* HAW. REV. STAT. §386-3 (1997).

[49] Act 224, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 768 (1998). If a disciplinary action standard other than good faith is specified in a collective bargaining or other employment agreement, then that standard will govern. *See id.* This legislation reverses the result of *Mitchell v. State Depart. of Educ.*, 85 Hawai'i 250, 942 P.2d 514 (1997). In *Mitchell*, the Hawai'i Supreme Court held that a teacher's mental stress claim arising out of her employer's disciplinary action was compensable under workers' compensation law. *See id.*

[50] *See* Act 224, § 1, *reprinted in* 1998 Haw. Sess. Laws 768.

[51] Act 134, *reprinted in* 1998 Haw. Sess. Laws 504.

[52] These regulations are contained in Hawai'i Revised Statutes chapter 587 (1997), which codifies the Child Protective Act.

[53] Act 134, § 1, *reprinted in* 1998 Haw. Sess. Laws 504.

[54] HAW. REV. STAT. § 587-1 (1997).

[55] Act 134, § 1, *reprinted in* 1998 Haw. Sess. Laws 504.

[56] Act 134, § 6, *reprinted in* 1998 Haw. Sess. Laws 506.

Furthermore, the amendments repeal the birth family preference under H.R.S. section 587-1.[57] Thus, the child's birth family is no longer given preferred consideration when Child Protective Services is determining where to place the child.[58]

The legislature also added a new paragraph to H.R.S. section 587-1 which requires that Child Protective Services "make every reasonable effort to be open, accessible, and communicative to the persons affected in any manner by a child protective proceeding[.]"[59] This new paragraph was added to address the legislature's determination that, prior to the amendments, Child Protective Services was a closed system.[60] This closed system prevented the sharing of reports and medical information between Child Protective Services and the court, Department of Human Services, and physicians.[61] The closed system often frustrated all involved parties' efforts to protect the child from harm.[62]

In an effort to create an open and accessible child protective services program, the legislature added a new section to H.R.S. Chapter 587 requiring disclosure of records of children "active in the child protective service system[.]"[63] Disclosure of a foster child's complete medical records "in the department's physical custody and relevant social history" to the foster parents and "foster child's principal treating physician" is mandatory within thirty days of foster placement.[64] Any information disclosed under this section remains confidential.[65]

In addition, three new sections were added to H.R.S. Chapter 587. The first two focus on medical treatment and establish comprehensive health care coverage, available from the first day of placement,[66] which includes health assessments for all foster children.[67] The third new section of H.R.S. Chapter 587 establishes a "child protective review panel."[68] The panel reviews serious

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[57] Act 134, § 6, *reprinted in* 1998 Haw. Sess. Laws 507. Prior to amendment, H.R.S. § 587-1 contained a family birth preference, which provided that "all involved should consider the fact that the child's best interests may well be forever intertwined with those of the child's birth family[.]" HAW. REV. STAT. § 587-1 (1992).

[58] *See* Act 134, § 6, *reprinted in* 1998 Haw. Sess. Laws 507.

[59] *Id.*

[60] *See* Act 134, § 1, *reprinted in* 1998 Haw. Sess. Laws 504.

[61] *See id.*

[62] *See id.*

[63] *See* Act 134, § 2, *reprinted in* 1998 Haw. Sess. Laws 505.

[64] *See id.* Furthermore, physicians are allowed to exchange "medical information [for children active in the child protective service system] without parental consent." *Id.*

[65] *See id.*

[66] *See* Act 134, § 2, *reprinted in* 1998 Haw. Sess. Laws 504.

[67] *See* Act 134, § 2, *reprinted in* 1998 Haw. Sess. Laws 504-05. The comprehensive health assessment must be performed either "forty-five days before or after an initial placement [in foster care]." *Id.* at 505.

[68] *See* Act 134, § 2, *reprinted in* 1998 Haw. Sess. Laws 505.

cases of abuse, and submits its findings and recommendations to the Child Protective Services director.[69] The panel members will not be compensated for their participation and will be "immune from liability for injuries and damages arising from the panel's report[.]"[70]

Under the new subsection (7) of H.R.S. section 587-72, the court must schedule a show cause hearing if the court finds aggravated circumstances[71] are present. At the show cause hearing, the child's family bears the burden of presenting sufficient evidence to prove that the case should not be set for a permanent plan hearing.[72]

2. *Child support enforcement amendments*

The child support enforcement amendments[73] address three goals. The amendments expand the definition of "child support,"[74] provide greater protection of the location of parents and children in domestic violence situations,[75] and expand the enforcement and penalty procedures for non-payment of child support.[76] Prior to the amendments, the H.R.S. section 576D-1 definition of "child support" only included "payment for the necessary support and maintenance of a child as required by law."[77] The definition now also includes spousal and medical support.[78]

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[69] *See id.* The amendment defines "serious abuse" as "reabuse, hospitalization, or death arising from an abuse." *Id.*

[70] *Id.*

[71] *See* Act 134, § 12, *reprinted in* 1998 Haw. Sess. Laws 511. The child protective services amendments add a section to H.R.S. § 587-2 which defines "aggravated circumstances" as:

> (1) The parent has committed, or has aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of another child of the parent;(2) The parent has committed a felony assault that results in serious bodily injury to the child or another child of the parent; (3) The parental rights to a sibling have been terminated involuntarily pursuant to chapter 571; (4) A court has made a determination regarding a sibling under section 587-73(a) of the presence of the situation described under section 587-73(a)(1) or (2), or both.

Act 134, § 3, *reprinted in* 1998 Haw. Sess. Laws 505-06.

[72] *See* Act 134, § 12, *reprinted in* 1998 Haw. Sess. Laws 511.

[73] Act 153, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 539; Act 83, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 161.

[74] *See* Act 153, § 4, *reprinted in* 1998 Haw. Sess. Laws 560.

[75] *See* Act 153, § 6, *reprinted in* 1998 Haw. Sess. Laws 563.

[76] *See* Act 83, §§ 1, 4, 9, *reprinted in* 1998 Haw. Sess. Laws 161-62, 163-65, 167.

[77] HAW. REV. STAT. § 576D-1 (1997).

[78] *See* Act 153, § 4, *reprinted in* 1998 Haw. Sess. Laws 560. Medical support includes "providing medical insurance coverage or to reimburse for maternity or delivery expenses incurred when debtor parent's child was born." *Id.*

The amendments also provide greater protection for the confidentiality of children of abusive parents.[79] Prior to the amendments, H.R.S. section 576D-12 prevented disclosure of the location of a parent covered by a child support enforcement agency protective order.[80] The amendments expand the protection to include a requirement of nondisclosure for the location of the child.[81] Furthermore, a new subsection (d) was added to section 576D-12 which limits disclosure by the family court or hearings officer of information about the child's parent.[82] Under the new subsection, disclosure is prohibited when the Secretary of Health and Human Services advises the family court or hearings officer that there is "reasonable evidence of domestic violence or child abuse"[83] and determines that disclosure may be harmful.[84]

H.R.S. section 584-12, which defines evidence relating to paternity, was amended by adding an additional subsection.[85] Thus, evidence relating to paternity now also may include:

> [b]ills for pregnancy and childbirth, including medical insurance premiums covering this period and genetic testing, without the need for foundation testimony or other proof of authenticity or accuracy, and these bills shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of child[.][86]

Furthermore, the child support enforcement amendments broaden the child support enforcement power through licensing regulation.[87] The legislature amended H.R.S. section 189-2, which regulates commercial marine licenses, to prevent parents who have failed to comply with child support or paternity subpoenas from obtaining, reinstating, or renewing commercial marine licenses.[88] Also, noncompliance with a support order now results in suspension of commercial marine licenses until authorization is received from the child support enforcement agency, the office of child support hearings, or the family court.[89]

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[79] *See* Act 153, § 6, *reprinted in* 1998 Haw. Sess. Laws 563.

[80] HAW. REV. STAT. § 576-D12 (1997).

[81] *See* Act 153, § 6, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 563 (1998).

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See* Act 153, § 9, *reprinted in* 1998 Haw. Sess. Laws at 564.

[86] *Id.*

[87] *See* Act 83, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 161.

[88] *See* Act 83, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws at 161-62 (1998).

[89] *See id.*

Furthermore, the amendments define the "date of service"[90] providing notice of license suspension or denial for noncompliance as "two days following the date of mailing."[91] Prior to the amendment, the suspension and denial provisions were tied to "receipt" of the notice, which is more difficult to satisfy than "service" of notice.[92]

D. *Insurance*

1. *Motor vehicle insurance amendments*

The Motor Vehicle Insurance Amendments[93] add two new sections to H.R.S. section 431:10C.[94] The first section requires indemnification of agents[95] by insurance companies for civil damages resulting from simple negligence in placement or renewal of policyholder motor vehicle insurance applications.[96] The indemnification does not cover gross negligence.[97]

The second new section allows either party to a motor vehicle law suit to elect arbitration to resolve tort claims covered by motor vehicle liability insurance.[98] Submission of the dispute to arbitration requires either a written request filed with the clerk of the court or an agreement between the parties.[99] Arbitration, however, is not mandatory and either party may refuse to participate in it.[100] Unless the parties have agreed otherwise, the "fees and costs of arbitration shall be borne equally by the parties."[101] The arbitration awards under this section are "limited to the applicable policy liability limit[.]"[102]

The amnesty period for uninsured motorists to obtain the required no-fault or motor vehicle insurance was extended under H.R.S. section 431:10C-

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[90] HAW. REV. STAT. § 576D-13 (1997). "Date of service" refers to the term as it is used in H.R.S. § 576D-13, which applies to suspension or denial of licenses.

[91] *See* Act 83, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 161, 163 (1998). "Noncompliance" refers to failure to comply with a "subpoena or warrant relating to a paternity or child support proceeding[.]" *Id.*

[92] *See* HAW. REV. STAT. § 576D-13 (1997).

[93] Act 275, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 922.

[94] *See* HAW. REV. STAT. § 431:10C (1997). This chapter applies to motor vehicle insurance section of the insurance code. *See id.*

[95] "Agents" include general agents, subagents, solicitors and brokers. *See* Act 275, § 2, *reprinted in* 1998 Haw. Sess. Laws 922.

[96] *See* Act 275, § 2, *reprinted in* 1998 Haw. Sess. Laws 922-23.

[97] *See* Act 275, § 2, *reprinted in* 1998 Haw. Sess. Laws 923.

[98] *See* Act 275, § 3, *reprinted in* 1998 Haw. Sess. Laws 923.

[99] *See id.*

[100] *See id.*

[101] *Id.*

[102] *Id.*

104.5.[103] Furthermore, the insurance commissioner's adoption of rules "to effectuate article 10C of Chapter 431" is now subject to the approval of the governor.[104]

The motor vehicle insurance amendments also expand the "permissive operator" definition found in H.R.S. section 431:10C-301(a)(2)[105] which previously provided for "express or implied permission of the named insured."[106] The new provision covers operators using the motor vehicle with a "reasonable belief that [they are] entitled to operate the motor vehicle."[107]

The amendment to H.R.S. section 431:10C-315 provides an additional alternative for measuring the statute of limitations for motor vehicle insurance benefits: "[t]wo years after payment of liability coverage, for underinsured motorist claims."[108] The marijuana exception was removed from the "driving under the influence" definition in H.R.S. § 431:10C-407(b)(1)(B).[109] Under the H.R.S. section 431:10G-301 amendment, there is no motor vehicle policy coverage for personal injuries or death sustained by motorcycle or motor scooter operators or their passengers "unless expressly provided for in the motor vehicle policy."[110]

2. *Pooled insurance*

Act 268[111] expands the pooled insurance[112] provisions of H.R.S. section 431:10-222.5 by adding a new subsection (g).[113] Prior to the addition of

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[103] *See* Act 275, § 7, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 925 (1998). The amnesty period was extended to December 31, 1998. *See id.*

[104] Act 275, § 12, *reprinted in* 1998 Haw. Sess. Laws 927.

[105] HAW. REV. STAT. § 431:10C-301(a)(2). This statute sets out the requirements for motor vehicle policy coverage. *See id.* A "permissive operator" is covered under the owner's policy and is defined as "any operator of the insured motor vehicle using the motor vehicle with a reasonable belief that the person is entitled to operate the motor vehicle[.]" Act 275, § 16, *reprinted in* 1998 Haw. Sess. Laws 928.

[106] HAW. REV. STAT. § 431:10C-301(2) (1997).

[107] Act 275, § 16, *reprinted in* 1998 Haw. Sess. Laws 928.

[108] 1998 HI H.B. 2823, Act 275.

[109] Act 275, § 31, *reprinted in* 1998 Haw. Sess. Laws 937. Prior to the amendment, H.R.S. § 431:10C-407(b)(1)(B)(v) read: "Driving under the influence of an intoxicating liquor as provided in section 291-4 or any drug, *except marijuana*, as provided in section 291-7." HAW. REV. STAT. § 431:10C-407 (1997) (emphasis added).

[110] *See* Act 275, § 34, *reprinted in* 1998 Haw. Sess. Laws 940.

[111] Act 268, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 910 (1998).

[112] "Pooled insurance" refers to "an insurance policy or policies from licensed private insurers which cover liability of all developers, contractors, and subcontractors, for their performance directly related to the project." HAW. REV. STAT. § 431:10-222.5 (1997).

[113] *See* Act 268, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 910 (1998).

subsection (g), pooled insurance could be purchased for "specific public works or private construction project[s]" with an estimated cost of $50,000 or more.[114] The terms "specific public works" or "private construction project[s]," however, were not defined in the previous statute. The new subsection (g) provides definitions for these terms. Under subsection (g), "specific construction project[,] specific public works construction projects, or any other construction project in the public interest" are defined to include projects with multiple sites, and projects involving ongoing construction in phases.[115]

E. Torts

1. Hotel innkeeper's liability for recreational equipment

The new section of H.R.S. Chapter 486K[116] limits hotel innkeeper's liability for recreation equipment.[117] Under the amendment, which took effect on July 20, 1998, a hotelkeeper has no duty to instruct, train or supervise a user of recreational equipment "where. . .[the activity in which the equipment is used] is not part of an activity guided or managed by representatives of the hotelkeeper."[118] However, wind, engine and motor powered land or water vehicles, such as windsurfers and jetskis, as well as equipment "designed for flight, gliding or controlled descent in the air" are excluded from the definition of "recreational equipment."[119]

2. Automatic external defibrillators

Act 160,[120] enacted on July 14, 1998, amends H.R.S. section 432-2[121] to exempt "[a]ny person who successfully completes training under an automatic external defibrillator program administered by a physician" from the state

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[114] *See* HAW. REV. STAT. § 431:10-222.5 (1997).

[115] *See* Act 268, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 910 (1998).

[116] H.R.S. chapter 486K applies to hotels.

[117] *See* Act 302, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 979. "Recreational equipment" is defined to include: "skin diving masks, snorkels, swim fins, bodysurfing boards, surfboards, canoes, kayaks, bicycles, skates, tennis or golf equipment, weights and exercise equipment, air mattresses, and floatation devices provided by the hotel." Act 302, § 1, *reprinted in* 1998 Haw. Sess. Laws 979.

[118] *See id.*

[119] *See id.*

[120] Act 160, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 605.

[121] H.R.S. § 432-2 defines the exceptions to the medical licensing requirements. *See id.*

medical licensing requirements.[122] Act 160 also amends H.R.S. section 663.5[123] by adding subsection (e), which provides immunity from civil damages for persons who complete physician-administered automatic external defibrillator programs.[124] The immunity provision imposes an obligation of good faith upon the person administering the automatic external defibrillator treatment.[125] The immunity only applies to situations where there is no actual or expectation of payment for services rendered, and where the attempted resuscitation occurs on a person in imminent danger of death.[126] The amendment also provides immunity from civil damages for any "person, including an employer, who establishes an automatic external defibrillator program[.]"[127] The immunity does not excuse any other duty imposed by law or by provisions regarding the "maintenance of equipment to be used for resuscitation[,]" and does not cover gross negligence or wanton acts or omissions.[128]

F. Wills and Trusts

1. Uniform Transfer-On-Death Security Registration Act

The Uniform Transfer-On-Death (TOD) Security Registration Act[129] provides the procedural framework for owners of securities to name a beneficiary who will receive full ownership of the securities immediately upon the death of the owner.[130] Intent to register a security in beneficiary form is evidenced by:

> the words 'transfer on death' or the abbreviation 'TOD', or by the words 'pay on death' or the abbreviation 'POD', after the name of the registered owner and before the name of a beneficiary.[131]

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[122] *See* Act 160, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 605, 606 (1998). An automatic external defibrillator is defined as "an electronic device that applies an electric shock to restore the rhythm of a fibrillating [rapidly irregularly contracting] heart." MERRIAM WEBSTER DICTIONARY 136 (1995).

[123] H.R.S. § 663-1.5 provides immunity for "good samaritans" and rescue teams. *See id.*

[124] *See* Act 160, § 2, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 605, 607 (1998).

[125] *See id.*

[126] *See id.*

[127] *See id.*

[128] *See id.*

[129] Act 63, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 139.

[130] *See id.*

[131] Act 63, § 1, *reprinted in* 1998 Haw. Sess. Laws 141.

Registration in beneficiary form "has no effect on ownership until the owner's death"[132] and is fully revocable without the consent of the beneficiary.[133]

II. HAWAI'I SUPREME COURT/INTERMEDIATE COURT OF APPEALS CASES

A. *Civil Procedure*

1. Meaning of "Practicing Law Within this Jurisdiction" under H.R.S. section 605-14: Fought & Co. v. Steel Engineering & Erection, Inc.[134]

In *Fought*, the Hawai'i Supreme Court held that, under its interpretation of H.R.S. section 605-14,[135] an out of state attorney acting as a consultant to a client and the client's Hawai'i counsel is not practicing law "within this jurisdiction."[136] This question was a matter of first impression in Hawai'i.[137] The case originated from a contract dispute over the construction of a new terminal building at the Kahului Airport in Kahului, Maui.[138] Plaintiff Fought, a steel supplier, brought suit against Steel Engineering ("Steel"), a structural steel erection subcontractor, after Steel withheld payment because the general contractor had withheld payment from Steel.[139] The issue was raised when Steel opposed Fought's request for attorney's fees because Fought's retained general counsel was not licensed to practice law in Hawai'i.[140]

In reaching its decision, the court balanced the State's right to regulate attorney licensing to protect its citizens from unlicensed or incompetent attorneys against the competing interests of businesses protecting their out of state interests, and against clients' right to have the attorney of their choice, wherever he or she may be located, represent them.[141] Accordingly, the court observed:

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[132] *Id.*

[133] *See id.*

[134] 87 Hawai'i 37, 951 P.2d 487 (1998).

[135] HAW. REV. STAT. § 605-14 (1993)(criminalizing practicing law within the State of Hawai'i without a license).

[136] *See Fought* 87 Hawai'i at 47, 951 P.2d at 497.

[137] *See id.* at 37, 951 P.2d at 487.

[138] *See id.* at 41-42, 951 P.2d at 491-92.

[139] *See id.* at 42, 951 P.2d at 492. The general contractor withheld payment from Steel because the Department of Transportation withheld payment from the general contractor after a disagreement arose regarding the project specifications. *See id.*

[140] *See id.* at 44, 951 P.2d at 494.

[141] *See id.* at 46, 951 P.2d at 496.

> the transformation of our economy from a local to a global one has generated compelling policy reasons for refraining from adopting an application so broad that a law firm, which is located outside the state of Hawai'i, may automatically be deemed to have practiced law "within the jurisdiction" merely by advising a client regarding the effect of Hawai'i law or by "virtually entering" the jurisdiction on behalf of a client via "telephone, fax, computer, or other modern technological means."[142]

Furthermore, the court reasoned that when parties are domiciled out of state, "competent representation undoubtedly requires consultation with legal counsel licensed to practice in another jurisdiction."[143] Thus, the court found that the client was entitled to recover attorney's fees for his out-of-state general counsel because the attorney was not practicing law "within this jurisdiction," and therefore there was no violation of H.R.S. sections 605-14[144] and 605-17[145] which would prohibit the recovery of fees.[146]

Even though attorney's fees are an element of damages, and therefore require some determination of fact, the court held that "appellate courts have jurisdiction to make factual determinations in the limited context of taxing attorneys' fees and costs incurred on appeal."[147] In reaching this result, the court applied the *Uyemura*[148] rule which provides that:

> where the wrongful act of a defendant causes a plaintiff to engage in litigation with a third party in order to protect his or her rights or interests, attorney's fees incurred in litigating with that third party may be chargeable against the wrongdoer as an element of the plaintiff's damages.[149]

Furthermore, the court held that the defendant's wrongful act does not have to be the "sole cause of a plaintiff's litigation with a third party in order to

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[142] *Id.* at 47, 951 P.2d at 497 (quoting Birdbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County, 949 P.2d 1, 6 (Cal. 1998)).

[143] *Id.*

[144] HAW. REV. STAT. § 605-14 (1993). This statute provides in part:

> Unauthorized practice of law prohibited. It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or United States. . . *Id.*

[145] HAW. REV. STAT. § 605-17 (1993). This statute provides that "[a]ny person violating section 605-14 . . . shall be guilty of a violation, but, upon subsequent violation of the section, the person shall be guilty of a misdemeanor." *Id.*

[146] *See Fought*, 87 Hawai'i at 47, 951 P.2d at 498.

[147] *Id.* at 52, 951 P.2d at 502.

[148] Uyemura v. Wick, 57 Haw. 102, 551 P.2d 171 (1976).

[149] *Fought*, 87 Hawai'i at 51, 951 P.2d at 501 (citing *Uyemura*, 57 Haw. at 108-09, 551 P.2d at 176).

enable the plaintiff to recover attorney's fees expended in the third-party litigation[.]"[150] The court extended the applicability of its holding to the State as well.[151]

2. Rule 11 sanctions: Gold v. Harrison[152]

The Hawai'i Supreme Court held that the Intermediate Court of Appeals ("ICA") did not have jurisdiction to consider whether Rule 11 of the Hawai'i Rules of Civil Procedure ("HRCP")[153] sanctions were appropriate in this case because the real party in interest, the attorney who was sanctioned, was not named as a party in the notice of appeal.[154] The court, however, did analyze the merits of the Rule 11 sanctions to give "guidance to the circuit court" and found that the sanctions would be appropriate if the court did have jurisdiction, even in a case where the attorney did not sign the complaint.[155]

The ICA agreed with the circuit court's determination that the plaintiff's claim was not "warranted by existing law" and found that the circuit court did not abuse its discretion in denying the attorney's request for an evidentiary hearing on the Rule 11 sanctions.[156] Furthermore, the court found that the plaintiff's appeal was frivolous. Hawai'i Rules of Appellate Procedure Rule 38[157] sanctions were warranted because the plaintiffs failed to raise any new arguments on appeal, did not "point to any evidence or case law that was not already cited in their memorandum," and refused to "acknowledge controlling authority brought to their attention on numerous occasions."[158] The court stated that Rule 11 sanctions could be imposed against the attorney in question, even though he did not sign the complaint.[159] The court based its conclusion that the attorney was "responsible for the claim" even though he did not sign the complaint because: "(1) [the attorney's] name was listed in

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[150] *Id.* at 52, 951 P.2d at 502.

[151] *See id.* at 55-56, 951 P.2d at 505-06. The court held that the state's waiver of sovereign immunity in contract actions, as well as the case law of other jurisdictions, renders the state liable for attorney's fees and costs to same extent as other litigants. *See id.*

[152] 88 Hawai'i 94, 962 P.2d 353 (1998).

[153] HAW. R. CIV. P. 11. This rule provides for sanctions against attorneys who file frivolous lawsuits. *See id.*

[154] *See Gold,* 88 Hawai'i at 104, 105, 962 P.2d at 363, 364. This case also includes a defamation discussion, *see infra* section II.H.1.

[155] *See Gold,* 88 Hawai'i at 104, 105, 962 P.2d at 363, 364.

[156] *Id.* at 106, 107, 962 P.2d at 365, 366.

[157] HAW. R. APP. P. RULE 38. This statute provides in part, that "[i]f a Hawai'i appellate court shall determine that an appeal decided by it was frivolous, it may award damages including reasonable attorneys' fees and costs to the appellee."

[158] *Gold,* 88 Hawai'i at 107, 962 P.2d at 366.

[159] *See id.* at 105, 962 P.2d at 364.

the complaint as an attorney for the Plaintiffs; and (2) his actions later ratified or indicated that he adopted the signature of the attorney who did sign the complaint."[160] In this case, the attorney assumed responsibility for "all actions with respect to filing and prosecution" of the case.[161] Thus, the attorney's sworn assertion that "everything in the case was done with his full knowledge and approval" constituted a ratification or adoption of the signature on the complaint.[162]

B. Construction Law

1. Recovery for economic loss: City Express, Inc. v. Express Partners

In the context of construction litigation, *City Express*[163] bars recovery for purely economic loss[164] in a negligence action against a design professional.[165] This case involved the construction of a warehouse for City Express, Inc. ("City Express") which operates a warehouse and trucking company.[166] An architect was hired to design the warehouse, which was to have two floors with a ramp connecting them.[167] Although some of the architects' blueprints designated the ramp for forklift use, the architects testified at trial that "it was their understanding, in designing the building, that the second floor would not be used by forklifts[,]" but rather only for "storage of light objects."[168] City Express began using forklifts on the second floor as soon as it moved into the warehouse, and "[t]he use of the forklifts caused the floor of the second level to crack."[169] Although five inches of concrete were poured to remedy the problem, the additional weight of the concrete "caused structural damage and the floor again began cracking."[170] City Express sued Express Partners, the business entity created by City Express' joint venture agreement with a

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[160] *Id.*

[161] *See id.* The attorney's actual words, contained in an affidavit filed with the circuit court, were that "[a]ll actions with respect to the filing and prosecution of this case . . . were taken by me and my firm as lead counsel for Plaintiffs[.]" *Id.*

[162] *See id.* at 105, 106, 962 P.2d at 364, 365.

[163] 87 Hawai'i 466, 959 P.2d 836 (1998).

[164] The court defined economic losses for negligent design of a building, the claim at issue in this case, as "those that pertain solely to the costs related to the operation and value of the building itself[,]" but not "personal injuries caused by the defective design or damage to property other than the building itself." *Id.* at 469, 959 P.2d at 839.

[165] *See id.* at 467, 959 P.2d at 837.

[166] *See id.*

[167] *See id.*

[168] *See id.*

[169] *Id.*

[170] *Id.*

developer to construct the warehouse, and Express Partners filed a third party complaint against the architects.[171]

"[T]he availability of economic loss damages in a negligence action against a design professional" was a issue of first impression in Hawai'i.[172] The court began the opinion by discussing the background and purpose of the economic loss rule:

> [t]he economic loss rule marks the fundamental boundary between the law of contracts . . . and the law of torts . . . [and] was designed to prevent disproportionate liability and allow parties to allocate risk by contract.[173]

In distinguishing *State ex rel. Bronster v. United States Steel*,[174] the court evaluated Restatement (Second) of Torts ("Restatement") section 552,[175] which defines the tort of negligent misrepresentation. *U.S. Steel* involved a claim by the State against U.S. Steel for negligent representation.[176] In that case, there was no contractual privity between the State and U.S. Steel, and therefore the court held that the economic loss rule did not bar the State's negligent representation claim.[177] In the present case, the court determined that, unlike *U.S. Steel*, the contractual privity present in *City Express* invokes the economic loss rule which bars recovery under Restatement section 552(2).[178] Privity was essential to the court's conclusion that the plaintiffs were barred from tort recovery of purely economic losses from design professionals.[179] In so holding, the court "preserve[d] the right of design

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[171] *See id.*

[172] *Id.* at 468, 959 P.2d at 838.

[173] *Id.* at 469, 959 P.2d at 839 (citing Berschauer/Phillips Const. Co. v. Seattle Sch. Dist., 881 P.2d 986, 990 (Wash. 1994)).

[174] 82 Hawai'i 32, 919 P.2d 294 (1996).

[175] RESTATEMENT (SECOND) OF TORTS § 552 (1977). This section states, in relevant part:

> Information Negligently Supplied for the Guidance of Others[:] (1) One who, in the course of his [or her] business, profession or employment, or in any other transaction in which he [or she] has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he [or she] fails to exercise reasonable care or competence in obtaining or communicating the information. (2) . . .[T]he liability stated in subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he [or she] intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he [or she] intends the information to influence or knows that recipient so intends or in a substantially similar transaction.

City Express, 87 Hawai'i at 469, 959 P.2d at 839 (modifications and ellipses in original).

[176] *See U.S. Steel*, 82 Hawai'i 32, 919 P.2d 294 (1996).

[177] *See id.* at 40, 919 P.2d at 302.

[178] *See* RESTATEMENT (SECOND) OF TORTS § 552 (1977). See *supra* note 175 for the text of section 552.

[179] *See City Express*, 87 Hawai'i at 470. 959 P.2d at 840.

professionals to limit their exposure to liability through contract[,]"[180] and joined a "growing trend of cases which bar recovery in negligence between parties to a contract, where the damages constitute what is known as 'economic loss.'"[181]

C. Criminal Law

1. Public safety exception to Miranda warnings: State v. Kane

In *Kane*,[182] the Hawai'i Supreme Court held that the "public safety exception" to the Miranda warnings requirement is not recognized in Hawai'i.[183] The public safety exception allows a police officer to question a suspect, prior to a reading of Miranda rights, for the "limited purpose of neutralizing . . .immediate danger" when a dangerous weapon or explosive is "freely available in a public place."[184]

The court, however, did not explicitly reject the "public safety" exception. In *Kane*, the police officer already knew the location of the dangerous weapon, thus there was no urgent need to question the suspect which would justify pre-Miranda interrogation.[185] Furthermore, even if the officer had been unaware of the location of the dangerous weapon, his questions were not "designed solely for the purpose of addressing the danger posed" by the dangerous weapon.[186] Thus, the exception did not apply to the facts of this case under the *Quarles* analysis, and the court did not to address whether it would adopt the "public safety" exception had it been applicable. [187]

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[180] *Id.*

[181] *Id.* (quoting STEVEN STEIN, CONSTRUCTION LAW § 11.04[2] (1997)).

[182] 87 Hawai'i 71, 951 P.2d 934 (1998).

[183] *See Kane*, 87 Hawai'i at 72, 951 P.2d at 935.

[184] *See id.* at 79, 951 P.2d at 942 (citing New York v. Quarles, 476 U.S. 649 (1984)).

[185] The United States Supreme Court established the parameters of the "public safety" exception to the Miranda rule in *New York v. Quarles*, 476 U.S. 649 (1984). In *Quarles*, the police searched a suspected rapist for a weapon after being informed by the victim that her assailant was carrying a gun. The search produced only an empty holster. The police officer questioned the suspect about the location of the gun, before reading him his Miranda rights, because they believed the unlocated gun posed a threat to public safety. After retrieving the gun, the police officer formally arrested the suspect and read him his Miranda rights. The United States Supreme Court held that the police were justified "in questioning the suspect for the limited purpose of neutralizing the immediate danger without first giving the warnings required by Miranda." *Kane*, 87 Hawai'i at 79, 951 P.2d at 942 (referring to *Quarles*, 476 U.S. 649).

[186] *See Kane*, 87 Hawai'i at 79, 951 P.2d at 942.

[187] *See id. Quarles* established a public safety exception to the Miranda requirement. *See supra* note 185.

The court also rejected the defendant's argument that H.R.S. section 134-8, which defines the elements of possession of a "bomb," was unconstitutionally vague on its face or as applied because it does not define the term "bomb."[188] The court reasoned that the descriptions of the permissible uses of explosives defined in other chapters of the H.R.S., and the intentional, knowing, or reckless intent requirement of H.R.S. section 134-8 gave "a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited . . . ."[189]

2. Interpretation of "selling" in Peddling Statute: State v. Kamal[190]

In *Kamal*, the Hawai'i Supreme Court held that a street peddler who sketched pictures of tourists and accepted "donations" from some people but did not ask for money was peddling in violation of section 29-6.2 of the Revised Ordinances of the City and County of Honolulu ("ROCCH").[191] Because Kamal was transferring property or providing services for consideration to those tourists who chose to give him a "donation" for his sketches, he was "selling" his artwork within the meaning of the peddling statute.[192] The court also rejected Kamal's argument that the peddling statute was unconstitutionally vague because "the term 'sell' has a definite, widely-understood meaning consonant with [the statute's] definitions."[193]

D. Employment and Workers' Compensation

1. Temporary employer's liability for workers' compensation claims: Frank v. Hawaii Planing Mill Foundation[194]

The Hawai'i Supreme Court adopted the majority view regarding a temporary employer's liability for workers' compensation claims,[195] and reversed the opinion of the ICA[196] in this case.[197] The ICA opinion held that

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[188] *See Kane*, 87 Hawai'i at 73, 951 P.2d at 936; *See* HAW. REV. STAT. § 134-8 (1993).

[189] *Kane*, 87 Hawai'i at 77, 951 P.2d at 940 (citing State v. Gaylord, 78 Hawai'i 127, 142, 890 P.2d 1167, 1182 (1995)).

[190] 88 Hawai'i 292, 966 P.2d 604 (1998).

[191] CITY AND COUNTY OF HONOLULU, HAW., REV. ORDINANCES § 29-6.2(b)(7) (1996). *See Kamal*, 88 Hawai'i at 292, 966 P.2d at 604.

[192] *See Kamal*, 88 Hawai'i at 295, 966 P.2d at 607.

[193] *Id.* at 296, 966 P.2d at 608.

[194] 88 Hawai'i 140, 963 P.2d 349 (1998).

[195] This is the view of 43 states. For a full list of citations, see *id.* at 140, 963 P.2d at 354, n.5.

[196] Frank v. Hawaii Planing Mill Found., 88 Hawai'i 465, 967 P.2d 662 (App. 1998).

[197] *See Frank*, 88 Hawai'i at 140, 963 P.2d at 349.

a temporary employee's workers' compensation award did not preclude him from bringing a negligence action against the company to whom he was temporarily assigned because that company did not secure workers' compensation insurance for him directly.[198] In reversing the ICA, the Hawai'i Supreme Court held that once an injured temporary employee has received workers' compensation benefits, made possible by his other employer's payments to the temporary agency which assigned the employee, the temporary employer is immune from tort liability.[199]

The court's holding relied heavily on *Ghersi v. Salazar*.[200] In *Frank*, as in *Ghersi*, the statutory employer[201] paid a fee to the temporary agency, which incorporated the cost of securing workers compensation coverage for the employee.[202] Even though the statutory employer did not directly secure workers' compensation for the employee, the court held that both the temporary agency and the statutory employer could be held liable under the workers' compensation act.[203] Both employers were protected by the workers' compensation act tort is immunity provision and could not be sued for damages.[204] Statutory employers,[205] therefore, are entitled to tort immunity under the workers' compensation statute when they pay a fee to an employee leasing company to secure workers' compensation coverage for an employee.

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[198] *See Frank*, 88 Hawai'i 465, 967 P.2d 662.

[199] *See Frank*, 88 Hawai'i at 146, 963 P.2d at 355. The court held: "[The temporary employer] is entitled to receive its benefit of the socially enforced bargain [embodied in the workers' compensation statute], that is, tort immunity." *Id.*

[200] 883 P.2d 1352 (Utah 1994). In *Ghersi*, a temporary employee attempted to sue his temporary employer after receiving workers' compensation benefits from the temporary agency which assigned him. The *Ghersi* court held that: "Huish [the temporary agency], through its contract with Adia [the temporary employer], provided workers' compensation coverage. Since both Adia and Huish could be liable under the [Workers' Compensation] Act, both are protected by it when they comply therewith. Because Huish was a [statutory] employer and paid workers' compensation, Huish cannot be sued by Ghersi [the injured employee] for damages." *Frank*, 88 Hawai'i at 146, 963 P.2d at 355, (quoting *Ghersi*, 833 P.2d at 1357-58 (citations omitted)).

[201] Statutory employment requires: an express or implied contract between the statutory employer and employee (in this case HPM and Frank, respectively); that the statutory employer's work be the primary source of work for the employee; and that the statutory employer has control over the details of the employee's work. *See Frank*, 963 P.2d at 355, n.6. The court noted that all three elements of statutory employment were fulfilled in this case. *See id.*

[202] *See Frank*, 88 Hawai'i at 146, 963 P.2d at 355.

[203] *See id.*

[204] *See id* (citing *Ghersi*, 833 P.2d at 1357-58).

[205] The court noted that "[a]lthough the parties herein, as well as a number of jurisdictions, characterize an employer such as HPM as a 'special' employer, we, instead, utilize the more accurate term 'statutory' employer throughout the opinion." *Frank*, 88 Hawai'i at 142 n.1, 963 P.2d at 351 n.1.

2. Workers' compensation benefits for injuries occurring off company premises: Ostrowski v. Wasa Electrical Services, Inc.[206]

Ostrowski addresses a matter of first impression for Hawaii: "[w]hen is an employee entitled to workers' compensation benefits for an injury occurring off-premises, but questionably associated with, a company-sponsored holiday party."[207] In this case, Plaintiff Ostrowski was injured during a fight at an after hours New Year's Eve party held on the sidewalk across the street from his employer Wasa's premises.[208] Earlier in the day, Wasa had sponsored a New Year's Eve party and provided food and non-alcoholic drinks; no alcoholic beverages were provided because serving or consuming alcoholic beverages on Wasa's premises was against company policy.[209] Ostrowski's injuries occurred over four hours after the end of the company sponsored party, at a non-company party on the sidewalk across the street from Wasa's premises, where alcohol was being served.[210] Ostrowski filed a claim for workers' compensation benefits and sued his employer after his claim was denied.[211]

The court adopted the *Tate v. GTE Hawaiian Telephone Co.*[212] test which requires "a causal connection between the injury and any incidents or conditions of employment."[213] In evaluating whether the requisite causal connection exists, *Tate* requires consideration of whether the injury:

> [(1)] takes place within the period of employment, [(2)] at a place where the employee reasonably may be, and [(3)] while he or she is fulfilling his or her duties or engaged in doing something incidental thereto.[214]

All three considerations must support the finding of a causal connection between the injury and the employment.

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[206] 87 Hawai'i 492, 960 P.2d 162 (App. 1998).

[207] *Id.* at 496, 960 P.2d at 166.

[208] *See id* at 493-94, 960 P.2d at 163-64.

[209] *See id.*

[210] *See id.* The alcohol at the non-company sponsored party was purchased and brought by individuals; no company funds were used to provide alcohol at the non-company sponsored party. *See id.*

[211] *See id.* at 494, 960 P.2d at 164.

[212] 77 Hawai'i 100, 881 P.2d 1246 (1994).

[213] *Ostrowski*, 87 Hawai'i at 497, 960 P.2d at 167 (citing *Tate*, 77 Hawai'i at 103, 881 P.2d at 1249).

[214] *Id.* at 497, 960 P.2d at 167 (quoting *Tate*, 77 Hawai'i at 103, 881 P.2d at 1249). In reaffirming the *Tate* test, which considers the time and place where the injury occurred, the court noted that it was partially overruling the test established in *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721 (1981), which rejected "spatial and temporal considerations" and focused on the "origin of the accident." *Ostrowski*, 87 Hawai'i at 497, 960 P.2d at 167, n. 8 (quoting *Chung* 63 Haw. at 648, 636 P.2d at 725).

To determine whether the social event in question was incidental to Ostrowski's employment, the court focused on the third *Tate* factor and adopted Larson's considerations, from *The Law of Workmen's Compensation*, §14.00.[215] Larson's considerations find that "[r]ecreational or social activities are within the course of employment when[:]"

> (a) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
> (b) The employer, by expressly or impliedly requiring the participation, or by making the activity part of the services of the employee, brings the activity within the orbit of the employment; or
> (c)The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[216]

The court noted that any one of these three considerations "or other factual considerations that the court deems relevant" was sufficient to satisfy the third requirement of the *Tate* test.[217] Furthermore, the test "must . . . be liberally construed in favor of the claimant."[218] The court affirmed the lower court's decision and held that the evidence failed to establish that the non-company sponsored party was incidental to Ostrowski's employment duties as an electrician.[219]

3. Wrongful discharge: Takaki v. Allied Machinery Corp.[220]

Under *Takaki*, a wrongful discharge claim cannot be maintained where the public policy embodied in the claim has already been incorporated into a statutory remedy. After the plaintiff, Alan Takaki, entered into an agreement to "promote and sell some of the various lines of equipment handled by Allied. . .[,]" he suffered back and knee injuries at the Allied worksite and later required surgical treatment.[221] Almost three years later, after undergoing treatment for "psychological distress" related to his injuries, Takaki obtained a physician's certificate stating that "Takaki was 'unable to perform his usual duties' and could not return to work for an indefinite period of time."[222] Allied sent Takaki a letter informing him that "[he] was terminated for failure

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[215] *Ostrowski*, 87 Hawai'i at 498, 960 P.2d at 168 (citing 1A LARSON, THE LAW OF WORKMEN'S COMPENSATION §14.00 (1993)).

[216] *Id.* at 498, 960 P.2d at 168 (quoting LARSON, *supra* note 215, § 22.00).

[217] *See id.* at 498, 960 P.2d at 168.

[218] *Id.*

[219] *See id.* at 492, 960 P.2d at 162.

[220] 87 Hawai'i 57, 951 P.2d 507 (Ct. App. 1998).

[221] *See id.* at 59, 951 P.2d at 509.

[222] *Id.* at 60, 951 P.2d at 510.

to abide by the terms of the. . .agreement"[223] the same day that Takaki sent Allied a letter requesting that a workers' compensation claim be filed on his behalf.[224]

Takaki sued Allied for wrongful discharge on the basis of *Parnar v. Americana Hotels*,[225] which was the first case in Hawai'i to recognize an action for wrongful discharge in violation of a "clear mandate of public policy."[226] The Hawai'i Supreme Court, however, has limited *Parnar* to "situations where a remedy is not provided for violation of the 'clear' public policy involved."[227] Thus, in the present case, the ICA held that the plaintiff could not maintain his *Parnar* claim because H.R.S. section 378-32[228] "already evidences a public policy against terminating an employee solely because of a work injury, and H.R.S. section 378-35[229] provides a remedy for violating that policy."[230]

The plaintiff in *Takaki* also asserted a racial discrimination claim against his employer which the court remanded because the appropriate elements[231] were not considered by the circuit court.[232] The ICA held that the plaintiff could maintain his claim even though he failed to plead with particularity because Hawai'i, unlike federal courts, does not require heightened pleading for civil rights claims.[233] The ICA also instructed the court on remand that if the plaintiff prevailed on the racial discrimination claim, he also would be

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[223] *Id.*

[224] *Id.*

[225] 65 Haw. 370, 380, 652 P.2d 625, 631 (1982). *Parnar* involved an allegation of a retaliatory discharge in furtherance of an antitrust violation. *See id.* The court held that the retaliatory discharge in *Parnar* was a "clear" violation of public policy and provided a remedy because there was no statutory remedy available to the plaintiff. *See id.* at 380, 652 P.2d at 631.

[226] *See Takaki*, 87 Hawai'i at 63, 951 P.2d at 513.

[227] *Id.* (quoting Ross v. Stouffer Hotel, Co., 76 Hawai'i 454, 464, 879 P.2d 1037, 1047 (1994)).

[228] HAW. REV. STAT. § 378-32 (1993).

[229] HAW. REV. STAT. § 378-35 (1993).

[230] *Takaki*, 87 Hawai'i at 59, 951 P.2d at 509. H.R.S. § 378-35 provides the following remedies for unlawful suspension, discharge, or discrimination against an employee in violation of H.R.S. § 378-32: "the [Department of Labor and Industrial Relations] may order the reinstatement, or reinstatement to the prior position, as the case may be, of the employee with or without backpay or may order the payment of backpay without any such reinstatement." HAW. REV. STAT. § 378-35 (1993).

[231] In order to establish a prima facie case of racial discrimination, "(1) [t]he plaintiff must be a member of a protected class; (2) the plaintiff must be demonstrably capable of performing his [or her] employment duties; and (3) the employer, after discharge, sought people with the same qualifications to fill the position." *Takaki*, 87 Hawai'i at 65, 951 P.2d at 515 (citations omitted).

[232] *See id.* at 64-65, 951 P.2d at 514-15.

[233] *See id.*

entitled to pursue damages for intentional infliction of emotional distress suffered as a result of the civil rights violation.[234]

E. Environmental Law

1. Applicability of Environmental Impact Statement requirement to Hawaiian Home Lands: Kepo'o v. Watson[235]

In *Kepo`o*, the Hawai'i Supreme Court considered the applicability of H.R.S. Chapter 343,[236] which applies to environmental impact statements ("EIS"), to Hawaiian Home Lands ("HHL"). H.R.S. Chapter 343 requires EIS preparation prior to development on state land. [237] The court found that HHL are "state lands" for purposes of the statute because the state holds both legal title and management responsibility over the land.[238] Furthermore, because the Hawaiian Homes Commission Act ("HHCA")[239] was adopted as part of the Hawai'i Constitution, there is no federal preemption problem.[240] Therefore, the HHCA does not conflict with H.R.S. Chapter 343 and an EIS must be prepared prior to development on HHL lands.[241]

F. Insurance Law

1. Insurer's duty to provide independent counsel: Finley v. The Home Insurance Co.[242]

The Hawai'i Supreme Court reversed and depublished the August 28, 1998 ICA opinion in this case.[243] The Hawai'i Supreme Court held that where there is a conflict of interest between the insurer and the insured because the insurer retains a reservation of rights to assert non-coverage at a later date, an insurer

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[234] *See id.* at 68, 951 P.2d at 518.

[235] 87 Hawai'i 91, 952 P.2d 379 (1998).

[236] HAW. REV. STAT. ch. 343 (1998).

[237] *See id.*

[238] *See Kepo`o*, 87 Hawai'i at 97-8, 952 P.2d at 385-6.

[239] Hawaiian Homes Commission Act of 1921, HAW. REV. STAT. ch. 191 (1993).

[240] *See Kepo`o*, 87 Hawai'i at 98, 99, 952 P.2d 386, 387.

[241] *See id.*; *see also* HAW. REV. STAT. ch. 343 (1998).

[242] 90 Hawai'i 25, 975 P.2d 1145 (1998).

[243] *Id.* at 25, 975 P.2d at 1145; *see also Finley v. The Home Insurance Co.*, No. 20830, 1998 WL 547093 (Hawai'i App. 1998). The ICA opinion held that where there is a conflict of interest between the insurer and the insured because the insurer defends an insured under a reservation of rights to assert non-coverage at a later date, an insurer is required to pay for the insured's independent counsel. *See Finley v. The Home Ins. Co.*, No. 20830, 1998 WL 547093 (Hawai'i App. 1998).

is not required to pay for the insured's independent counsel.[244] Thus, an insurer's reservation of rights alone does not entitle the insured to reject the attorney hired by the insurer and to select his own independent counsel to represent them at the insurer's expense.[245]

The court based its decision primarily on the rationale that the protections offered by the Hawai'i Rules of Professional Responsibility ("HRPC") were sufficient to protect an insureds interests even in a reservation of rights conflict of interest situation.[246] The court expressly adopted the rule implied by HRPC Rule 1.7(b)[247] which establishes that: "retained counsel solely represents the insured when a conflict arises between the interests of the insurer and the insured."[248] Furthermore, the court held that:

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[244] *See Finley*, 90 Hawai'i at 29, 975 P.2d at 1149. In so holding, the court rejected the reasoning of a majority of states which require insurers to pay for independent counsel when a conflict of interest exists because: "[e]ven the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company." *Id.* at 30, 975 P.2d at 1150(quoting United States Fidelity & Guar. Co. v. Louis A. Roser Co., 585 F.2d 932, 938 n.5 (8th Cir. 1978)).

[245] *See Finley*, 90 Hawai'i at 31, 975 P.2d at 1151. The court, however, recognized the right of the insured to reject the tender of his defense to counsel selected by the insurer in a reservation of rights situation. If the insured wants to pursue his own defense, he will be responsible for any fees incurred by the counsel of his choice. *See id.* at 35, 975 P.2d at 1155 (explaining that the insured's right to pursue their own defense has been recognized by implication in Hawai'i in *Yuen v. London Guar. & Accident Co.*, 40 Haw. 213, 232 (1953); and citing Hawai'i Rules of Professional Conduct ("HRPC") Rule 1.8(f) which states in relevant part: "[a] lawyer shall not accept compensation for representing a client from one other than the client unless: (1)the client consents after consultation[.]". The Court commented that "[t]he requirement of client consent [in HRPC 1.8(f)] necessarily implies the right not to consent.")

[246] *Id.* at 34, 975 P.2d at 1154.

[247] *Id.* at 33, 975 P.2d at 1153; *see* HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.7(b). The rule states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. [Comment 10 to Rule 1.7] A lawyer may be paid from a source other than a client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence.

Id.

[248] HAW. RULES OF PROFESSIONAL CONDUCT Rule 1-7(b). The court noted that it was adopting the modern view. *See, e.g., State Farm Fire & Cas. Co. v. Mabry*, 497 S.E.2d 844, 847 (Va. 1998)("The attorney employed by the insurer to defend the insured is bound by the

> [t]o satisfy the requirements of the HRPC, the arrangement between the insurer and retained counsel must assure the attorney's professional independence, and the insurer may not interfere with the attorney's professional judgment.[249]

Thus, the court concluded that because the counsel retained by the insurer must follow the HRPC requirements, retained counsel is "allowed full rein to exercise professional judgment[,]" the insured's interests will be sufficiently protected in most cases.[250]

2. HIGA only amenable to suit for statutory claims: Mendes v. Hawai'i Insurance Guaranty[251]

The Hawai'i Supreme Court established in *Mendes* that the Hawai'i Insurance Guaranty Association ("HIGA")[252] is "amenable to suit for the

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same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured." (internal quotation marks and citations omitted)). *See also* Douglas Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 294 (1994)("Defense counsel must treat the insured as the client. Recognizing the insured as the attorney's sole client is consistent with recent judicial decisions." (footnote omitted)).

[249] *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153. In support of this proposition the court quoted the following relevant HRPC provisions:

> [Rule 1.2] (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which the objectives are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. (c) A lawyer may limit the objectives of the representation if the client consents after consultation. [Rule 1.8(f)] A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6. [Rule 5.4(c)] A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

Id. (footnote omitted).

[250] *See id.* at 34, 975 P.2d at 1154. The court explained that "we do not rule out the possibility that, during the pendency of the action, an actual conflict of interest could develop that would warrant the withdrawal or dismissal of retained counsel and the appointment of new counsel." *Id.* Furthermore, the court added that alternate remedies are available to insureds making a requirement that insurers always pay for independent counsel in reservation of rights situations unnecessary. These alternate remedies include: "(1) an action against the attorney for professional malpractice; (2) an action against the insurer for bad faith conduct; and (3) estoppel of the insurer to deny indemnification." *Id.* at 35, 975 P.2d at 1155.

[251] 87 Hawai'i 14, 950 P.2d 1214 (1998).

[252] *See id.* at 17, 950 P.2d at 1217. HIGA, a statutorily created, non-profit, unincorporated entity, was established to "provide a mechanism for the payment of covered claims under

limited purpose of compelling it to perform its statutory duty to deal with covered claims of insolvent insurers."[253] In this case, the plaintiff, Mary Mendes, sought underinsured motorist benefits from HIGA after her insurer was declared insolvent, to cover injuries she suffered in an automobile accident.[254] After Mendes and HIGA were unable to reach a settlement, Mendes filed a complaint against HIGA.[255] The complaint contained three counts: the first alleged that HIGA was responsible for Mendes' claims against her insolvent insurer; the second alleged that HIGA breached of its duty of good faith and fair dealing; and the third alleged tortious breach of contract.[256]

HIGA argued that it did not have a contractual relationship with Mendes, and was therefore entitled to judgment in its favor on Count I, the breach of contract claim.[257] The court, however, rejected HIGA's argument. Because HIGA's statutory duties must be the basis of claims against it, no contractual relationship is required for a plaintiff to have standing to sue HIGA.[258]

HIGA argued that Counts II and III were "barred by the statutory immunity contained in H.R.S. section 431:16-116."[259] The Hawai'i Supreme Court agreed with HIGA and limited HIGA's liability to enforcement of HIGA's statutory duties.[260] Thus, the court recognized HIGA's statutory immunity from Mendes' claims of bad faith, breach of contract, and severe emotional distress.[261] The court supplied two reasons for its holding. First, statutory immunity is justified because of HIGA's status as a non-profit, statutorily created entity established to protect consumers.[262] Second, the fact that "all expenses of HIGA fall on the general public as an additional expense" provided a rational basis for the legislature's "policy determination to limit HIGA's exposure to liability."[263]

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insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer." HAW. REV. STAT. § 431:16-102 (1993).

[253] *Mendes*, 87 Hawai'i at 18, 950 P.2d at 1218.

[254] *See id.* at 16, 950 P.2d at 1216.

[255] *See id.*

[256] *See id.*

[257] *See id.*

[258] *See id* at 18, 950 P.2d at 1218.

[259] *Id.* at 18-19, 950 P.2d at 1218-19; *see also* HAW. REV. STAT. § 431:16-116 (1993). The relevant portion of this statute states: "[t]here shall be no liability on the part of and no cause of action of any nature shall arise against. . .[HIGA] or its agents or employees. . .for any action taken by them in the performance of their powers and duties under this part." *Id.*

[260] *See Mendes*, 87 Hawai'i at 19, 950 P.2d at 1219.

[261] *See id.*

[262] *See id.*

[263] *Id.* Thus, HIGA is only amenable to suit for the limited purpose of requiring it to perform its statutory duties, and is immune from other non-statutory claims. *See id.* at 14, 950 P.2d at

3. Intrafamily tort immunity does not invalidate household exclusions to homeowner's policies: Salviejo v. State Farm Fire & Casualty, Co.[264]

In *Salviejo*, the ICA held that the abrogation of intra-family tort immunity does not constitute a public policy supporting invalidation of household exclusions[265] in homeowner's policies.[266] The Salveijos sued a restaurant owner for negligence after their child was injured at the restaurant.[267] The restaurant owner responded by bringing a counterclaim against the child's parents and a third party claim against the child's grandfather alleging negligence and seeking indemnification and/or contribution from them.[268] The plaintiffs, both the parents and the grandfather, tendered their defense to their homeowners insurer, State Farm Fire and Casualty Company ("State Farm").[269] State Farm refused to defend both the cross claim and third party claim, and the Salviejos filed for declaratory relief on State Farm's duty to defend.[270]

The ICA upheld the household exclusion,[271] which limits policy coverage to bodily injuries sustained by non-insured parties and excludes coverage for claims or suits brought against the insured for sharing or repayment of damages to a third party.[272] Similar "household exclusion" provisions in auto insurance policies have been invalidated as against public policy.[273] The court distinguished the invalidation of auto insurance household exclusions based

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1214.

[264] 87 Hawai'i 430, 958 P.2d 552 (Ct. App. 1998).

[265] Household exclusion provisions exclude bodily injury coverage "sustained by a named insured or a resident of the named insured's household, if the resident is a relative or 'any other person under the age of 21 who is in care of' either a named insured or a relative." Salviejo v. State Farm Fire & Cas., Co., 87 Hawai'i 430, 431, 958 P.2d 552, 553 (quoting from insurance policy at issue in this case).

[266] *See id.* at 439, 958 P.2d at 561.

[267] *See id.* at 432, 958 P.2d at 554.

[268] *See id.*

[269] *See id.*

[270] *See id.*

[271] Under the Plaintiffs' policy, the "household exclusion" states that coverage for personal liability and medical payments to others does *not* apply to "bodily injury to you or any insured within the meaning . . . of the definition of insured. This exclusion also applies to any claim made or suit brought against any insured to share damages with or repay someone else who may be obligated to pay damages because of the bodily injury[.]"*Salviejo*, 87 Hawai'i at 432, 958 P.2d at 554 (quoting Section II of the Salviejo's State Farm insurance policy). Under the policy, "insured" is defined as "you, and if residents of your household, your relatives; and any other person under the age of 21 who is in care of a person described above." The references to "you" and "your" refer to the named insured. *Id.*

[272] *See id.* at 431, 958 P.2d at 553.

[273] *See id.* at 436, 958 P.2d at 558; *see, e.g.*, State Farm Mut. Auto. Ins. Co. v. Wolfe, 638 F.Supp. 1247 (D. Haw. 1986).

on the fact that the plaintiffs in those cases were able to refer to specific public policies expressed in the auto insurance regulatory statutes which conflicted with the household exclusion.[274] Because the plaintiff in this case failed to refer the court to specific public policies which support invalidation of the homeowner's policy household exclusion provision, the court upheld the provision.[275]

G. Property Law

1. Restrictive covenants: K.K. Fong v. Hashimoto[276]

In *Fong*, the ICA enforced restrictive covenants imposing height setback restrictions against owners of downslope lots in favor of owners of upslope lots.[277] The defendant, Gerald Hashimoto, owned Lot 11, located on the makai, or ocean side of the road, which was burdened by the one-story height restriction.[278] The plaintiff, Dale Fong, owned Lot 5, located across the street and upslope from Lot 11.[279] Fong's Lot 5 had "wide views of the ocean and surrounding land[,]" as long as he had a clear view plane across Lot 11.[280] This litigation arose when Mr. Hashimoto began building a second story onto his house on Lot 11.[281] The defendants argued that Mr. Fong could not enforce the restrictive covenants against them because "[the developer] conveyed Lot 5's title to [Fong's] predecessors in 1940, three years before the restrictions were included in Lot 11's deed."[282] Thus, according to the defendants, the restrictive covenants were unenforceable because the

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[274] *Salviejo*, 87 Hawai'i at 441, 958 P.2d at 563. The court noted that there is "no statute in Hawai'i which substantively regulates the provision of homeowner's insurance, or which would evince a legislative intent to make coverage available for all uncompensated victims of negligent homeowners." *Id.*

[275] *See id.* at 431, 958 P.2d at 553. The court also cited several cases from Washington, New York and New Jersey, as well as other states for the proposition that household exclusion provisions in homeowner's policies are generally considered valid and that lack of regulation of homeowner's policies constitutes a lack of public policy to support invalidation of the household exclusion. *See id.* at 437-42, 958 P.2d 559-64.

[276] No. 19424, 1998 WL 71951 (Hawai'i App., Feb. 20, 1998).

[277] *See id.* at *1.

[278] *See id.* at *4. Lots 12 and 14, also located on the makai side of the road, were burdened by one-story restrictive height covenants as well. *See id.*

[279] *See id.* The owners of Lot 4, which was similarly situated to Lot 5, later joined the suit against Hashimoto. *See id.*

[280] *Id.*

[281] *See id.*

[282] *Id.* at *5.

developer could not have created a covenant in favor of Lot 5 because he had already sold that piece of land.[283]

The ICA disagreed with the defendant's argument and held that retention of legal title[284] by the vendor pursuant to an agreement of sale is a sufficient interest to "impose restrictions on another parcel of land for the benefit of the land subject to the agreement of sale." [285] As part of its analysis, the court rejected the concept of mutual privity[286] and noted that because horizontal privity was present in this case, it did not need to address the question of "whether horizontal privity is required for a covenant to run with the land in all cases."[287]

Furthermore, the court held that height and setback restrictions are enforceable as equitable servitudes[288] when a common grantor imposes such restrictions on a subdivision and the common scheme was in existence when the subdivision lots sales started.[289] The ICA focused on the grantor's intent to create a common plan to support its finding that a common plan existed in this case.[290] Therefore, the fact that the restrictions were not placed on certain lots was not dispositive. Furthermore, a mandatory injunction was the appropriate relief because the downslope owners violated the restrictive convenants even though they had at least constructive, and possibly actual notice.[291]

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[283] *See id.*

[284] The court noted that the Hawai'i Supreme Court recognizes the equitable conversion doctrine which embodies the concept of legal versus equitable title: "upon the execution and delivery of the agreement of sale, there accrues to the [purchaser] an equitable interest in the land. The legal title is retained by the [seller] essentially as security for the payment by the [purchaser] of the purchase price." *Id.* at *11 (quoting Hawaii v. Horworth, 71 Haw. 204, 211, 787 P.2d 674, 678 (1990))(internal quotation marks and citations omitted).

[285] *Id.* at *1.

[286] Mutual privity is described as "a covenant arising from simultaneous interests in the same land." *Id.* at *13 (quoting Waikiki Malia Hotel v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 386-87, 862 P.2d 1048, 1058 (quoting Flying Diamond Oil v. Newton Sheep Co., 776 P.2d 618, 628 (Utah 1989)).

[287] *See id.* at *13.

[288] Equitable servitudes are "'equitable property interest[s] in the burdened land, appurtenant to the benefited land' and are essentially covenants enforceable in equity." *Id.* at *15 (quoting 9 R. POWELL, POWELL ON REAL PROPERTY § 60.01[2], at 60-9-10 (1997).

[289] *See id.* at *1.

[290] *See id.* at *18. "The test of whether [a common plan of development exits] is 'whether substantial common restrictions apply to all lots of *like character or similarly situated.*'" *Id.* at *17 (citing Constant v. Hodges, 730 S.W.2d 892, 894-95 (Ark. 1987)(quoting Jones v. Cook, 611 S.W.2d 506, 506 (Ark. 1981))(emphasis added). In *Fong*, the court found that the grantor intended a common plan because he placed height restrictions on lots for the purpose of maintaining the upslope owners' view, which qualified as lots of "like character or similarly situated." *See id.* at *17.

[291] *See id.* at *1, 19.

2. *Effect of community plan on SMA permit:* GATRI v. Blane[292]

Under *GATRI*, a community plan which provides detailed provisions for implementation of the general plan has the "force and effect of law for the purposes of a [special management area] SMA permit."[293] In this case, GATRI wanted to develop a "restaurant park commercial project" in Kihei, Maui.[294] GATRI's special management area ("SMA") permit application was denied by the Maui County Planning Department, even though GATRI's proposed use was permitted under the applicable zoning because the community plan designated the property as single family residential.[295]

The ICA first considered whether the circuit court had jurisdiction over the Director of Planning's final decision to deny the SMA permit. The court found that because there was no express procedure for appeal under the SMA permitting scheme in Maui, the commission delegated authority to the Director to make the final decision.[296] The Director was required to notify the commission about which permits were granted and that the Director's decision was "a final decision equivalent to a denial of the application."[297] Thus, the circuit court properly entertained GATRI's appeal because the Director's decision constituted a final decision for jurisdictional purposes.[298]

In Maui, community plans are part of the general plan and they designate a specific land use plan rather than merely focusing on broad policy guidelines.[299] The court held that the community plan in the present case had the "force and effect of law insofar as the statute requires that a development within the SMA must be consistent with the general plan."[300] Under H.R.S. section 205A-26(2)(C),[301] an SMA permit must be consistent with both the

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[292] 88 Hawai'i 108, 962 P.2d 367 (App. 1998).

[293] *Id.* at 109, 962 P.2d at 368.

[294] *See id.*

[295] *See id.*

[296] *See id* at 112, 962 P.2d at 371.

[297] *See id.* at 111-12, 962 P.2d at 370-71.

[298] *See id.*

[299] *See id* at 113, 962 P.2d at 372. The court used the specific land use plan/broad policy guideline distinction to distinguish *Protect Ala Wai Skyline v. Land Use and Controls Committee of the City Council of the City and County of Honolulu*, 6 Haw. App. 540, 547, 735 P.2d 950, 955 (1987). *Protect Ala Wai* held that because the general plan for the City and County of Honolulu was a "statement of broad policies for the long-range development of Honolulu," its provisions were meant to serve as "policy guidelines, as opposed to rigid requirements. . . ." *GATRI*, 88 Hawai'i at 114, 115, 962 P.2d at 373, 374 (quoting *Protect Ala Wai*, 6 Haw. App. at 547, 735 P.2d at 955.)

[300] *GATRI*, 88 Hawai'i at 114, 962 P.2d at 373.

[301] HAW. REV. STAT. § 205A-26(2)(C) (1993). This statute establishes mandatory requirements for the SMA permit procedure and "provides in relevant part that a SMA permit shall not be approved unless the authority finds that 'the development is consistent with the

general plan and the zoning to be approved.[302] Therefore, the court held that it was proper for the Director to deny GATRI's SMA permit application, even though it was consistent with the zoning, because the application was inconsistent with the community plan.[303] Accordingly, the ICA held that:

> It is unnecessary . . . for the county to rezone a parcel to conform to a change in the general plan in order to preempt the issuance of a SMA permit . . . [because the community plan] is part of the general plan of Maui County. Therefore, it has the force and effect of law and a proposed development which is inconsistent with the [community plan] may not be awarded an SMA permit without a plan amendment.[304]

H. TORTS

1. Defamatory statements versus rhetoric hyperbole: Gold v. Harrison[305]

In *Gold*, the ICA adopted the Ninth Circuit's three-part test for defamatory statements.[306] The test asks:

> (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact[;]
> (2) whether the defendant used figurative or hyperbolic language that negates that impression[;] and
> (3) whether the statement in question is susceptible of being proved true or false.[307]

In this case, the statement of defendant-appellee, George Harrison, reprinted in a *Honolulu Advertiser* article, was at issue.[308] A circuit court had recently ruled "that an easement existed over Harrison's land in favor of . . . neighbor-

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county general plan *and* zoning." *GATRI*, 88 Hawai'i at 114, 962 P.2d at 373, (quoting HAW. REV. STAT. § 205A-26(2)(C)(emphasis added)).

[302] *GATRI*, 88 Hawai'i at 114, 962 P.2d at 373 (referring to HAW. REV. STAT. § 205A-26(2)(C)).

[303] *See id.* at 115, 962 P.2d at 374.

[304] *Id.* The court's holding overrules the portion of *Protect Ala Wai* (see *supra* note 288) which provides "a proposed project is per se in conformity with the general plan if the project site was zoned prior to the adoption of the general plan and the proposed project is in accordance with the zoning." *Id.* at 115, 962 P.2d at 374. Because the SMA permit must conform to both the community plan and the zoning, "[c]onsistency with the zoning alone is insufficient." *Id.*

[305] 88 Hawai'i 94, 962 P.2d 353 (App. 1998). This case also contains a Rule 11 discussion. *See supra* section II.A.2.

[306] *See Gold*, 88 Hawai'i at 101, 962 P.2d at 360.

[307] *Id.* (quoting Fasi v. Gannett Co., Inc., 930 F. Supp. 1403, 1409 (D. Haw.), *aff'd*, 114 F.3d 1194 (9th Cir. 1995), *cert. denied*, 118 S. Ct. 302 (1997)(internal quotation marks omitted)).

[308] *See id.* at 96, 962 P.2d at 355.

ing property owners" including the plaintiffs in this case.[309] Harrison responded to the circuit court's ruling by stating: "Have you ever been raped? I'm being raped by all these people . . . . My privacy is being violated. The whole issue is my privacy."[310] Gold, one of the neighboring landowners, filed suit against Harrison for oral and written defamation as well as intentional infliction of emotional distress.[311] In applying the Ninth Circuit test to the facts of the case, the court found that the statement in question was not false and defamatory because rhetoric hyperbole is protected by the First Amendment.[312]

2. Duty of informed consent for second opinion physicians: O'Neal v. Hammer[313]

In *O'Neal*, the Hawai'i Supreme Court recognized, as a matter of first impression, a duty of referring physicians to obtain informed consent and a duty of second opinion physicians to fully inform patients of the nature of the proposed treatment.[314] In this case, the plaintiff Rose O'Neal sought treatment of her jaw problems from Dr. Henry Hammer, an orthodontist.[315] After discussing the benefits and risks of two possible treatments,[316] Dr. Hammer recommended a "combined treatment plan that . . . includ[ed] orthodontics and orthodontic surgery to surgically advance O'Neal's lower jaw into a more forward position."[317] O'Neal agreed to follow Dr. Hammer's recommendation, and Dr. Hammer began orthodontic treatment.[318] Dr. Hammer then referred O'Neal to Dr. Lewis Williamson to undergo the mandibular advancement surgery.[319] However, "O'Neal was concerned about the inability of the Tripler surgeons to guarantee a positive result" and asked Dr. William-

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[309] *Id.* at 97, 962 P.2d at 356.

[310] *Id.*

[311] *See id.* at 96, 962 P.2d at 355. Gold's twelve-count complaint also alleged false light/invasion of privacy and negligence. *See id.*

[312] *See id.* at 103, 962 P.2d at 362. Rhetoric hyperbole is "figurative or hyperbolic language that would negate the impression that [the speaker] was asserting an objective fact" about the person to whom the statement is directed. *Id.* at 101, 962 P.2d at 360.

[313] 87 Hawai'i 183, 953 P.2d 561 (1998).

[314] *See id.* at 187, 190, 953 P.2d at 565, 568.

[315] *See id.* at 184, 953 P.2d at 562.

[316] The alternative treatment plan "consisted of orthodontic treatment only, to establish the best possible interdigitation and alignment of O'Neal's teeth." *Id.* at 185, 953 P.2d at 563.

[317] *Id.* The recommended orthodontic surgery is called mandibular advancement surgery. *See id.*

[318] *See id.* Before D.r Hammer began treatment, he referred O'Neal to two oral surgeons at Tripler Hospital for confirmation that she was a candidate for mandibular advancement surgery. Dr. Hammer began treatment after both surgeons informed him that O'Neal was a candidate for the oral surgery. *See id.*

[319] *See id.*

son for a second opinion regarding her eligibility for surgery.[320] Dr. Williamson conducted his own analysis of O'Neal's case and confirmed that she was a candidate for surgery.[321] The surgery was eventually performed by a third doctor, Dr. Berringer, who used a different procedures on the right side than he used on the left side because the "bone on the left side of O'Neal's jaw did not split properly[.]"[322] O'Neal claimed that she suffered mouth and jaw problems as a result of the surgery and brought suit against Drs. Hammer, Williamson, and Berringer.[323] In her complaint, O'Neal alleged:

> [the doctors] failed to disclose the risks of surgery to her, that it was negligent for them to have advised her to have the surgery done, and that Dr. Berringer performed the surgery in a negligent manner.[324]

The court held that expert testimony is not necessary to prove a duty of informed consent.[325] The duty for referring physicians is triggered when the physician either orders a specific procedure or "retains a degree of participation, by way of control, consultation and otherwise," as to the patient's treatment.[326] Thus, the duty is limited to referring physicians who are actively involved and who maintain some control over their patients' treatment, and does not extend to every health care worker who comes in contact with the patient.[327]

In *O'Neal*, the court found the requisite degree of participation because the referring doctor ordered the procedure, "coordinated all phases of the treatment," and "initiated the first irrevocable step in the treatment plan[.]"[328] The court accordingly held that Dr. Hammer had a "continuing responsibility to properly advise [O'Neal] of the risks and alternatives to the proposed surgery."[329] The court also held that the duty to obtain a patient's informed con-

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[320] *Id.*

[321] *See id.* The court noted that it was unclear "whether, on this occasion, Dr. Williamson explained the risks or possible complications of mandibular advancement surgery to O'Neal." *Id.*

[322] *See id.*

[323] *See id.* O'Neal alleged that the surgery was performed negligently, and that as a result "her face looks 'lopsided,' that she has to endure severe neck, jaw and shoulder pain, that her teeth no longer fit, that she is sometimes unable to chew, that she cannot open her mouth properly, and that she has undergone several unsuccessful surgical procedures in an attempt to repair the damage to her jaw." *Id.*

[324] *Id.* O'Neal settled her claims against Dr. Berringer, and the claims against him were "dismissed with prejudice" before trial. *See id.*

[325] *See id.* at 187, 953 P.2d at 565.

[326] *See id.* at 189, 953 P.2d at 567.

[327] *See id.* at 188, 953 P.2d at 566.

[328] *Id.* at 189, 953 P.2d at 567.

[329] *Id.*

sent extends to a second opinion physician as well.[330] The court focused on the second opinion physician's "integral" role in advising and informing the patient and found a "sufficiently close relationship"[331] to establish a duty to advise the patient of the risks and alternatives to the proposed treatment or surgery.[332]

Lelia P. Beck[333]

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[330] *See id.* at 190, 953 P.2d at 568. A consulting physician advises and makes recommendations to the treating physician himself, rather than to the patient directly; whereas the second opinion physician is engaged directly by the patient. *See id.* (citing Prooth v. Wallsh, 432 N.Y.S.2d 663, 666 (N.Y. Sup. Ct. 1980)). In recognizing this distinction, the court held that consulting physicians "do not owe a duty to the patient to warn of the inherent risks of a proposed treatment or surgery." *Id.* at 190, 953 P.2d at 568.

[331] *Id.*

[332] *See id.* The court noted that it would be "illogical" to hold otherwise, because advising a patient of the "risks and alternatives to the proposed treatment or surgery" is the "primary duty" of second opinion physicians. *See id.*

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