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## ARTICLES



## COMMENTS



## CASENOTES

## RECENT DEVELOPMENTS

# Shooting from the Lip: *United States v. Dickerson,* Role [Im]morality, and the Ethics of Legal Rhetoric

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Lawyers engage in distinctive language behavior, brandishing a specialized rhetoric of advocacy. Like some other "role-differentiated" lawyer behavior,[1] this rhetoric has features that are undesirable from a "universalist" moral perspective. Legal rhetoric is often over-bearing, even hostile.[2] It employs misdirection and omission, distorts opposing views, ridicules or vilifies opponents, and uses these and other verbal strategies to make arguments that are not convincing even to the speaker. This aggressive and deceptive behavior is plainly inconsistent with the universal moral imperative of respect for all persons.[3]

Yet, the matter is more complicated: like other forms of "role differentiated" behavior in which lawyers engage, their wild-west rhetoric is susceptible of strong moral justification as well as condemnation. Justifications for otherwise morally criticizable behavior by lawyers traditionally rely on the lawyer's role in the adversary system, maintaining that justice (if not always truth) is best served by a high-noon duel of well-

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[1] "Role-differentiated" behavior is the result of reasoning that "places weight upon the role that the person occupies and locates concerns about how one ought to behave within a context of what is required, expected, or otherwise appropriate of persons occupying that role." Richard Wasserstrom, *Roles and Morality, in* THE GOOD LAWYER 25, 25-26 (David Luban ed., 1984).

[2] One example of hostile and disrespectful – even downright violent – language turned up unbidden during the writing of this section. The New York Times reported that a judge cited an attorney for his "Rambo lawyering" and his efforts to "intimidate and harass" his opponent by threatening in a letter to "conduct the legal equivalent of a proctology exam" on the opponent's finances and billing practices. Benjamin Weiser, *A Judge Moves to Strike a Blow for Legal Decorum*, N.Y. TIMES, June 1, 1999, at B5.

[3] *See infra* notes 12-14 and accompanying text. We believe that some legal rhetoric is in fact unethical. Nonetheless, to assert that it "plainly" violates widely-accepted moral strictures is to engage in the over-certainty on complex issues that characterizes too much legal rhetoric.

matched opponents shooting from the lip. Thus, condemnation and justification of legal rhetoric seem equally tenable positions.

Yet, the matter is more complicated still. The adversary-system justification of otherwise morally criticizable role-differentiated lawyer behavior presupposes the prototype advocacy situation in which life, liberty, or some other invaluable good depends on zealous representation. Role-differentiated legal rhetoric seems most justified, therefore, in a summation in a capital or other major felony trial, or in a trial memorandum or appellate brief in some similar matter of real consequence. But lawyers are not just litigators: they are counselors, mediators, judges, scholars, and teachers as well. Yet, despite these "role-differentiations," the rhetorical strategies of advocacy are used in letters, judicial opinions, law reviews, and classrooms: no matter what the context, lawyers often talk the same talk.[4]

In this article, we look at the ways judges, advocates, and scholars employ the "disrespectful" rhetorical strategies of advocacy.[5] After sketching some background theory on role-differentiated morality and the ethics of advocacy in Part IA, we describe in Part IB some features of legal rhetoric that seem to offend universalist notions of morality – *e.g.*, abuse of classical rhetoric's strategies of *logos, ethos*, and *pathos*, as exhibited in *ipse dixit* argument, misuse of precedent, use of "false implicature"[6] to mislead, arguing what one does not believe, misreading opposing views, and belittling those who hold such views. In Part II, we examine a microcosm of legal rhetoric – the judicial, advocacy, and scholarly prose that has been engendered by one issue in criminal procedure. Finally we examine the possible moral, institutional, and practical justifications for the law's disrespectful rhetoric and consider

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[4] *See* Gerald Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1550-51 (1990) ("[T]here is . . . a discipline-specific rhetoric of law . . . that . . . shapes our advocacy, our judicial opinions, our scholarship, and our teaching").

[5] Our focus here is on written rhetoric – judicial opinions, appellate briefs, and law review articles. Our sense is that, given the constraints on written language (e.g., its durability and potential for dissemination), the rhetoric of court room and conference room is even more disrespectful. An extreme example arose during the trial of a man who poured lighter fluid over his wife and then set her on fire. The judge "burst into song in open court crooning, 'You light up my wife,' to the tune of 'You Light Up My Life.'" Deborah Epstein, *Redefining the State's Response to Domestic Violence: Past Victories and Future Challenges*, 1 GEO. J. GENDER & L. 127, 141 (1999) (citing SUPREME COURT OF THE STATE OF FLORIDA, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 121 (1990)).

[6] The term "implicature" is borrowed from linguistic pragmatics. Implicature is the mechanism by which participants in a conversation understand that which is not stated. For example, when Speaker A asks, "Would you like some coffee?," and speaker B replies, "Does the Pope say Mass?" implicature allows Speaker A to understand Speaker B's response as "yes." False implicature is the intentional exploitation of implicature by a speaker or writer to suggest a proposition that is not true. *See infra* notes 75-78 and accompanying text.

whether a radical change in language behavior is, realistic or not, the only solution consistent with the duty of respect.

We conclude that the negative potential of the law's rhetoric of disrespect is troubling enough to require radical change. The deceit, insincerity, hyperbole, and scorn that characterize much legal rhetoric are especially problematic because of the law's rhetoricity – the law is in large part affirmation and declamation.[7] Thus, if the law's dishonest and disrespectful rhetoric causes it to fall into disrepute, it has no other practice with which to redeem itself. Moreover, the rhetorical excesses of judges are especially dangerous, because judicial rhetoric is consequential – disposing of life, liberty, property, and reputation – and almost always immutable. Dissenters and commentators may expose the weak arguments and mean spirits of a judicial opinion, but short of reversal the court's words will not only stand but resonate in future controversies.

Recourse by judges and scholars to the role-differentiated rhetoric of advocacy is also undesirable because legal rhetoric encourages over-simplification and over-certainty in complex situations and promises exemption from moral agency. This recourse is obviously undesirable in judicial decision-making, but it is hardly less infelicitous in scholarship. Although a scholar's combativeness and over-certainty may do little real harm to other persons – except when exercised too energetically on the work of an untenured colleague – they nonetheless limit the writer's intellectual and moral horizon and, thus, that of the profession.

In addition, there are serious costs incurred when judges make arguments that do not motivate their own belief – for example, advancing precedent or statute as the ground for decisions when their real reasons are grounded in justice between the parties or economics, or advancing justice between the parties as the ground for decisions that are in fact rooted in social policy. This lack of sincerity is disrespectful, first, in that the reader is asked to stand on ground the judge does not share. Further, it hardly encourages the reader's respect for, or loyalty to, the legal system. Moreover, this lack of forthrightness incurs further cost – when we are denied the judge's real reasons, we have no idea of the judge's true character and have no real way of predicting future decisions.

We come to these conclusions after a look at the rhetoric that has arisen around an issue that was pending in the Supreme Court as we wrote this article: the status of the Supreme Court's decision in *Miranda v. Arizona*.[8]

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[7] Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, *in* THE ETHICS OF LAWYERS 3, 16 (David Luban ed., 1984).

[8] Miranda v. Arizona, 384 U.S. 436 (1966) (holding that unless the legislature devises other fully effective means to inform defendants in criminal cases about their Fifth Amendment right to silence and to assure the continuous opportunity to exercise it, defendants must be

We chose this issue because it generated legal rhetoric at its disrespectful worst and its respectful best in the judicial, advocacy, and scholarly contexts. Indeed, the writing of this article was prompted by the roughness with which readers were treated by the Fourth Circuit's decision in *United States v. Dickerson*,[9] on which certioriari had been granted, and which the Supreme Court eventually reversed. Although the fate of *Dickerson*, and thus of *Miranda*, was unresolved during most of the writing of this article, as rhetoricians we were less interested in the outcome of the debate than in the verbal wars waged over *Miranda* by judges, advocates, and scholars. Our purpose was not to second-guess the Supreme Court but rather to articulate ethical norms by which the rhetoric of the profession – including that of the Court in *Dickerson* – can be measured. In this respect, we are pleased to note that Justice Rehnquist's majority opinion is measured and respectful in tone and relatively candid in argument. The worst excesses of the Fourth Circuit's opinion have been removed to the dissent, surely a safer place for such conduct so long as it continues to be a part of the legal culture.

## I. BACKGROUND

### *A. Ethics*

Our critique of legal rhetoric is informed in substantial part by Richard Wasserstrom's critique of the "role-differentiated" conduct of lawyers and the work of Robert Audi on the use of reasons in advocacy. Between them, Wasserstrom and Audi call into question two conventional ideas about the

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advised, before any custodial interrogation can begin, of the right to remain silent, the fact that any statement may be used in evidence against them, and the right to the presence of an attorney, retained or appointed).

[9] 166 F.3d 667 (4th Cir. 1999) *rev'd*, Dickerson v. United States, 120 S. Ct. 2326 (2000) [hereinafter *Dickerson II*] (holding that *Miranda* was overruled in 1968 by 18 U.S.C. § 3501). Section 3501 purported to restore the pre-*Miranda* test for the admissibility of confessions in federal court: voluntariness as determined by judicial consideration of the totality of the circumstances surrounding the making of the confession. The Fourth Circuit's decision was reversed by a 7-2 decision of the Supreme Court – Justices Scalia and Thomas were the lone dissenters. *See* Dickerson v. United States, 120 S. Ct. 2326 (2000) [hereinafter Dickerson III]. In an opinion written by Chief Justice Rehnquist, the Court held that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves." *Id.* at 2328. The Court's refusal to overrule *Miranda* rested less on approbation than on the fact that Miranda "warnings have become part of our national culture." *Id.* at 2336. The dissent accused the majority of refusing to acknowledge that *Miranda* was a mistake and of taking upon itself the right to impose on Congress and the States constraints not required by the Constitution, in short, of "convert[ing] *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid . . . of judicial arrogance." *Id.* at 2348 (Scalia, J., dissenting).

ethics of advocacy. First, Wasserstrom challenges the view that the lawyer's role as her client's zealous representative permits the lawyer to be indifferent to the morality of the client's goals and to the means used to effectuate those goals. Second, Audi criticizes the view that advocates may with moral justification adduce weak reasons made to seem strong by rhetorical skill and adduce reasons, weak or strong, that do not motivate their own belief. Like Wasserstrom, Audi approaches the ethics of lawyers from a universalist and foundationalist perspective.

The work of Richard Wasserstrom and Robert Audi on roles and advocacy raises difficult questions about the morality of traditional legal rhetoric. Both writers suggest that any exemption from universal moral obligation conferred by the lawyer's role is both narrow and problematic. Indeed, Wasserstrom and Audi seem inclined to believe that only where the stakes are life or liberty may the demands of a lawyer's role override those of universal moral agency.

Applying this critique of the practice of law (Wasserstrom) and of advocacy (Audi) to the rhetorical practices of lawyers, one might conclude that this characteristically aggressive and deceptive role-differentiated language behavior is acceptable only in persuasive writing for the court, and only in situations of great consequence. Regardless of one's position on this issue, however, it is not hard to conclude that disrespectful rhetoric is as frequent as it is inappropriate in judicial opinions and legal scholarship, a contention we try to substantiate in Part II of this article. The balance of Part I.A summarizes Wasserstrom's and Audi's ideas on the ethics of roles and advocacy.

### *1. Role-differentiated amorality*

The attorney-client relationship, requiring that the attorney "prefer in a variety of ways the interests of the client . . . over those of individuals generally,"[10] gives rise to "role-differentiated behavior" in which it is "both appropriate and desirable . . . to put to one side considerations of various sorts – and especially various moral considerations – that would otherwise be relevant if not decisive."[11] Wasserstrom sees a tension between this role amorality sanctioned by professional ethics and the "universalistic" dimension of morality.[12] Morality is concerned with "the welfare and happiness" of individuals and with their autonomy, that is, with "the real opportunity to fashion a life that he or she will find genuinely satisfying."[13] Morality also has to do with "the respect that is due to all persons because they are persons,

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[10] Wasserstrom, *supra* note 7, at 7.

[11] *Id.* at 5.

[12] Wasserstrom, *supra* note 1, at 28.

[13] *Id.*

and the resulting wrongness in viewing or using members of the moral community solely as means to some further end, as things to be used as one might utilize artifacts or other objects."[14] "It is this universalistic dimension," Wasserstrom says, "that produces the tension with roles and with their ostensibly different, more local, and particularistic way of inviting persons to reason about what they should and should not do, and why."[15]

Wasserstrom considers, but is ultimately unconvinced by, the traditional justifications offered for the lawyer's sanctioned unconcern with the morality of her client's goals and the means used to realize them. He considers two basic arguments that support "the plausibility and appropriateness of role-restricted moral reasoning" in the legal profession and are "largely compatible with the more universalistic demands of morality . . . ."[16] The first is a utilitarian argument, which holds that given single-minded pursuits of clients' goals,

> the legal system will end up doing more justice to more persons than would be the case under any less stringent and focused mode of moral deliberation . . .. [W]hatever desirable moral outcomes appear to be blocked by the existence of and appeal to the role in question are in fact made more frequent and more likely by the role than by its absence.[17]

A second basic justification for role-defined moral reasoning is grounded in the expectation that the lawyer-client agreement will be honored. "[I]f a prospective client and a lawyer have entered into an attorney-client relationship,"[18] even if representation involves morally objectionable means or ends, "it is morally wrong to defeat the client's expectations about the vigor and single-mindedness of the lawyer's actions on the client's behalf,"[19] especially where "a client reasonably expects that the lawyer will pursue his or her interests because the institution is already in place that creates and defines the role-restricted behavior appropriate for lawyers."[20]

Wasserstrom finds these justifications plausible, but partial. In particular, "arguments that are based simply upon the existence of roles and the creation of de facto expectations . . . are certainly not decisive arguments against changing the nature of the roles . . .. [T]hat things have been done in a certain way can never by itself constitute an adequate justification for the rightness of continuing permanently to do them in the same way."[21] Wasserstrom concludes that "almost none of the arguments supported by appeals to roles

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[14] *Id.*
[15] Wasserstrom, *supra* note 1, at 29.
[16] *Id.* at 32.
[17] *Id.* at 30.
[18] *Id.* at 31.
[19] *Id.*
[20] *Id.* at 32.
[21] *Id.* at 34-35.

justify favoring some interests over others no matter what . . . ."[22] In particular, he believes that the strongest justifications for role-differentiated amorality are inappropriately generalized from the special case of the criminal defense attorney.[23] He explains,

> [b]ecause a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused – without regard, so to speak, for the merits.[24]

For Wasserstrom, these special needs of a criminal defendant, coupled with the defense attorney's role in an adversarial proceeding, may justify amoral

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[22] *Id.* at 34.

[23] Wasserstrom, *supra* note 7, at 14.

[24] *Id.* Wasserstrom's view is similar to that of the ABA Model Rules of Professional Conduct. Although Rule 3.1 requires attorneys to have a non-frivolous basis for asserting or controverting an issue, the rule contains an exception for the criminal defense bar, who "may nevertheless so defend . . . as to require that every element of the case be established." Whether the criminal defense bar is privileged to breach moral strictures by which other lawyers are bound is a subject of debate among legal ethicists. *See, e.g.*, Monroe H. Freedman, Symposium on Professional Ethics, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (arguing that the maintenance of the adversary system, the presumption of innocence, and the obligation of lawyer/client confidentiality at times justify conduct that frustrates the search for truth); Harry I. Subin, *The Criminal Defense Lawyer's 'Different Mission': Reflections on the 'Right' to Present a False Case*, GEO. J. LEGAL ETHICS 125 (1987) (arguing that a criminal lawyer should not be allowed to put forward a defense the lawyer knows is false).

For their part, the lay public and popular media are outraged by defense tactics that strain credulity and treat complainants or other witnesses disrespectfully. This is especially true where the crime charged is a heinous one. A recent example is the outrage over defense tactics in the case of police officer Justin Volpe, accused of the horrendous assault of Abner Louima, who was beaten and sodomized with a broken stick in the bathroom of a police station. Debra Baker, *Shredding the Truth*, ABA J., Oct. 1999, at 40. In his opening statement, Volpe's attorney told the jurors that Louima's injuries were not "consistent with the nonconsensual insertion of an object into his rectum." *Id.* at 41. The insinuation that Louima's injuries were the result of consensual gay sex created public furor. The press and much of the bar felt Volpe's defense attorney had crossed the line by raising a defense so apparently frivolous and disrespectful of the victim. *Id.* The attorney said he was just doing his job. For some, this incident illustrates the need for a revision of ethical rules so as to draw the line between zealous advocacy and misrepresentation. *Id.*

It is impossible not to share the public indignation in cases like these, but there is a serious and principled argument against reining in the defense bar: outrage at the zealous defense of those accused of outrageous crimes assumes the defendants' guilt. Thus, unless defense counsel's strategy involves appeal to racism, homophobia (the Volpe case may have crossed that line) or other base feelings, due process and the presumption of innocence appear to require that the defense bar be permitted to offend.

role-differentiated tactics by the criminal defense bar. This special case does not justify, however, "a comparable perspective on the part of lawyers generally."[25] Outside of the criminal defense context, "the role-differentiated amorality of the lawyer is almost certainly excessive."[26]

Yet, it is not only, or even primarily, what he sees as the thin, over-generalized justifications for role-differentiated lawyer conduct that render such conduct problematic for Wasserstrom. Even assuming much stronger institutional justifications, role-differentiated unconcern for morality is questionable, even undesirable, for several other reasons. First, traditional institutional arguments assume that our institutions are just and efficient. "To the degree to which institutional rules and practices are unjust, unwise, and undesirable, to that same degree is the case for the role-differentiated behavior of the lawyer, weakened, if not destroyed."[27] Second, lawyers take on less than admirable character traits by engaging in role-differentiated behavior – "competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; pragmatic rather than principled."[28] Third, role-differentiated amorality may be even more problematic for lawyers than for other professionals because of the nature of the legal profession itself. The lawyer "directly says and affirms things,"[29] "tries to explain, persuade, and convince others that the client's cause should prevail."[30] Lawyers talk about justice, yet their words are for sale; "[t]he verbal, role-differentiated behavior of the lawyer *qua* advocate puts the lawyer's integrity into question in a way that distinguishes the lawyer from other professionals."[31] The lawyer's conventional role-differentiated amorality is therefore problematic even if strong justifications for it exist.

### 2. *The ethical use of reasons in advocacy*

Robert Audi addresses some ethical concerns that arise out of one aspect of the lawyer's role – advocacy, conceived narrowly as "the affirmative presentation of a position represented as sound and offered for adoption by an audience."[32] Audi's thesis is that "advocacy needs an ethic of reasons, and not just of external behavior,"[33] because "morality (as Kant saw) concerns not

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[25] Wasserstrom, *supra* note 7, at 14.
[26] *Id.*
[27] *Id.* at 15.
[28] *Id.*
[29] *Id.* at 16.
[30] *Id.*
[31] *Id.*
[32] Robert Audi, *The Ethics of Advocacy*, 1 LEGAL THEORY 251, 252 (1995).
[33] *Id.* at 251.

only overt behavior, but also what we inwardly do . . .."[34] Advocacy is "subject to stronger moral constraints than expressive conduct in general,"[35] because it is an attempt to influence other human beings. The goal of an ethics of advocacy is to integrate "the role-specific criteria for responsible advocacy . . . with more general moral considerations, including the requirements often conceived under the heading respect for persons."[36] Audi argues that advocates should ideally "1) have, 2) be genuinely motivated by, and 3) offer, or at least be willing to offer, good reasons."[37]

Audi's exploration of the moral constraints on advocacy entails two important distinctions: the distinction between "threshold" principles and "desirability" principles and the distinction between "subscriptive" and "representative" advocacy. Threshold principles are minimal standards below which a moral advocate may not go through the use of rhetorical dirty tricks.[38] Desirability principles set a higher standard; advocates may exploit the grey area beneath these standards and above the threshold principles, but they risk criticism for doing so.[39] "The central idea underlying the distinction between threshold and desirability principles is this: Although it is morally permissible to do what one has a right to do, one can still be criticizable for doing it."[40]

Equally crucial to Audi's discussion is the distinction between subscriptive and representative advocacy.

> Representative advocacy is the kind appropriate for standing in for others, as a lobbyist does; subscriptive advocacy is the kind appropriate to proposing a public policy, as a concerned citizen does .... Actual motivation or belief is not crucial to distinguishing representative from subscriptive advocacy: The lobbyist could accept the cause represented, and the citizen could be lying. Thus, representative and subscriptive advocacy are understood in terms of the motivation and thrust appropriately attributable to them as carried out by the advocate, rather than in terms of the advocate's actual convictions . . . . "[S]ubscribe" is a psychological term, "subscriptive" a behavioral term.[41]

A lawyer arguing a client's cause is, of course, engaging in "representative" advocacy. Such advocacy is conventionally assumed to be "impersonal, in the

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[34] *Id.* at 252.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 263.

[38] *Id.* at 257.

[39] *Id.*

[40] *Id.* Audi notes that this distinction is similar to the distinction, more familiar to lawyers, between duty and aspiration. He also notes an important distinction – failure to meet aspirational standards is not necessarily grounds for moral criticism, but failure to observe desirability principles is always morally criticizable. *Id.* at 257 n.6.

[41] *Id.* at 255.

sense that one speaks from that point of view and not necessarily from conviction."[42]

The threshold constraints on both subscriptive and representative advocacy derive from the fundamental moral requirements that we do no harm to others and that we speak the truth.[43] As might be expected, the constraints on representative advocacy are somewhat less stringent than those on subscriptive advocacy. In general, a representative advocate may argue all but the most morally outrageous causes, like tyranny, for example. Moreover,

> [o]ne may advocate an action that supports a cause which is on balance morally wrong, provided there is an overriding moral reason for doing so – e.g., in defending, as free expression, the legalization of public speeches by racist groups (note that this rules out non-moral reasons, such as prudential ones, as sufficient warrant) . . . . One may also advocate certain prima facie immoral actions in defending a client one knows to be guilty, at least where what one advocates is, or is essential to, just consideration of the case, as opposed to being aimed at the client's acquittal regardless of justice. For the basis of the advocacy here is a moral right to be effectively represented before the law.[44]

Even representative advocates are constrained, however, by the threshold "veracity" principle, which forbids lying and gross distortions. Even though representative advocates do not purport to speak in their own voice, they can still be guilty of falsehood when they purport to recount facts. Although "certain uses of rhetoric or psychological manipulation to highlight evidence and gain attention are permissible, even if often undesirable . . ., outright lying and gross distortion of facts are prima facie . . . criticizable."[45]

Audi's "desirability" principles include the "evidential" principle, which requires advocates to offer good, not specious reasons, and the related "proportionality" principle, which requires advocates "to weight reasons they offer for their position, in accord with their evidential force – e.g., not to exaggerate the force of (and so disproportionately weight) the reasons."[46] A "good" reason "counts toward the truth of that position to a degree such that,

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[42] *Id.* Audi notes here the "principle of professional detachment under which a lawyer is not to be regarded as endorsing the client's political, economic, social, or moral views." *Id.* at 255 n.5 (quoting Charles Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant or Otherwise, in* THE GOOD LAWYER 215 (David Luban ed., 1984)). Although a lawyer's efforts on behalf of a client are unequivocally representative, the arguments in a scholarly article are just as plainly subscriptive. The rhetoric of judicial opinions is more difficult to categorize. Judges both "stand in" for the law (representative advocacy) and propose public policy (subscriptive advocacy). This dual (or hybrid?) nature of judicial rhetoric is perhaps at the root of its ethical ambiguity.

[43] *Id.* at 258.

[44] *Id.* at 259.

[45] *Id.* at 259-60.

[46] *Id.* at 263.

if one had nothing else to go on, one would be minimally reasonable in accepting the position on that basis."[47]

Violations of the evidential and proportionality principles – such as misleading, giving bad reasons, giving no reasons, presenting weak reasons as strong – entail moral consequences.

> [Such tactics] are a kind of manipulation which one should avoid using, even when speaking in someone else's voice. Even if the cause is just, the manipulative means used to promote it . . . lend themselves to promoting evil. They are instruments of persuasion which, if unalloyed with evidence, affront the dignity of the audience.[48]

But as important as the evidential principle is, there is, according to Audi, a still stronger desirability principle – the "motivational" principle, which holds that "if one is not motivated by a reason one gives, then using it (evidentially) in advocating laws or policies is, apart from special circumstances, *prima facie* reprehensible or at least undesirable."[49] Audi provides five reasons why it is wrong for an advocate to give non-motivating reasons. First, respect for persons demands that we do not ask someone else to "stand on a ground we do not share."[50] Second, Audi proposes a Kantian consideration: "the moral status of one's motivating reason(s) affects that of action rooted therein."[51] Third, since advocacy (at least subscriptive advocacy) is ordinarily both expressive of one's character and predictive of future behavior, forthrightness is not served unless the motivational principle is respected.[52] Fourth,

> [e]ven if both advocate and audience take a non-motivating reason offered by [the advocate] to be in the abstract good, at least one of them is not motivated by it, and it is, in this respect, a weak social glue . . .. The . . . fragile agreement that often results in such cases is not a reliable basis for social cooperation.[53]

Finally, "if we have no preference for offering good reasons that motivate us over those that do not, then our advocacy is not as fully in the service of . . . truth as it might be."[54]

The motivational principle is more applicable to subscriptive than to representative advocacy, because representative advocacy "carries a weaker

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[47] *Id.*
[48] *Id.* at 264.
[49] *Id.* at 261.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 262.
[53] *Id.*
[54] *Id.* at 263.

presumption that one is moved by the reasons one gives."[55] Where representative advocacy is concerned, the very considerations that mandate the motivational principle in subscriptive advocacy may on occasion generate "overriders" for representative advocacy. Nonetheless, the motivational principle has considerable application to representative advocacy; indeed, it is "a constraint that operates except in special circumstances . . .."[56] Even in representative advocacy, the audience presumes "that I am in any case not offering reasons I do *not* take to be good – which would be an insult to them. On their assumption, my giving non-motivating reasons will at least be misleading as to my character and possibly my future conduct."[57]

The motivational principle applies with special force where

> what is at stake is of such significance [e.g. liberty] that there seems to be substantial reason for advocates to avoid adducing reasons that do not move them . . . . On reflection, at least, we want the reasons people give to us for major actions – say, for passing restrictive laws and policies – to be such that they themselves are moved in the way they want us to be. There is a deficiency in respect implied by asking someone to agree to something, especially to give up a liberty, on a ground one at best abstractly appreciates and does not oneself stand on.[58]

Finally,

> the motivational principle has more force in some domains of advocacy than in others. Legislators are heavily bound by it: Not only should the people be treated with candor, but the reasons legislators give should both express their character and provide a basis of reliable prediction of future behavior . . .. However, lawyers representing their clients are understood to follow special conventions of zealous representation . . ..[59]

In addition to the prima facie "desirability" of offering good and "motivating" reasons, Audi also identifies specific desirability principles applicable to the role responsibilities of advocates. Subscriptive advocates should be consistent, e.g., "one should try to avoid advocating as legislator something one would reject as citizen."[60] Of course, such "role consistency . . . may be impossible [for a representative advocate] to achieve," yet both subscriptive and representative advocates should observe the principle of "role

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[55] *Id.* at 265.

[56] *Id.* at 267.

[57] *Id.*

[58] *Id.* at 267-68.

[59] *Id.* at 269. Following Audi's reasoning, judges would appear to be as heavily bound by the motivational principle as legislators – if not even more heavily bound, since judges, unlike legislators, do not ordinarily serve at the people's pleasure.

[60] *Id.* at 270.

hierarchy,"[61] deciding at a minimum which of their roles should prevail in case of conflict. The moral basis for this prima facie obligation is the need for consistency and for "moral integration." With regard to the latter, Audi explains that

> [i]t is both prudentially unwise and morally undesirable to be valuationally fragmented .... A morally sound person has both a sense of moral priorities that is not exhausted by any particular social role and a way of ordering prima facie duties in relation to this sense.[62]

For Audi, the only role that can ever be "automatically morally dominant" is that of moral agent. "Role ethics, as we might call it, is secondary to the ethics of agency: the general ethical principles that apply to us all simply as persons."[63] Thus, although role responsibilities create prima facie duties and constraints for advocates, general moral responsibilities "should govern one's resolution of role conflicts affecting advocacy."[64]

In conclusion, it is worth noting that, like Wasserstrom, Audi sees criminal defense as a distinct form of advocacy. Audi discusses at length the application of his "evidential" and "motivational" principles to the criminal defense lawyer. He suggests that the advocate's prima facie duty to "offer only good, motivating reasons" may be overridden by "the accused's rights to a fair trial with competent representation . . .."[65] With respect to the motivational principle in particular, he also suggests that the stakes in a criminal trial may provide an overriding factor.

### *B. Background: Rhetoric*

Broadly defined, "rhetoric is the art or the discipline that deals with the use of discourse, either spoken or written, to inform or persuade or motivate an audience . . .."[66] Rhetoricians customarily narrow their concern, however, to the discourse of persuasion, a focus implicit in such definitions of rhetoric as "a means of so ordering discourse as to produce an effect on the listener or reader,"[67] or "the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols."[68] Rhetoric in this narrow sense is the advocate's medium of expression.

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[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 271.

[65] *Id.* at 273.

[66] CLASSICAL RHETORIC FOR THE MODERN STUDENT 1 (Edward P.J. Corbett & Robert J. Connors eds., 4th ed. 1999) [hereinafter CORBETT].

[67] *Id.* (quoting Marie Hochmuth Nichols).

[68] *Id.* (quoting Kenneth Burke).

Classical rhetoric identified three modes of persuasion: rational appeal (*logos*), ethical appeal (*ethos*), and emotional appeal (*pathos*). *Logos* appeals to the audience's rational faculties by providing it with sound deductive or inductive arguments. It is buttressed by *ethos*, the character of the speaker as evinced in the discourse itself. Even a convincing argument might prove futile if the audience does not trust and esteem the speaker and believe in his or her benevolence, candor, and intelligence. Finally, persuasion might require *pathos*. Oftentimes the only way to sway an audience is to arouse its emotions, to make it care about the outcome of an issue.

Some rhetoricians, like Aristotle himself, would like the discipline to confine its persuasive methods to *logos* alone, believing that good reasons provide the only pure grounds for decision-making. Robert Audi might second this preference. His critique of advocacy is primarily a critique of reasoning, and his conclusion is that advocacy "needs an ethic of reasons."[69] To this, Wasserstrom might add that the rhetoric of law also needs an ethic of *ethos* and *pathos*: because an advocate's words are for sale, there is special cause to distrust the persona created in legal discourse and the emotional appeals made. The role-differentiated behavior of lawyers puts their integrity into greater question than that of other rhetoricians.

Because the rhetoric of law is so much a rhetoric of advocacy, it will only have credibility if it also has an ethic.[70] The following section tries to outline an ethic of legal rhetoric by describing some of the practices in each mode of persuasion that violate the duty of respect generally and Audi's threshold and desirability principles in particular, and for which the exigencies of role provide no sufficient excuse.

### *1. Logos (or an ethic of reasons)*

Explanation is the primary way lawyers justify positions and decisions, persuade audiences, and guide the administration of justice. Thus, as a preliminary matter, an ethic of legal reason would require syllogistic or enthymematic[71] arguments to exhibit truthful premises and valid reasoning.

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[69] *See supra* notes 32-35 and accompanying text.

[70] We are not the first writers to perceive the ethical dimension of legal rhetoric. Richard Weisberg's POETHICS (1992) makes a notable contribution. James Boyd White has also considered, at least implicitly, the ethics of legal rhetoric, although to us at least, his faith in the law as an on-going self-correcting democratic conversation is overly optimistic. *See* James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 867 (1986).

[71] The enthymeme is "the rhetorical equivalent of the syllogism" and more closely resembles customary reasoning. It can be described as an "abbreviated syllogism – that is, an argumentative statement that contains a conclusion and one of the premises, the other premise being implied." CORBETT, *supra* note 66, at 53. When analyzing an enthymeme, one should carefully articulate the implied premise since the weaknesses of the enthymeme may be hidden

An argument may be misleading if it is based on false, implicit, or partial premises, or on premises additional to or other than those offered. Offering untruthful premises violates the first of Audi's threshold principles: Do not lie. In legal rhetoric, it is a lie, for example, to rely upon authority that does not stand for the proposition it is cited for[72] or is not good law.[73]

Gross distortion and giving false impressions may also violate Audi's threshold veracity principle because definitions of "lie" include statements "intended or serving to convey a false impression."[74] These violations are encountered perhaps even more frequently than outright lies in legal rhetoric because accepted standards of professional responsibility prohibit making false statements, but not giving false impressions.[75] Thus, lawyers usually avoid making demonstrably untrue statements, but are more relaxed about misleading their readers by implying what they know to be false.

To understand the rhetorical ploy of false inference, one must understand first, the operation of inference, the means by which listeners understand what speakers only imply. Central to this understanding are philosopher of language H. P. Grice's theories of the Cooperative Principle and "Implicature." Conversation, Grice says, is a cooperative endeavor that succeeds because language users observe certain rules, rules Grice labels "conversational maxims." The maxims are Quantity (the statement will be as informative as required), Quality (the statement will be truthful and based on sufficient evidence), Relation (the statement will be relevant), and Manner (the statement will be clear and orderly).[76] When a statement seems to violate one of these rules, its audience assumes the speaker has a reason for the apparent violation and tries to infer that reason, to piece out the implicature, the missing term that makes the statement consistent with the maxims and therefore meaningful.

Assume, for example, that a sheriff pulls a driver over for speeding and finds the driver's license has expired. The sheriff says, "I'm not going to

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there, that is, the implied premise may be invalid. *Id.* at 54.

[72] See Ursula Bentele's discussion of Justice Rehnquist's revisionist misreadings of precedent in *Chief Justice Rehnquist, the Eighth Amendment, and the Role of Precedent*, 28 AM. CRIM. L. REV. 267, 286-95 (1991).

[73] For example, in *Division of Employment v. Smith*, 494 U.S. 872 (1990), Justice Scalia cited *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), for the proposition that an individual's religious beliefs do not excuse compliance with an otherwise valid law. Scalia failed to mention, however, that *Gobitis* was nullified by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[74] THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1109 (2d ed. 1987).

[75] For example, Rules 3.3 and 4.1 of the ABA Model Rules of Professional Conduct forbid the knowing making of "a false statement of material fact or law."

[76] H.P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS 41, 45-46 (Peter Cole & Jerry L. Morgan eds., 1975).

impound your car, but you are going to have to appear in court." The driver responds, "Perhaps your son needs some new shoes." The driver's response seems to violate the maxim of relation – it does not appear to be directly relevant to the question asked. But a listener can construct the implicature: The driver will grease the sheriff's palm if the court appearance could be avoided.

Grice's analysis of conversational implicature illuminates our understanding of false implicature, or false inference.

> False inference is possible only because listeners and readers assume that Grice's principles are being observed. Readers who assume, who trust, that a writer observes Grice's maxims are open to inference and also vulnerable to false inference. Trust, then, is a condition of both implicature and of false implicature.[77]

Violations of the trust upon which the cooperative principle depends are unethical, particularly violations of the maxim of quality (do not say what is false or that for which you lack evidence – conduct that is a *per se* moral offense) and the maxim of relation (relevance).

> We are able to infer correctly and imply with confidence because we provide the suppressed premise or missing term that makes syllogisms of consecutive statements, for instance. We should, then, judge exploitations of Grice's maxim under Relation as unethical in any context because, as rational beings, we are always vulnerable to false syllogism.[78]

An example of false implicature in the legal arena comes from a witness who responds to the question, "Did you see Mr. Thomas shoot the officer?" with "I was there, wasn't I?" The statement may be true but the implication that "being there" is "seeing" the shooting may be false.

The ethical consequences of false implicature are sometimes mitigated when the rhetorical situation is likely to reveal an implicature as false, as respondent's brief may in the appellate context or scholarly critique in the marketplace of ideas. In those situations, false implicature may be a violation not of Audi's threshold principles but of Audi's desirability principles, which govern morally permissible but criticizable behavior.

> [I]n judging the morality of a particular rhetorical means, we must do so within a framework that focuses on the reader's presumed vulnerability to false inference. Questions about what the reader can be presumed to know, whether the reader has access to information, and what expectations are fostered by external factors and by the immediate context in which the implicature appears

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[77] Arthur E. Walzer, *The Ethics of False Implicature in Technical and Professional Writing Courses*, 19 J. TECH. WRITING & COMM. 149, 151, 153 (1989).

[78] *Id.* at 155.

> will bear on our judgment of the reader's susceptibility and responsibility and of the writer's culpability.[79]

Yet, in the law, a reader may be vulnerable and a writer culpable even if the rhetorical situation reveals an implicature as false. For example, lies and false implicature in a judicial opinion, even if unmasked in a concurrence or dissent, nonetheless bind the parties and the future. Rhetorical practices merely undesirable in a litigator or scholar would thus appear to be inexcusable on the bench.

If outright lying and false implicature violate Audi's threshold principles, other rhetorical devices violate Audi's desirability principles. Central to Audi's desirability principles are the evidential principle, which requires that lawyers give reasons for their positions and that the reasons given are good (*i.e.*, provide a minimally reasonable basis for accepting the position), and the proportionality principle, which requires that reasons be properly weighted (their force not exaggerated). In classical rhetoric, violations of these principles are violations of *logos* – they are ploys sufficiently manipulative that they may promote evil even if the cause is just.

One violation of the evidential principle is the failure to provide reasons at all. In legal rhetoric, *ipse dixit* statements, positions asserted without support, but so forcefully as to discourage questioning or critique, are particularly common examples of unsupported premises.[80]

Faithfulness to the evidential and proportionality principles also requires that we refrain from offering unsupported, implicit, or partial premises, or premises resting on bases additional to or other than those offered since, in logic, granting the premises often requires one to accept the conclusion. In order to assess the soundness of an argument, in order not to be led astray by a covert switch in grounds, the bases upon which premises rest need to be identified, the reasons and evidence supporting those premises evaluated, and the inferences drawn from the premises checked. Take, for example, the premise "capital punishment deters crime." This premise seems to have an empirical basis, for which we would expect statistical support. Sometimes, however, expectations are thwarted, and an empirical premise is used to make a normative argument. "Because capital punishment deters crime, it is good." This assumes without proving not only the empirical truth of the deterrence theory but the normative judgment that crime reduction and punishment benefit society more than mercy and compassion. Both require support.

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[79] *Id.* at 155-56.

[80] Holmes' dissent in *Lochner v. New York*, 198 U.S. 45 (1905), contains a famous *ipse dixit* declaration: "This case is decided upon an economic theory which a large part of the country does not entertain." *Id.* at 75 (Holmes, J., dissenting). The assertion is made so flatly that disagreement is moot.

This is especially true with enthymematic reasoning. One of the essential differences between a syllogism and an enthymeme is that "a syllogism leads to a necessary conclusion from universally true premises but the enthymeme leads to a tentative conclusion from probable premises. In dealing with contingent human affairs, we cannot always discover or confirm the truth."[81] We act on the basis of the merely probable or the probably right, [82] in the law as well as in life.

Thus, misleading arguments stem not only from unsound premises, but from inductive logical fallacies, like hasty conclusions,[83] false analogies,[84] or false dichotomies.[85] One logical fallacy to which law is particularly vulnerable is the normative fallacy: although the binding nature of enacted law and the doctrine of *stare decisis* are often the sole justification in legal argument, the sheer existence of a law or condition does not always justify the law or condition, especially when reliance on authority avoids difficult issues and has questionable results.[86] Yet another common fallacy in legal argument is the old chestnut known as "begging the question" – the premise assumes the conclusion, rendering argument redundant.[87] Finally, if authors mischaracterize a position in order to knock it down, they have created strawman arguments. Such arguments fail to defeat the true claim.

Even if an argument flows logically from or to a sound premise – and, thus, provides a "good" reason – it is not necessarily an ethical argument. Of

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[81] CORBETT, *supra* note 66, at 53.

[82] Consider the enthymeme: "John will fail his exams because he has not studied." The truth of the minor premise – John has not studied – can be confirmed. The unstated premise is only probable, however: One who does not study will fail. This is not universally true, though its probability is likely and therefore persuasive. CORBETT, *supra* note 66, at 54.

[83] *See, e.g.*, Romer v. Evans, 116 S. Ct. 1620, 1634 (1996) (Scalia, J., dissenting) (stating that "[b]ecause [homosexuals] reside in disproportionate numbers in certain communities . . . and care about homosexual rights ardently . . ., they possess political power much greater than their numbers").

[84] *See, e.g.*, Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984). The New Jersey Supreme Court, in imposing on social hosts liability for injuries caused by drunk drivers, falsely analogized social hosts to liquor licensees and ignored the fact that, unlike bartenders, hosts often do not serve guests and cannot assess intoxication. *Id.* at 1224.

[85] *See, e.g., id.* (imposing liability on social hosts to compensate victims of drunk drivers but neglecting to mention that victims already had a remedy against the intoxicated driver).

[86] *See, e.g.*, V.C. v. M.J.B., 725 A.2d 21 (N.J. Super. Ct. App. Div. 1999) (purportedly applying the "best interests" test when a "psychological parent" seeks custody, but concluding without comment that deference must be given to the statute's narrow definition of parent).

[87] *See* Sutton v. United Airlines, 130 F.3d 893, 903 (10th Cir. 1997) (plaintiffs cannot have it both ways: they are either disabled under the Americans with Disabilities Act because their uncorrected vision restricts the major life activity of seeing and thus renders them unqualified as pilots, or they are qualified for that position because their vision is correctable and does not interfere with a major life activity).

equal, if not prime, importance is that speakers give the real reasons for their conclusions, i.e., adhere to Audi's motivational principle. Under the motivational principle, it is morally undesirable to offer reasons that do not carry the conviction of the speaker, because motivating reasons show respect for persons, effect the actions rooted in them, are expressive of character (rhetoric's *ethos*), are predictive of future behavior, provide a basis for social cooperation, and serve truth.[88] Thus, lawyers should be candid about the real reasons for their positions. They should not make arguments, for example, that are motivated by normative (social and moral) principles but defended only on grounds of authority. When public justification does not mirror private conviction, an argument loses ethicity and credibility.

Legal realist Judge Robert A. Leflar wrote about this phenomenon in the context of judicial opinions: "Often, neither formal logic nor interpretations of prior precedent constitute real reasons either for moving the law in new directions or for refusing to move it. The real reasons are apt to be socio-economic or even political."[89] If a court fails to give its real reasons, there is a good chance that not only will lawyers and other judges misinterpret the meaning and scope of the decision – only to be rudely surprised by later decisions that seem contrary to the court's stated justifications – but courts will inevitably suffer a loss of integrity and credibility.[90] Thus, opinions should be assessed for their honesty in this respect.[91]

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[88] *See supra* notes 49-54 and accompanying text.

[89] Robert A. Leflar, *Quality in Judicial Opinions*, 3 PACE L.R. 579, 581 (1983).

[90] Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 741 (1979).

[91] An interesting example of an opinion that seemingly violates Audi's motivational principle is *Braschi v. Stahl*, 543 N.E.2d 49 (N.Y. 1989). To protect the adult life partner of the deceased tenant of record from eviction from a rent-controlled apartment, the court redefined "family" to include those "whose relationship is long-term and characterized by an emotional and financial commitment and interdependence." *Braschi*, 543 N.E.2d at 54. The court said such a definition was justified by the reality of contemporary family life. *Id.* In other words, it offered a social policy justification for its decision. To lawyers, *Braschi* was significant because of the impact its redefinition of family could have on other areas of law: intestacy, insurance, and adoption law, to name but a few. Yet, as the inevitable cases came up before the New York Court of Appeals, it consistently refused to redefine family in any context other than rent control. *See, e.g., In re* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (holding that the lesbian ex-life-partner of the biological mother had no standing to seek visitation with a child jointly raised, because Alison D. was not a "parent" within the meaning of § 70 of New York's Domestic Relations Law). Such a phenomenon suggests that the court was not in fact prepared to accept new social configurations of family and did not give the real reasons for its decision in *Braschi*. It is interesting to speculate why. One significant omission in the *Braschi* decision is any mention of the fact the tenant of record died of AIDS (*see* Philip S. Gustis, *New York Court Defines Family to Include Homosexual Couples*, N.Y. Times, July 7, 1989, at A1) and that eviction might render homeless his life partner, a man quite possibly at risk of AIDS himself. Given this possibility, one could speculate that compassion motivated the *Braschi* result rather than social policy, but that the court was uncomfortable resting its decision upon

*2. Ethos*

The ethical appeal gains importance when an argument deals with an issue about which certainty is unlikely and opinion divided. In this situation, an audience's position might be influenced by its assessment of the speaker's character, or "persona," as it is revealed in discourse. Classical rhetoricians tried in particular to exhibit good judgment, moral character, and benevolence.[92] Good sense is manifest in discourse when a person demonstrates a good grasp of the subject matter, logical reasoning, appropriate perspective, and good taste. High moral character requires exhibiting respect for communal values, disdain for unscrupulous tactics, and unwavering personal integrity. Good will is demonstrated by showing open-mindedness and a sincere concern for the audience's well-being.[93]

Creating a persona is complicated, because it is revealed in every characterization, as James Boyd White points out in his discussion of the persona of the court.

> In rhetorical terms, the court gives itself an *ethos*, or character, and does the same both for the parties to a case and for the larger audience it addresses – the lawyers, the public, and the other agencies in government. It creates by performance it own character and role and establishes a community with others. . . . It is here that we can find its values most fully defined and realized.[94]

The persona of the court, like that of any author, is revealed in the tone of voice the author adopts and the attitudes the author assumes toward materials and sources, the content of the text, and the parties involved.[95]

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such grounds. The court's less than candid reasoning made it impossible to predict its future actions, resulting in a flood of pointless litigation and disappointed hopes. Even well-intentioned violations of the motivational principle, then, entail bad consequences. When judges write "dishonest" opinions, predictability suffers, as in *Braschi*. In addition, truth suffers, as does the cohesion between court and counsel, governing and governed.

[92] CORBETT, *supra* note 66, at 73.

[93] *Id.*

[94] White, *supra* note 70, at 846.

[95] Robert L. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J. L. & HUMAN. 201 (1990). Robert L. Ferguson describes the judicial persona as revealed in opinions as having four principal traits: first, a monologic voice, *id.* at 207 (a single, seemingly disinterested voice that appears "as if forced to its inevitable conclusion by the logic of the situation and the duties of office"); second, an interrogative mode, *id.* at 208-10 (the power to frame the question that is to be answered and thus to render it rhetorical in scope); third, a declarative tone, *id.* at 213 (resisting mystery and complexity by using "hyperbole, certitude, assertion, simplification, and abstraction"); and finally, a rhetoric of inevitability, *id.* at 214 (the association of the judge's view with the correct course in history).

The judge Ferguson describes is akin to James Boyd White's description of the "boss"

The difficulty in maintaining a consistently admirable and attractive persona makes exploitation of *ethos* difficult. Inauthenticity can be revealed by a single lapse, jeopardizing the entire effect of the ethical appeal. Hidden agendas, biases, unfounded assumptions, elitism have a way of rising to the surface. Notes of peevishness, pettiness, malevolence, vulgarity, arrogance are sounded by the use of nit-picking strategies, pejorative language, stereotypical depiction, exaggeration, inappropriate jocularity, sarcasm, and imperiousness. Judicial humor, for example, undercuts a court's *ethos* when it is misplaced. A dissonant display of bad taste and bad judgment occurred in *Davis v. United States*, where a sailor was savagely beaten to death after a game of pool. Inexplicably finding this an occasion for humor, Justice O'Connor begins "Pool brought trouble – not to River City, but to the Charleston Naval Base."[96]

*3. Pathos*

Emotional appeal plays a role in the persuasive process because of the vital impact it has on our intellectual convictions and our will to act. There is nothing reprehensible about this fusion unless the appeal prompts behavior or arouses feelings that a reasonable person would later regret.

Classical rhetoric singles out two types of appeal that are apt to induce shame: *Ad populem* and *ad hominem* arguments, both of which attempt to divert the audience from the issue at hand by exciting emotions and anesthetizing rational faculties. Such tactics show a disrespect for persons that is offensive to a universalist morality. An argument *ad populem* invokes irrational fears and biases, as illustrated by the prejudicial remarks of the defense in the trial of Bernhard Goetz, who shot four black teenagers on a New York subway. Defense counsel played on racial fears, describing the complainants as the "gang of four," as "predators" on society, and as "vultures and savages."[97] *Ad hominem* arguments are arguments directed at a person

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judge, who declares "the meaning of an authoritative text" in a voice itself "authoritative, unquestioning, and unquestionable." White, *supra* note 70, at 855-56. Yet, White also recognizes another judicial persona – a judge who justifies a decision by expounding on the text and respecting the readers' intelligence and discernment. With this type of judge, "the individual and the community alike [engage] in a continual process of education, of intellectual and moral self-improvement . . .." *Id.* at 867.

[96] 512 U.S. 452, 454 (1994).

[97] GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE 206 (1990). Not even the more permissive ethical standards arguably appropriate to criminal defense can encompass conduct, like racist rhetoric, that breaches the threshold principle "Do no harm." In contrast, appeals to pathos would seem ethical when they speak to our higher feelings. For example, Human Rights Watch petitioned a British court not to release General Augusto Pinochet on grounds of unfitness to stand trial, arguing *inter alia* "Of particular concern is whether the evidence shows

rather than at the issue. Intellectual competitiveness renders legal scholars prone to the *ad hominem* trap, even though *ad hominem* argument rarely enhances an author's *ethos*.[98]

## II. THE FATE OF *MIRANDA*: A RHETORICAL MICROCOSM

### *A. Judicial Rhetoric: United States v. Dickerson*

The majority opinion of the Fourth Circuit Court of Appeals in *United States v. Dickerson*[99] is judicial rhetoric at its most disrespectful. Arguments grounded in *logos, pathos,* and *ethos* alike too often lack candor and deal roughly with opposing views and their proponents. Indeed, with respect to defense, prosecution, dissent, and audience at large, the opinion manifests the "contempt, mockery, disdain, [and] detraction"[100] that Kant urges us to avoid. The court repeatedly violates Audi's evidential, proportional, and motivational principles and comes very close to violating his threshold "veracity" principle. These ethical shortcomings are all the more inexcusable because the advocacy of judicial opinions is at least partially subscriptive advocacy.[101] In sum, the inappropriate use of the role-differentiated rhetoric of the adversary system in *Dickerson* is not only disrespectful, but, ultimately, productive of disrespect.

Analyzing the rhetoric of the majority opinion in *Dickerson* puts us, uncomfortably, in two places at once: outside legal rhetoric but, inevitably, inside it as well. We are tempted to argue (as we both believe) that the Fourth Circuit is dead wrong,[102] to argue that *Miranda*'s constitutional status is demonstrated not only textually, but also by the Supreme Court's continued application of *Miranda* to controversies arising out of state prosecutions and

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not merely that Pinochet is a sick, old man – *a fate to which many of Pinochet's victims would have gladly aspired* – but, as British law requires, that he is incapable of understanding the proceedings against him and of assisting in his own defense." *Court Order Sought on Pinochet Medical Judgment: Decision Must Not be Rushed or Secret*, Human Rights Watch Press Release, Jan. 24, 2000, http://www.hrw.org/press/2000/01/pino0124.htm (emphasis added).

[98] See, for example, Martha Nussbaum's "*ad feminem*" attack on Judith Butler in *The Professor of Parody*, THE NEW REPUBLIC, Feb. 22, 1999, at 37.

[99] 166 F.3d 667 (4th Cir.), *rev'd*, Dickerson v. United States, 120 S. Ct. 2326 (2000) [hereinafter *Dickerson II*].

[100] ODORA O'NEILL, CONSTRUCTION OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 115 (1991).

[101] *See supra* notes 41-45 and accompanying text.

[102] The temptation is all the keener because one of us for many years briefed and argued appeals for indigents convicted of crimes. The rhetoric of role often long outlasts the role. Thus, although we have aimed for respectful rhetoric, we apologize for having probably committed some of the very abuses we decry.

to federal habeas corpus proceedings.[103] The further temptation is to argue in no uncertain terms, using the traditional legal rhetorical strategies. We try to be mindful in what follows that our enterprise is not to convince the reader that the wrong decision was made but, rather, to see whether the decision was wrongly made.

The disrespectful rhetoric of *Dickerson* is all the more disturbing because of its major target. Whether *Miranda* is constitutional, sub-constitutional, or non-constitutional; whether it has had a good, bad, or unknowable effect on law enforcement, criminal justice, or crime rates – one thing seems certain: the Warren court's decision is explicitly grounded in an ethic of universal respect. Discussing the development of the privilege against self-incrimination, Chief Justice Warren writes that all the policies supporting the privilege "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens."[104] Moreover, the rhetoric of *Miranda* is itself informed by this principle. The opinion is characterized by careful explanation and respect for the views of others. Ironically, it is the Court's respect for the views and autonomy of others (suggesting that Congress and the states might find still better ways to protect the guarantee against compelled self-incrimination) that invited much of the Fourth Circuit's argument in *Dickerson.*

### *1. Statement of the case*

On the merits, *Dickerson* was a decision waiting to happen: it was just a matter of time until a federal court with a conservative cast of mind[105] ruled that *Miranda v. Arizona*[106] is dead, having been nullified by 18 U.S.C. § 3501,[107] enacted by Congress in 1968. Although that statute itself was widely

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[103] *See, e.g.*, Withrow v. Williams, 507 U.S. 680 (1993) (federal habeas); New York v. Quarles, 467 U.S. 649 (1984) (state case). Indeed, *Miranda* itself is a state case, and it is difficult to imagine on what basis other than constitutional interpretation the Court would presume to pass on the rights of criminal defendants prosecuted under state law.

[104] *Miranda*, 384 U.S. at 460.

[105] The United States Court of Appeals for the Fourth Circuit is such a court. The New York Times calls it, "the country's most self-confident, activist, conservative court." Roger Parloff, Miranda *on the Hot Seat*, N.Y. TIMES MAG., Sept. 26, 1999, at 84, 85.

[106] 384 U.S. 436 (1966).

[107] Section 3501 provides in pertinent part as follows.

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issues as to voluntariness . . . .

(b) The trial judge in determining the issue of voluntariness shall take into consideration

considered – most notably by Federal prosecutors – to be a dead letter, an unconstitutional abrogation of Supreme Court precedent, dedicated amici had long been urging the federal courts to perform *sua sponte* judicial review of § 3501.[108] It was this challenge that the Fourth Circuit took up in *Dickerson*, ruling, as urged, that the rules set out in *Miranda* are not required by the Constitution, and that therefore § 3501 is constitutional and in full force, because the statute does no more than overrule judicially created rules of evidence and procedure.[109]

*Dickerson* is factually and procedurally complex. By the Fourth Circuit's account, the robber of an Alexandria, Virginia, bank was driven from the scene in a car registered to Dickerson. Taken into custody, Dickerson told the FBI Agents that he drove a distant relative named Jimmy Rochester to and from a location near the bank. Rochester was arrested and confessed, implicating Dickerson as his driver. A search of Dickerson's apartment and car produced substantial incriminating evidence, including a handgun and leather bag like those used in the robberies, masks, dye-stained money and a "bait bill" from the robberies, and solvent used to clean dye-stained money.[110]

Indicted on several counts of bank robbery, Dickerson moved to suppress his confession on the ground that he was not timely given his *Miranda* warnings and to suppress items of evidence on the ground that they were, variously, the result of the *Miranda* violation and of a defective search warrant. After a hearing, the District Court suppressed Dickerson's confession on *Miranda* grounds, believing Dickerson's account and

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all the circumstances surrounding the giving of the confession, including

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,

(2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,

(3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,

(4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

[108] Paul G. Cassell has been particularly central to this struggle. Cassell is a former law clerk of Antonin Scalia (when Justice Scalia was a Federal Appeals Court Judge) and a former prosecutor in the Fourth Circuit. He has written numerous articles calling for the overruling of *Miranda*. He frequently works with two conservative public interest groups, the Washington Legal Foundation and the Safe Streets Coalition, and has written amicus briefs urging this *Miranda* agenda, notably those in *Dickerson*. *See* Parloff, *supra* note 105. When the Department of Justice declined to brief and argue *Dickerson* in the Supreme Court, Cassell was invited by the Court to argue in favor of § 3501.

[109] *Dickerson II*, 166 F.3d at 672.

[110] *Id.* at 674.

disbelieving that of the FBI agent who questioned him. The District Court declined to suppress evidence obtained as a result of the confession (his co-defendant's statement implicating Dickerson), however, holding that although Dickerson's confession was obtained in violation of *Miranda*, it was voluntary within the meaning of the Due Process Clause of the Fifth Amendment, and therefore its fruits were admissible. It also declined to suppress evidence found in the trunk of Dickerson's car.[111] But the court did suppress evidence found at Dickerson's apartment, finding that the warrant was, *inter alia*, insufficiently particular in describing the items to be seized.

The government thereupon asked the District Court to reconsider its suppression order, seeking to introduce further (though not newly discovered) evidence concerning the timing of the *Miranda* warnings and asking in the alternative that Dickerson's statement be admitted under 18 U.S.C. § 3501, which by its terms admits into evidence in Federal Court confessions deemed "voluntary" albeit in violation of *Miranda*.[112]

The District Court declined to reconsider its previous order,[113] and the government appealed to the Fourth Circuit, arguing both that the District Court should have reopened the *Miranda* hearing and that the suppression of tangible evidence on Fourth Amendment grounds was erroneous. On this appeal, the government did not brief or argue the § 3501 issue, but an amicus brief was filed by the Washington Legal Foundation and Safe Streets Coalition urging the Fourth Circuit to hold *sua sponte* that Dickerson's confession was voluntary within the meaning of § 3501.

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[111] *Id.* at 676.

[112] *Id.*

[113] United States v. Dickerson, 971 F. Supp. 1023 (E.D. Va. 1997) [hereinafter *Dickerson I*]. The District Court's opinion did not address the § 3501 issue, possibly because the government declined to argue that point. The court was openly critical of the government's attempts to re-open the suppression hearing. The judge criticized the prosecution's preparation, observing at the hearing that "this is one of those deals where they threw the case at [the AUSA] at 4:00 on the day before [the hearing]." *Id.* at 1023, 1024 n.2. Moreover, the court concluded that at least some of the evidence that the prosecution sought to add to its case in fact corroborated Dickerson's testimony and not that of the FBI agent. Finally, the court was no more receptive to the government's rhetoric than to its affidavits, as follows:

> The government begins its plea for reconsideration by asserting that "at stake here is not only our ability to bring Dickerson to book for multiple armed robberies but also quite possibly an agent's career." More correctly, what is at stake here is the liberty of a citizen who is presumed to be innocent and whose constitutionally protected rights were breached by the government. At the end of the day, and regardless of the outcome of the trial of this case, Agent Lawler will not spend the next several years in prison – Dickerson may.

*Id.* at 1025 n.4.

Deciding that it had the power to review the denial of reconsideration[114] and that the standard of review was "abuse of discretion,"[115] the Fourth Circuit concluded that the hearing judge did not abuse his discretion when he refused to allow the government to supplement its *Miranda* case.[116] The appellate court nonetheless reversed the order suppressing Dickerson's confession, ruling that it had the power to consider the *Miranda* / § 3501 issue *sua sponte*; that § 3501 is constitutional and supersedes *Miranda*;[117] and that, since § 3501 requires only a finding of traditional "voluntariness," and the district court had already held the confession to be voluntary, no remand for application of the statute was required.[118] The Fourth Circuit also reversed the order of the District Court suppressing tangible evidence on Fourth Amendment grounds.

*2. Rhetorical analysis*

The majority opinion in *Dickerson* is long: twenty-four pages in the Federal Reporter. The structure of the opinion itself makes plain that despite the half dozen or so issues presented, *Dickerson* has one and only one real point: § 3501 controls. Thus, the opinion begins not with the usual introduction of parties and issues, but with a paragraph in which the court summarizes its § 3501/*Miranda* argument. It continues with a longer summary of the § 3501 argument in Section I. In Section IIIB, the court provides a lengthy analysis of the issue.

*a. Opening paragraph*

The opening paragraph is set out in full below because it introduces not only the court's conclusion that § 3501 supersedes *Miranda*, but also introduces several of the court's most disrespectful rhetorical strategies: false implicature, omission, insincerity, hyperbole verging on deceit, and sneering sarcasm directed at the holders of opposing views.

> In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly

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[114] *Id.* at 678 n.10.
[115] *Id.* at 678.
[116] *Id.* at 680.
[117] *Id.* at 692.
[118] *Id.* at 692-93.

> refused to enforce the provision.[119] In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.[120]

If readers are to be convinced that the court's holding that § 3501 supersedes *Miranda* is correct, they must be convinced of two things: that it is appropriate for the court to decide the issue *sua sponte* and that *Miranda* is not grounded in the Constitution. These issues are the very heart of the matter – but in the opening paragraph they are, respectively, misrepresented and omitted.

First, the reader is led to assume, incorrectly, that the § 3501/*Miranda* issue was raised on appeal by the government. The court's statement "the Department of Justice has now asserted . . . that [§ 3501] is unconstitutional,"[121] followed by its assurance that "the issue [is] squarely presented"[122] is an instance of false implicature exploiting the reader's expectation that utterances will be rationally related to each other. In fact, the government's assertion was not made in the course of the proceedings in *Dickerson*, not, indeed, in the course of any proceeding before the court.[123] "With the issue squarely presented" is thus a non-sequitur with respect to whatever assertions the government may have made. And since neither side raised § 3501 before the Fourth Circuit, it is simply not true that the issue was "squarely presented."

Second, the substantive question at the heart of the § 3501/*Miranda* question – the constitutional status of *Miranda* – is simply absent from the opening paragraph. The question as framed by the court is no more than a shadow cast by the real question. Indeed, the shadow question is not even explicitly framed – the reader must reconstruct it from the court's conclusion "that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting

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[119] The dangling modifier in this sentence would bother some readers.

[120] *Dickerson II*, 166 F.3d at 671.

[121] *Id.*

[122] *Id.*

[123] In fact, it was made in a letter from Attorney General Janet Reno to Congress dated September 10, 1997. *Id.* at 672.

§ 3501."[124] The court's conclusion contains an enthymeme that, elaborated, holds as follows.

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|---|---|
| *Major Premise*: | Congress may establish the rules of evidence and procedure in the federal courts. |
| *Implied Premise*: | Section 3501 is a rule of evidence or procedure. |
| *Conclusion*: | Congress acted within its authority in enacting § 3501. |

Yet this "proof" demonstrates nothing. The real *Miranda* / § 3501 question concerns what Congress may *not* do. The major premise is more properly: "Congress may not overturn decisions of the Supreme Court interpreting the Constitution." But in the opening paragraph of *Dickerson*, the Constitution is just negative space – present only in the government's purportedly unexplained assertion of § 3501's "unconstitutionality" and in the derisive expression "taking the Fifth."[125] Although in the body of the opinion, the *Dickerson* majority does eventually, albeit less than candidly, discuss at length both the appropriateness of its *sua sponte* decision and the constitutional status of *Miranda*, its misleading and evasive opening may nonetheless deceive a busy or novice reader.

The hyperbole that is the stylistic signature of *Dickerson* (and present in quite a few other judicial opinions) is already much in evidence in the opening paragraph. Congress has not just the "intent" of restoring pre-*Miranda* law, it has the "clear intent."[126] The statute was not only "enacted," it was "duly" enacted.[127] The Department of Justice has "steadfastly" refused to apply § 3501. The issue is "squarely" presented.[128] Congress acted "well" within its authority.[129] In contrast to all this magnification, the *Miranda* violation found by the District Court is reduced in scale to a mere "technical" violation.[130]

In addition to misleading, concealing, and exaggerating – rhetorical excesses going to *logos* – the opening paragraph of *Dickerson* makes an appeal going to *pathos* as well. The court argues *ad hominem*, impugning the probity and competence of the Department of Justice. First, the reader is led

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[124] *Id.* at 671.

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* Justice Scalia's dissent in *Dickerson III* is similarly hyperbolic: "the decision in *Miranda*, if read as an explication of what the Constitution requires is preposterous," Dickerson III, 120 S. Ct. 2339; the elimination of compulsion "cannot conceivably require the right to have counsel present," *id.*; the court "flagrantly offends fundamental principles of separation of powers . . . ." *Id.* at 2342.

[130] *Dickerson II*, 166 F.3d at 671.

to question the motivation and competence of lawyers who refuse to enforce a statute that is all that a federal statute should be – "[D]uly enacted by the United States Congress and signed into law by the President of the United States." But there is worse: the government has been "taking the Fifth" on § 3501. In other words, like the criminal defendants it should be prosecuting, the Department of Justice is hiding its guilty secret behind that great obstruction to law and order, the Constitution.

The locution "taking the Fifth" thus reveals the Court's contempt not only for the prosecution, but also for the privilege at the heart of the *Miranda*/§ 3501 debate. The guarantee against compelled self-incrimination contained in the Fifth Amendment is mentioned very rarely in *Dickerson* – and its first and most prominent mention is here, in a sarcastic epithet more appropriate in a police precinct or tabloid newspaper than in a judicial opinion and, therefore, a breach of the court's *ethos*. The rhetorical strategy backfires, however, allowing the reader to glimpse another reason, perhaps the "real" reason, for the court's decision: a political agenda that privileges law enforcement over individual rights. The court's ostensible reason for concluding that § 3501 supersedes *Miranda* – Congress's "power to establish the rules of evidence and procedure in the federal courts" – though given much lip service, may not in fact motivate the court's own belief. These violations of Audi's motivational, evidential, and proportional principles will become clearer still in the rest of the opinion.

*b. Section I*

Insincerity, misdirection, omission, gross exaggeration, contempt – the opening paragraph of *Dickerson* provides a sampling of the majority's rhetorical excesses.[131] Section I of the opinion, which summarizes the history of § 3501 and the court's analysis of the *Miranda* / § 3501 issue, continues these strategies. Much of it is reprinted here, with line numbers to facilitate reference; citations are omitted.

> In ruling on the admissibility of Dickerson's confession, the district court failed to consider § 3501, which provides, in pertinent part, that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is evident that Congress
> 5 enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court.

[131] Compare this with the exaggeration and contempt of the Supreme Court dissent. "Today's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance." *Dickerson III*, 120 S. Ct. at 2348 (Scalia, J., dissenting). Although this is spirited dissent, to some (ourselves included) its assertion of intellectual superiority is offensive.

Thus, if Congress possessed the authority to enact § 3501, Dickerson's voluntary confession is admissible as substantive evidence in the Government's case-in-chief.

Congress enacted § 3501 as a part of the Omnibus Crime control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," the Court has never considered whether the statute overruled *Miranda*. Indeed, although several lower courts have found that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, no Administration since the provision's enactment has pressed the point. In fact, after initially declining to take a position on the applicability of § 3501, the current Administration has now asserted, without explanation, that the provision is unconstitutional.

Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. In addition to "caus[ing] the federal judiciary to confront a host of '*Miranda*' issues that might be entirely irrelevant under federal law," Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced – during an era of intense national concern about the problem of run-away crime – the acquittal and the nonprosecution of many dangerous felons." This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

In its historical precis (lines 10-26), the court cites Justice Scalia's concern, expressed in a 1994 concurrence, over the non-enforcement of § 3501. His suggestion that non-enforcement "may have produced – during an era of intense national concern about the problem of run-away crime – the acquittal and the non-prosecution of many dangerous felons"[132] appeals to the audience's fear of violent crime (an *ad populem* argument from *pathos*).[133]

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[132] Davis v. United States, 512 U.S. 452, 465 (1994) (Scalia, J., concurring).

[133] Although the Court's reaffirmance of *Miranda*'s constitutionality may be arguable, it is not so patently wrong as to merit Justice Scalia's doomsday *ad populum* argument in his dissent. "[T]o justify today's agreed-upon result, the Court must adopt a significant new, if not

The Fourth Circuit exploits this fear, noting (lines 26-28) "This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. *Without his confession it is possible, if not probable, that he will be acquitted.*"[134]

Like most *ad populem* arguments, this one contains a considerable overstatement: Dickerson is indeed *not* "just such a case." There appears to be a great deal of evidence of guilt other than Dickerson's confession, if indeed his statement can be fairly characterized as such.[135] A bank robber was seen leaving the scene of the crime as a passenger in Dickerson's car. Tangible evidence was found in Dickerson's apartment and car – a gun and leather bag described by eye-witnesses, marked money, and the fluid used to clean marked money. The actual robber confessed, implicating Dickerson.[136] Finally, should Dickerson try to explain away the evidence, his statement can be used to impeach his credibility.[137]

Accusing the Department of Justice of condoning the non-prosecution of violent felons (an *ad hominem* argument), the court inadvertently allows the reader to glimpse motivating reasons for its decision that are only obliquely

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entirely comprehensible, principle of constitutional law . . . [namely] that this Court has the power, not merely to apply the Constitution but to expand it . . . . That is an immense and frightening antidemocratic power, and it does not exist." *Dickerson III*, 120 S. Ct. at 2337 (Scalia, J., dissenting). In contrast, Rehnquist seeks to quell any anxiety that reaffirmance might produce.

> The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary . . . may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-circumstances test which § 3501 seeks to revive is more difficult than Miranda for law enforcement officers to conform to, and for courts to apply in a consistent manner . . . .

*Id.* at 2336.

[134] *Dickerson II*, 166 F.3d at 672 (emphasis added). When the court writes "it is possible, if not probable, that he will be acquitted," *id.*, it is exploiting semantic ambiguity. "Possible, if not probable" has two distinct, lexical meanings: "not just possible, but probable" and "possible, even though not probable." The latter would appear correct in light of the evidence, but the court's hyperbole "just such a case" presses the reader in the direction of the first meaning.

[135] Dickerson "confessed" to transporting a relative with a criminal record to and from the vicinity of a bank. Appellee's Petition for Rehearing and Petition for Rehearing En Banc at 2-3, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Appellee's Petition for Rehearing]. It is not clear what, if anything, he said about other bank robberies. The statement of facts in Dickerson's brief in opposition to en banc review seems to suggest that Dickerson's only statement concerned driving his disreputable relative on one occasion.

[136] *Dickerson II*, 166 F.3d at 673-74.

[137] *See* Harris v. New York, 401 U.S. 222, 224-25 (1971) (holding that a statement taken in violation of *Miranda* may be used to impeach a testifying defendant's credibility if the statement is found to be voluntary).

acknowledged (lines 29-34). As in the epithet "taking the Fifth," the Court's hyperbolic abuse of *pathos* here suggests that the politics of law and order, not the ordained roles of judiciary and legislature, is what really drives *Dickerson*.

In the same passage (lines 29-34), the court attempts to secure the ethical high ground for itself, accusing the Department of Justice of "elevating politics over law" in its refusal to argue § 3501, adding, "[F]ortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it." The court's attempt to argue its own stalwart ("cannot prevent us") independence ("court of law and not politics") rings hollow. First, it sets up a false dichotomy: there *are*, of course, no courts of politics.[138] Second, in light of the court's explicit concern with securing convictions, it appears that the court does indeed have its own political agenda and is merely engaging in the disingenuous, if standard, rhetorical ploy of calling those with opposing views "political."

Portraying itself as the impartial champion of the rule of law, the Fourth Circuit is creating a persona, making an argument from *ethos* that is no less inappropriate for being a convention of the judicial opinion.[139] Some may object to this critique of the court's rhetoric by arguing that no harm is done, or even some good, by the apolitical pose: first, it is the rare person who believes that judges do not take their political convictions to the bench with them;[140] second, the fiction gives non-majoritarian decision-making the appearance of legitimacy; third, as a practical matter, the pretense of impartiality may indeed operate as a constraint on partiality.

Yet, on balance, the mantle of impartiality nonetheless seems to us a disturbing rhetorical strategy better done without. Claiming complete

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[138] Justice Scalia creates a false "them-us" dichotomy at the outset of his dissent in *Dickerson III*.

> Those to whom judicial decisions are an unconnected series of judgments that produce either favored or disfavored results will doubtless greet today's decision as a paragon of moderation, since it declines to overrule *Miranda v. Arizona* . . . . Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of Miranda, but a radical revision of the most significant element of Miranda (as of all cases): the rationale that gives it a permanent place in our jurisprudence.

*Id.* at 2337 (Scalia, J., dissenting). Like the Fourth Circuit's rhetorical ploy, Justice Scalia's attempt to monopolize the ethical high ground fails: no member of the legal community believes that judicial decisions are "unconnected."

[139] *See* Ferguson, *supra* note 95.

[140] Journalists routinely discuss the political predilections of judges. For example, The New York Times has reported that the Fourth Circuit is known as a "model of conservative pursuits." Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1, A22. "It's gotten to the point that if there is a 2-to-1 liberal panel decision, you can predict with almost 'perfect' certainty it will go before the full court and be reversed. Liberal panel decisions are not allowed to survive." *Id.*

neutrality, even to an audience who knows it to be untrue, almost always entails undesirable consequences in addition to the disrespect inherent in untruthfulness. As Wasserstrom suggests, the law's dependence on language imposes a higher standard for its use and graver consequence for transgressions. When judges utter an obvious untruth, their integrity and thus, their authority become suspect, even when the untruth is a conventional one. Having attempted to gain the reader's good opinion, the Fourth Circuit summarizes its *Miranda* /§ 3501 argument, over-simplifying and distorting.

> Determining whether Congress possesses the authority to enact § 3501 is *relatively straightforward.* Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. *Clearly it is not. At no point* did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, disclaimed any intent to create a "constitutional straightjacket," referred to the warnings as "procedural safe-guards," and invited Congress and the States "to develop their own safeguards for [protecting] the privilege." Since deciding *Miranda*, the Supreme Court has *consistently* referred to the *Miranda* warnings as "prophylactic," and "not themselves rights protected by the Constitution." *We have little difficulty* concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's *unquestioned* power to establish the rules of procedure and evidence in the federal courts . . ., is governed by § 3501, rather than the judicially created rule of *Miranda*.[141]

Nothing could be clearer than the court's argument here. The text has perfect surface cohesion, proceeding in the promised "straightforward" fashion: a model of linearity.

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|---|---|
| *Major Premise*: | "Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution." |
| *Minor Premise*: | "[T]he rule set forth by the Supreme Court in *Miranda* is [clearly not] required by the Constitution." |
| *Conclusion*: | "Therefore . . . § 3501, enacted . . . pursuant to Congress' unquestioned power to establish the rules of procedure and evidence . . . is constitutional . . . [and] the admissibility of confessions in federal court is governed by § 3501, rather than . . . *Miranda*. |

[141] *Dickerson II*, 166 F.3d at 672 (citations omitted).

The problem with this proof is the articulation of the minor premise, the ambiguity of "rule." The "rule" of *Miranda* can mean either the larger "ruling" or the specific "rules." The Supreme Court laid out ruling and rules there as follows.

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination . . ..As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained, or appointed.[142]

The distinction is critical; the general rule requiring "fully effective" procedural safeguards is grounded in the Fifth Amendment, but the specific rules, the *Miranda* warnings themselves, are not. The Fourth Circuit demonstrates no more than that the traditional *Miranda* warnings are just one example of "fully" effective safeguards.

In rhetorical terms, the court has built its argument around a half-truth. It is true that the warnings in themselves are not "rights," but it is equally true that the Constitution, as interpreted by the interpreter of last resort in *Miranda*, requires some "fully effective" means of informing suspects of their rights.[143] Arguments that use half-truths as premises are particularly dangerous, because they appear so plausible: premises and logic seem sound, but the conclusion may as easily be wrong as right. Such arguments have a sinister totalitarian pedigree.

In Gricean terms, arguments from half-truths are false implicatures under the maxim of quantity. Readers assume that sufficient information is being provided by the writer, neither too much or too little. This credulousness is exploited where, as here, information is selectively and incompletely provided.

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[142] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[143] The Supreme Court points out the Fourth Circuit's mistake, but it does so in a mild and civil fashion that contrasts with the lower court's bombast.

> The Court of Appeals relied in part on our statement that the Miranda decision in no way "creates a 'constitutional straightjacket.'" *See* [*Dickerson II*,]166 F.3d at 672 (quoting *Miranda*, 384 U.S. at 467, 86 S. Ct. 1602). However, a review of our opinion in Miranda clarifies that this disclaimer was intended to indicate that the Constitution does not require police to administer the particular Miranda warnings, not that the Constitution does not require a procedure that is effective in securing Fifth Amendment rights.

*Dickerson III*, 120 S. Ct. at 2334 n.6 (internal citations).

In ethical terms, the court violates Audi's evidential and proportional principles when it supports its decision with the non-constitutionality of the *Miranda* warnings themselves. Improperly weighting a weak reason, the court fails to provide a "good" reason.

In its zeal to buttress its weak argument with a string of quotes from the Supreme Court, however, the Fourth Circuit sets a bomb ticking in its argument. Having cited the Supreme Court's invitation to Congress and the states "to develop their own safeguards for [protecting] the privilege" (line 10-11), the Fourth Circuit is led to characterize § 3501 as "enacted at the invitation of the Supreme Court" (line 14). Yet, in the very first sentence of its opinion, the circuit court had already, and accurately, characterized § 3501 as an attempt by Congress to overrule *Miranda* and "restor[e]" the former "voluntariness" enquiry.[144] Indeed, in Section III B, the court will spend three pages establishing that, in enacting § 3501, Congress intended to "reverse" *Miranda* and return to a "case-by-case determination of whether a confession was voluntary."[145] The Supreme Court is surely not in the habit of "inviting" Congress to "reverse" the Court by reestablishing precisely the ruling that the Court itself has struck down. The contradiction causes the *Miranda* / § 3501 argument to self-destruct.

*c. Section III B*

The rhetorical excesses of the opening paragraph and Section I recur in Section III B – where the Fourth Circuit elaborates on its *Miranda* / § 3501 analysis – and three more are added: misuse of precedent, the willful distortion of dissenting views, and the refusal to entertain questions.

Before beginning its analysis, the court leads the reader on a digression into *Miranda* scholarship that perhaps tells the reader more than the court intends. "Interestingly," the court begins, "much of the scholarly literature on *Miranda* deals not with whether Congress has the legislative authority to overrule the presumption created in *Miranda*, but whether it should."[146] The court then cites articles on both sides of the debate over *Miranda*'s effect on conviction rates, including three articles by Paul G. Cassell, attorney for amici curiae in *Dickerson*. The court then pronounces: "This debate, however, is one we need not enter. Whether Congress should overrule *Miranda* tells us nothing about whether it could. More importantly, it is not our role to answer that question.

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[144] *Dickerson II*, 166 F.3d at 671.

[145] *Id.* at 684-87.

[146] *Id.* at 687. A careful reader's rule of thumb holds that when a judge precedes a proposition with "interestingly," the judge's reason for stating the proposition is often far more interesting than the proposition itself.

It is the province of the judiciary to determine what the law is, not what it should be."[147]

Despite this boiler-plate disclaimer, the court appears to believe that *Miranda* allows felons to escape conviction and that it *should* be overruled. At the conclusion of its analysis, the court seems to breathe a sigh of relief: "No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities."[148] Here, as in its earlier charge that the government was "taking the Fifth," the court reveals that separation of powers is not the motivating reason behind its decision; the characterization of those rules of law with which the court does not agree as "mere technicalities,"[149] like the expression "taking the fifth," is part of the law and order rhetoric that accompanies a conservative political agenda.

There are substantial costs associated with both the pretense of impartiality and the concealment of a court's real reasons. First, as Audi points out, an advocate who gives a non-motivating reason asks the audience to "stand on ground [the advocate does] not share."[150] The lack of respect inherent in such expectation is magnified when the advocate is a judge and the audience is bound by conclusions supported with non-motivating reasons. Second, it is difficult to predict the future behavior of advocates who do not provide their real reasons – a substantial consideration when judicial opinions are concerned.[151] Finally, simple respect for truth would appear to require that judges prefer motivating to non-motivating reasons.[152]

Even if the court does consider the overruling of *Miranda* to be a good thing, it may be objected here that it is illogical and unfair to tax it with insincerity and consequently with violating Audi's motivational principle – the court's ostensible reason, Congress' power to overrule *Miranda*, is also its real reason. Even if it is a reason, however, the contrived and over-simplified nature of the legal argument, and its mockery of the fifth amendment, suggests that the court is making an argument that does not entirely motivate its own belief that § 3501 is good law. Although the court elaborates in section III B on its argument that the "rule" of *Miranda* is not grounded in the Constitution, it still proves no more than that the specific procedures set out in *Miranda* are

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[147] *Id.*

[148] *Id.* at 692.

[149] *See, e.g., id.* The phrase "technical violation of *Miranda*" is always used in *Dickerson* to describe the failure to provide *Miranda* warnings. The phrase is repeated so often that it becomes a kind of mantra. Yet viewed with less partiality, apparent "technicalities" reveal themselves to be, like the *Miranda* warnings, complicated answers to complicated problems.

[150] Audi, *supra* note 32, at 261.

[151] *See id.* at 262.

[152] *See id.*

not required by the Constitution. It is difficult to believe that such a weak reason can be a motivating reason.

In an attempt to persuade the reader that it is a good reason, the court uses Supreme Court precedent lavishly, but disingenuously, hiding the forest in the trees. The quotations are all accurate, but one fact is left unnoted. All but one of the cases cited to demonstrate the a-constitutionality of *Miranda* are cases in which the Supreme Court applied *Miranda* to either a State criminal court proceeding or a federal habeas corpus petition,[153] where the Supreme Court may only decide issues arising out of the Constitution.[154] The court never addresses this issue.

In Section III B, the court employs two final rhetorical abuses: the distortion beyond recognition of dissenting views and the refusal to entertain questions. The dissenter's § 3501 / *Miranda* contention is brief and simple. He argues, first, that it is inappropriate to decide an issue of such significance *sua sponte*, on the sole basis of "about two pages from amici that the majority agrees with."[155] The dissenter then continues:

> The majority holds that § 3501 governs the admissibility of confessions in federal court because Miranda is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on both sides to answer one question for me. If Miranda is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? *See[,] e.g., Stansbury v. California*, 511 U.S. 318, 114 S.Ct. [1899], [114] L.E.2d 293 (1994) (per curium); *see also, Mu Min v. Virginia*, 500 U.S. 415, 422, 111 S.Ct. 1899, 114 L.E.2d 493 (1991) (noting that with respect to cases tried in state court, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution"). This question illustrates that

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[153] The only exception is *Davis v. United States*, 512 U.S. 452 (1994), which concerned a court martial.

[154] *See* Chandler v. Florida, 449 U.S. 560, 569-70 (1981) (state cases); 18 U.S.C. § 2254(a) (2000) (habeas corpus only for claims that person is in custody "in violation of the Constitution or laws" of the United States).

The court also uses precedent in less than candid fashion to support its assertion that the Supreme Court disapproves of irrebuttable presumptions in criminal cases and thus of *Miranda*'s presumption of involuntariness. The court cites to *Sandstrom v. Montana*, 442 U.S. 510 (1979), with a "cf." signal and the parenthetical "recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases." Although "cf." conventionally signals an analogy to the stated preposition, there is no principled analogy to *Sandstrom*. In *Sandstrom* the court determined that the common jury instruction that "we are presumed to intend the ordinary consequences of our actions" created a conclusive presumption that conflicts with the presumption of innocence and therefore violates a defendant's right to Due Process. To cite *Sandstrom* to support the overruling of *Miranda*'s presumption that unwarned confessions are coerced, as the Fourth Circuit does, is to create a false implicature, exploiting the reader's expectation that cited authority will be relevant.

[155] *Dickerson II*, 166 F.3d at 697 (Michael, J., dissenting in part).

> the § 3501 issue is so sweeping that we should not be delving into it on our own. In this case, we should follow our usual practice of deciding only the issues raised by parties.[156]

The rhetorical candor here is remarkable even for a dissenter. While, as in *Dickerson*, the authors of majority opinions seek to foreclose doubt, dissenters traditionally seek to foster it. But it is rare for a judge to so openly entertain doubt, saying "I don't know," even in dissent, and to ask a question without answering it.

The majority's response to the dissent displays judicial rhetoric at its worst, mischaracterizing opposing views and refusing to allow any challenge to its own reasoning.[157] At the end of Section III, B, the majority writes:

> We are reassured in our conclusion by the fact that our dissenting colleague, after examining all of the relevant authority at his disposal, has been unable to conclude differently. At best, the dissent can but pose a rhetorical question concerning the constitutionality of § 3501. Apparently, all of the relevant authority of which the dissent is aware supports the conclusion we reach today. As a consequence, we have no difficulty holding that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*.[158]

This is a material distortion of the dissenter's view, as the dissenter himself points out in a footnote.

> The majority misses my point when it erroneously suggests that I have examined all of the relevant authority and cannot conclude that *Miranda* renders § 3501 unconstitutional. My point is that we should not be examining the question at all, much less deciding it. For the record, however, not everyone

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[156] *Id.*

[157] Justice Scalia similarly mischaracterizes the views of his colleagues in the majority. The Court would not agree with Scalia's statement that it disregarded "[C]ongressional action that concededly does not violate the Constitution . . . ." *Dickerson III*, 120 S. Ct. at 2342. The construction of the latter sentence (deliberately?) conceals the identity of the conceding party, but the most likely party, the majority, would surely not concede that § 3501 was a legitimate exercise of power since the statute contradicted the Court's interpretation of the Fifth Amendment. Ironically, Justice Rehnquist has been taken to task for using "[c]oncededly" where no concession has been made. *See* Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in* Billy Budd, Sailor, *with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1, 47 (1982).

Scalia also engages in willful misreading of *Miranda*. He writes, for example, "What is most remarkable about *Miranda* . . . is its palpable hostility toward the act of confession," *Dickerson III*, 120 S. Ct. at 2339 (Scalia, J., dissenting), and "[p]reventing foolish (rather than compelled) confessions is . . . the only conceivable basis" for the rules suggested in *Miranda*. *Id.* Such gross misreading approaches *ad hominem* argument, seeming to impugn the motives of the Warren Court.

[158] *Dickerson II*, 166 F.3d at 692.

> agrees with the majority. *See* 1 Charles Alan Wright, Federal Practice and Procedure § 76 (2d. ed.) ("Unless the [Supreme] Court overrules *Miranda*, or holds that the 1968 statute [§ 3501] has successfully accomplished this, lower courts must follow the decision rather than the statute."); I. Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.5(e) (1984) (§ 3501 "is unconstitutional to the extent that it purports to repeal *Miranda*.")[159]

But worse than the majority's characterization of the dissenter's doubt as assent is its refusal to respond to the question he raises. This refusal is disrespectfully dismissive in its manner of refusing – by deeming the question irrelevant, unworthy of an answer.

> In the end, the dissent poses only the following rhetorical question: "If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts." Post at 697. As noted above, the Supreme Court has stated in unmistakable terms that the rule set forth in *Miranda* is not required by the Constitution. See ante at 688-90. In fact, in one of the Supreme Court's most recent applications of Miranda to a state court prosecution the Supreme Court specifically stated that "*Miranda*'s safeguards are not constitutional in character." *Withrow v. Williams*, 507 U.S. 680, 690-91, 113 S.Ct. 1745, 123 L.E.2d 407 (1993). Thus, although the dissent raises an interesting academic question, the answer to why the Supreme Court applies Miranda in prosecutions arising in state courts has no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution.[160]

The refusal to entertain questions is disrespectful, but to deny the relevance of the question itself is a still more disrespectful strategy. Moreover, it is ironic that the majority chooses to dismiss the question here by calling it "rhetorical." Although it is not unusual for courts to deny their own rhetoricity,[161] it is incongruous for a court that itself uses manipulative language practices to employ "rhetorical" as a derogatory term. Moreover, the court's evasion of the question here is disrespectful in its lack of candor. The court's refusal to answer cannot be motivated by a belief that the dissent's question concerning the application of *Miranda* to the states is irrelevant. On the contrary, the real reason why the court cannot entertain the question is that the only possible answers are unacceptable. There are only two possible explanations for the Court's continued application of *Miranda* in state cases: 1) the *Miranda* rule is required by the Constitution, or 2) for 35 years, the

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[159] *Id.* at 697, n.* (Michael, J., dissenting).

[160] *Id.* at 691, n.21.

[161] *See* Wetlaufer, *supra* note 4, at 1555, 1590. It also appears from the context that the *Dickerson II* court is using "rhetorical question" to mean a question that *deserves* no answer. *See Dickerson II*, 166 F.3d at 691 n.21. In fact, a "rhetorical question" is a question that *needs* no answer, "something phrased as a question only for dramatic effect and not to seek an answer, such as *who cares*? (= nobody cares)." OXFORD AMERICAN DICTIONARY 581 (1980).

Supreme Court has been doing something it has no power to do: imposing non-constitutional rules of evidence and procedure on the state courts.[162]

The second answer is the only one consonant with the constitutionality of § 3501, but to utter it would be lèse majesty. No matter how disrespectful the court permits itself to be toward counsel and dissent, it must present at least the appearance of respect for its hierarchical superior, the Supreme Court. Ironically, this respect deprives the *Dickerson* court of the only principled argument for the constitutionality of § 3501, and the very conclusion Justice Scalia would reach:[163] *Miranda* was a mistake.[164]

In sum, the rhetoric of the majority opinion in *United States v. Dickerson* combines an intermittently exaggerated respect for the Supreme Court with disrespect for the rest of its audience – parties, counsel, dissenter, the general reader. As we have seen, this disrespect takes many forms. And although *Dickerson* is undoubtedly an extreme example of judicial rhetoric, it is far from an anomaly.[165] It is the rare judicial opinion that does not overstate the strength of its own reasoning, misstate opposing views, and provide reasons that do not motivate the court's own belief. Many engage as well in the even more disrespectful practices noted here – false implicature, misuse of precedent, evasion of hard questions, and vilifying those who hold opposing views.

This is the reality of much judicial prose: a rhetoric that too often seeks to subdue rather than to educate. And our courts are highly unlikely to adopt a more ethical, more cooperative rhetoric anytime soon. Nonetheless, it is troubling to contemplate the possible effects of disrespectful judicial rhetoric – compliance without respect, oversimplification, institutionalized deception. One can be forgiven for wondering whether, in the end, a legal education and

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[162] *See* Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 498 (1999).

[163] *Dickerson III*, 120 S. Ct. at 2337 (Scalia, J., dissenting).

[164] Our colleague, Susan Herman, suggested that this institutional constraint might override motivational, evidential, and proportionality principles – that is, it might be ethical to give weak and non-motivating reasons when advancing one's real reasons would violate hierarchical norms.

[165] *See, e.g.*, Minersville School District v. Gobitus, 310 U.S. 586 (1940); Parker v. Levy, 417 U.S. 733 (1973); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989); Division of Employment v. Smith, 494 U.S. 872 (1990). These opinions all reflect a conservative cast of mind, and we are mindful of J.B. White's question whether defenders of individual rights sometimes sink to the rhetorical lows that bedevil the cases cited above. White points to some of the excesses of Justice Douglas, singling out *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Henry v. United States*, 361 U.S. 98 (1959). And we have noticed that even those courts that generally use rhetoric ethically occasionally engage in disingenuous practices. *See, e.g.*, Kelly v. Gwinnell, 476 A.3d 1219 (N.J. 1984).

the rhetorical excesses it can foster are not the worst preparation for a judicial career.

### *B. The Rhetoric of Appellate Advocacy: Briefs in Support of and in Opposition to Petition for Rehearing En Banc in United States v. Dickerson*

Because in *United States v. Dickerson* a panel of the Fourth Circuit decided an issue raised only by amici, an examination of the rhetoric of appellate advocacy in the context of the *Miranda* /§ 3501 debate requires that we look primarily at the briefs of counsel and amici in support of and in opposition to rehearing en banc rather than at the briefs on appeal.[166] When we look at the briefs in support of and in opposition to rehearing, we find that the unusual situation in *Dickerson* makes for some illuminating rhetorical practices and singular role behavior.

The role of appellate counsel logically entails a rhetoric of representative advocacy, while a rhetoric of subscriptive advocacy would seem more appropriate for amici curiae, since in principle these "friends" of court disinterestedly advocate the public good.[167] In the *Dickerson* briefs, roles and rhetoric can be observed both in conflict and in concert.

First, we have amicus curiae, the Washington Legal Foundation (WLF), nominally a subscriptive advocate, who assumes the representative role of prosecution. Its credibility and ethicity are ultimately diminished by its disrespectful, take-no-prisoners rhetoric.

Next, we have the United States Attorney and the Department of Justice (DOJ), whose role calls for representative advocacy, but whose expressed belief in the constitutional status of *Miranda* makes them subscriptive advocates cautiously arguing the same proposition as counsel for Dickerson. This role confusion seems at first glance to weaken the persuasiveness of the government's arguments. Further reflection suggests, however, that its thoughtful and measured argument enhances both persuasiveness and ethical credibility.

Finally, on Dickerson's side, we have his counsel's brief and those of two amici, the American Civil Liberties Union (ACLU) and the National Association of Criminal Defense Lawyers (NACDL). Counsel for Dickerson weds his role as defense attorney with uncompromising representative rhetoric that avoids disrespectful excesses. The rhetoric of amici ACLU and NACDL is more representative than subscriptive, largely indistinguishable from that

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[166] The amicus briefs of the Washington Legal Foundation and the Safe Streets Coalition (WLF/SSC) on appeal and in *United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997), will also be briefly examined since they prompted the Fourth Circuit's decision in *Dickerson*.

[167] In practice, however, the rhetoric of amicus briefs tends toward the representative, and is largely indistinguishable from that of counsel for the parties.

of counsel for defendant-appellant Dickerson, but in traditional terms these are model briefs – crisp, yet dignified, with none of the mud-slinging and rabble-rousing that mar the opposition brief of amicus WLF. Nonetheless, we came away from a study of all five briefs with a subversive sense that the most persuasive is the most subscriptive and least adversarial – that of the prosecution compelled by circumstance to argue out-of-role.

*1. Amicus brief of the WLF in opposition to rehearing*

The brief of the WLF, like the majority decision in *Dickerson*, is tainted by rhetorical excesses that violate Audi's threshold and desirability principles. First, there is an outright untruth stemming from a violation of the maxim of quality (the statement will be truthful and based on sufficient evidence). On the question of whether the continued application of *Miranda* to the states is an indication it is a constitutional rule, the WLF says it "may represent no more than the application of the Court's judicially-created, but not constitutionally mandated, remedial scheme in the absence of legislatively devised alternatives."[168] Because the Supreme Court has no power to impose any "remedial scheme" on state courts in the absence of a constitutional mandate, this is not a viable argument.[169]

Then there are *ipse dixit* arguments. The WLF commends the Fourth Circuit for holding that the requirement that a court "consider several *Miranda* factors, as well as some additional ones" means § 3501 goes beyond merely restoring the pre-*Miranda* voluntariness standard.[170] Yet requiring courts to consider giving *Miranda* warnings or creating factors for after-the-fact assessment of voluntariness does not on its face establish procedures as "fully as effective as . . . [*Miranda* warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it,"[171] a caveat to permissible alternatives that the Warren Court adds and that the

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[168] Brief of the Washington Legal Foundation in Opposition to Petition for Rehearing at 10-11, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of the WLF in Opposition to Rehearing]. Why the Court has applied *Miranda* in state cases and federal habeas cases for 35 years if it is not constitutionally mandated is the question at the heart of the *Miranda* / §3501 debate. It has, as noted in Part IIA, only two possible answers: 1) *Miranda* is indeed constitutionally mandated or 2) the Court has been mistakenly doing something it has no power to do. *See supra* note 162 and accompanying text. Because the WLF cannot accuse the Court of blundering, amicus equivocates. Faced with the same dilemma, the Fourth Circuit called the question "rhetorical." *Dickerson II*, 166 F.3d at 691 n.21; *see also supra* note 161.

[169] *See e.g.*, Stansbury v. California, 511 U.S. 318 (1994).

[170] Brief of the WLF in Opposition to Rehearing at 11 n.6, *Dickerson II*, (No. 97-4750).

[171] *Miranda*, 384 U.S. at 490.

Fourth Circuit and the WLF ignore.[172] Despite amici's *ipse dixit* contention that Section 3501 does more than restore the pre-Miranda voluntariness test, there is no evidence that it does so.[173]

There are strawman arguments based on a misstatement of opposing views. The WLF condemns the DOJ for asking the court to rehear a case in order to apply different law than the panel did when the Department knows that the law it wants the court to apply is "incorrect."[174] The Department would not concede this, however. Rather it thinks that there is another "equally well-established" line of cases that might govern the problem.[175]

In addition, there are a host of disrespectful language practices that breach an ethic of *ethos* and *pathos*. There are peevish, incredulous *ad hominem* attacks on the Department of Justice similar to those made in the Fourth Circuit's opinion. On the Department's refusal to pursue the Section 3501 issue, amici say, "this unique and unwarranted posture of the Department of Justice is itself reason enough for the Court to exercise its discretion to deny

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[172] Like the blurb in an advertisement for a film, the Fourth Circuit and the WLF quote selectively and out-of-context.

[173] In fact, the WLF/SSC seem aware of this in their earlier brief in *Leong*. There they concede "Section 3501 cannot be read in splendid isolation . . .. [I]t must be examined against the backdrop of all federal law that bears on the subject . . .. Taken together, these remedies along with section 3501 form a constitutional alternative to the *Miranda* exclusionary rule." Brief of Amici Curiae Washington Legal Foundation and Safe Streets Coalition in Response to Supplemental Briefs of the Parties and Amicus National Ass'n of Criminal Defense Lawyers at 21-22, United States v. Leong, 116 F.3d 1474 (4th Cir. 1997) (unpublished table decision) [hereinafter Brief of Amici Curiae WLF/SSC].

[174] Brief of the WLF in Opposition to Rehearing at 16, *Dickerson II* (No. 97-4750).

[175] There are also strawman arguments in an earlier brief of the WLF/SSC in *Leong*. There, the WLF/SSC assert that "[i]n order to warrant disregarding Section 3501 in this case, the argument the Department of Justice would have to make is that the lower courts have a duty to follow a non-constitutional Supreme Court holding instead of an Act of Congress superseding that holding." Brief of Amici Curiae WLF/SSC at 3, *Leong* (No. 96-4876). But that is not the argument the Department of Justice would make. It would and did instead argue that it had a duty to follow a Supreme Court holding on a constitutional requirement.

Other strawman arguments in *Leong* are coupled with overstatement and condescension. "The centerpiece of the Department's brief is the claim that the Supreme Court has already decided the constitutionality of § 3501, and the brief diligently marshals every bit of supporting court *dicta*." *Id.* at 7-8. But the Department of Justice does not claim the Supreme Court has decided the issue. In fact, in *Dickerson*, it says instead that lower courts should not apply § 3501 to admit confessions that *Miranda* would exclude because the Supreme Court has said "[w]e reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Brief for the United States in Support of Partial Hearing En Banc at 12, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief for the United States in Support of Partial Hearing].

en banc rehearing."[176] Unique? Seven administrations have adopted this position. "Reason enough to deny en banc rehearing"? This assumes it is more important to punish the Department for its "defiance" than to give plenary consideration to a novel issue of surpassing importance to an individual and to the community. The WLF's vengefulness breaches its ethical persona.

Indeed, the WLF's advocacy consistently violates Wasserstrom's notion of "the respect due all persons . . ., and the resulting wrongness in viewing or using members of the moral community solely as means to some further end, as things to be used as one might utilize artifacts or other objects."[177] For the WLF, Dickerson is only a means to an end, which is to bring the § 3501 issue first before the Fourth Circuit and then before the Supreme Court. This is, to some degree, an ethical failing shared by all amicus briefs – the friends of the court often have little interest in the fate of the individual parties. But the WLF takes this a step further, advocating a decontextualized form of appellate review based entirely on argument by amici. Its discussion of the equity of deciding an issue raised only by amicus curiae does not enhance its image, however.[178]

> [T]he *Dickerson* Court was expressly made aware of, and had available to it, the Foundation's voluminous briefs on Section 3501 filed in both *Leong* and *United States v. Sullivan*, the predecessor cases to *Dickerson*. While Dickerson did not brief Section 3501 in this Court, he had ample opportunity to address it in his brief as appellee, and/or in oral argument, and he could have sought permission to file a supplemental, post-argument brief once he saw the extent of the panel's interest in the issue.[179]

Although defense counsel might with hindsight be faulted for failing to brief a potentially harmful issue, even though it was not put into contention by the government, the WLF's statement makes us equally aware of the legitimacy of the defendant's concern that the court proceeded with only one-sided briefing from amici for the United States in other cases and this one.

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[176] Brief of WLF in Opposition to Petition for Rehearing at 3, *Dickerson II* (No. 97-4750).

[177] Wasserstrom, *supra* note 1, at 28.

[178] Counsel for Dickerson argued,

> [t]his case has raised an issue of tremendous import, yet Mr. Dickerson was given little, if any, real chance to weigh in on the matter. Regardless of the holding in this case, notions of fundamental fairness and due process dictate that the party whose interests are most adversely affected by the Court's actions should be given the full opportunity to brief and argue the issue.

Appellee's Petition for Rehearing at 10 n.9, *Dickerson II*, (No. 97-4750).

[179] Brief of WLF in Opposition to Petition for Rehearing at 16 n.9, *Dickerson II*, (No. 97-4750) (citations omitted).

The WLF can also be downright insulting, calling the Department's petition for a rehearing "coy,"[180] though it is unclear what conceivable justification it has for describing the government's position – even if it has vacillated – as "coquettish." As if this were not enough, the WLF/SSC also have a history of hyperbole and disdain. In *Leong*, they argue the DOJ is "unable to answer" arguments that *Miranda*'s exclusionary rule is not constitutional and instead enlists "a red herring: the lower court's duty to follow the Supreme Court's constitutional holdings."[181] This argument is not just inapposite, the WLF/SSC says, it is "wholly inapposite."[182] The DOJ's failure to discuss *United States v. Alvarez-Sanchez*, a case not involving a custodial confession, is criticized not just for being absent from the defendant's brief, but for being "notably absent."[183] In an argument *ad hominem*, the DOJ, in refusing to argue for § 3501,

> seems not to have the kind of legal judgment that is properly the province of the Executive Branch, but rather a political judgment that (for some inscrutable and unarticulated reason) § 3501 should not have been passed by Congress .... The Court should not sanction the Department's maneuvers to avoid its duty to faithfully execute the law.[184]

Yet, the WLF/SSC has its own political agenda that leaks out in their amicus brief in support of the United States in *Dickerson*. They admit the "explosion of violent crime" compels measures that will "diminish the misuse of our justice system by criminal defendants" and that will prevent "the release of dangerous criminals" because of "technical *Miranda* claims."[185] Moreover, the WLF/SSC argue "Dickerson would *in no way* have been unfairly prejudiced by the district court's consideration of § 3501," especially because "[p]rejudice concerns are, in any event, simply inapplicable because Dickerson (and the United States) both had affirmative duties to direct the district court's attention to the statute . . .."[186]

There is room in advocacy for indignation over perceived miscarriages of justice. But obfuscation, mockery, incredulity, and condescension aimed at professionals with sincere differences of opinion are bad taste, bad rhetoric, and bad ethics. Moreover, even if such practices can be condoned as

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[180] *Id.* at 17. "Coy" has nasty and sexist connotations.

[181] Brief of Amici Curiae WLF/SSC at 3, *Leong* (No. 96-4876).

[182] *Id.*

[183] *Id.* at 8.

[184] *Id.* at 30.

[185] Brief of the Washington Legal Foundation and the Safe Streets Coalition as Amici Curiae in Support of the Appellant United States at 2, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No.97-4750), *rev'd, Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of Amici Curiae WLF/SSC].

[186] *Id.* at 10 (emphasis added).

expressions of zealous advocacy likely to be neutralized by equally zealous opposing rhetoric, one serious consequence remains. The rhetoric of the winning side is all too often perpetuated in the court's opinion.[187]

In *Dickerson*, the Fourth Circuit incorporates into its opinion some of the dubious rhetorical practices of the WLF/SSC in their brief on appeal from the district court. Indeed some of the logical fallacies the Court committed in its decision were first made by the WLF/SSC in their brief. The amici were the first to admit that § 3501 was enacted specifically to overrule the rules promulgated in *Miranda* and to restore the voluntariness standard,[188] admitting § 3501 "establishes a 'lenient' standard of admissibility."[189] Then, perhaps fearing that rules as effective as *Miranda* warnings are indeed constitutionally required, they equivocate – making the *ipse dixit* argument that § 3501 is as effective. This equivocation causes their argument on procedural safeguards to self-destruct, as the court's arguments on this issue did.[190] The circuit court also echoed in *Dickerson* many of the disrespectful language practices of the WLF, mocking all parties on the *Miranda* side of the *Miranda*/ § 3501 debate but singling out the DOJ. However distasteful this is in an advocate, the consequential nature of judicial rhetoric and public perception of judicial integrity suggest the rightness of a higher standard of decorum.

### 2. *Prosecution's brief in partial support of rehearing*

The prosecution in *Dickerson* manifests a very different view than the WLF of the moral and professional responsibilities of an appellate advocate. The WLF finds it extraordinary that the Department disregards its traditional duty to defend an Act of Congress against a constitutional challenge whenever a "reasonable argument can be made in its defense."[191] The Department of Justice, however, has a view akin to that advanced by Audi, who argues

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[187] Indeed, Justice Scalia's sneering litany of the majority's "word games" (in trying to equate "constitutional underpinning" "constitutional origin" and "constitutionally based" with "constitutional"), *Dickerson III*, 120 S.Ct. at 2348 (Scalia, J., dissenting), is modeled on his former clerk's amici brief which offers a similar sarcastic litany: "The Department maintains that ... *Miranda* rules are based on 'constitutional premises'; 'rests on a constitutional foundation'; or has 'constitutional footings' or 'moorings.' These phrases have no fixed meaning and of little assistance in answering ... whether *Miranda*'s exclusionary rule can be modified by Congress." Brief of WLF in Opposition to Rehearing at 7, n.3, *Dickerson II* (No. 97-4158) (citations omitted).

[188] Brief of the WLF/Safe Streets, *Dickerson* at 5.

[189] *Id.* at 6.

[190] *See supra* notes 133-34 and accompanying text.

[191] Brief of WLF in Opposition to Rehearing at 19, *Dickerson II* (No. 97-4750); *see also id.* at 20.

> it is essential we not take our moral obligations to extend only to acting within our rights or to be defined wholly by our social roles. Morality is more demanding than that. It gives primacy to our character as agents; it provides ideals as well as restrictions, and it prevents us from submerging our moral autonomy in our professional roles.[192]

The Department takes the moral high road in refusing to pursue an argument that is consistent with its traditional role, because that argument seems to be contrary to its understanding of the Constitution. Interestingly, the Department of Justice does not defend its position using the unbridled rhetoric of representative advocacy. Instead it is openly subscriptive, prefacing its arguments with "we believe," where traditional appellate advocacy would simply assert. Moreover, it is remarkably candid about the ambiguity of authority.[193]

For example, although arguing "[t]he *Miranda* decision was itself clearly based on the Constitution, for it held that '[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement . . . can be truly the product of . . . free choice,'"[194] the DOJ also admits the Supreme Court has "retreated from that aspect of its reasoning."[195] The DOJ concedes that "[r]ead in isolation, there is language in *Tucker* and its progeny that might be read to support [a] conclusion" that "*Miranda* is a 'judicially created rule' that could be supplanted by legislation."[196] Yet, it suggests that the Court review the whole "body of Supreme Court jurisprudence on this issue"[197] because "an equally well-established line of Supreme Court cases . . . directly requires the conclusion that *Miranda* has a constitutional basis."[198] The Department of Justice points to *Miranda*'s consistent application to the states and on federal habeas review to put *Tucker et al* in perspective.

This candor is atypical of advocacy rhetoric. For example, although the DOJ concedes that *Tucker* establishes *Miranda*'s rules as not *per se* constitutional, amici for the ACLU, more typically and more traditionally, find ways of discussing *Tucker* and its progeny in much more affirmative terms, as follows.

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[192] Audi, *supra* note 32, at 281.

[193] Justice Rehnquist's opinion for the majority in *Dickerson* adopts this candor when it admits "there is language in some of our opinions that supports the view taken by [the Fourth Circuit]. *Dickerson III*, 120 S. Ct. at 2333.

[194] Brief for the United States in Support of Partial Rehearing at 8, *Dickerson* (No. 97-4750).

[195] *Id.*

[196] *Id.* at 9.

[197] *Id.* at 6.

[198] *Id.*

> To be sure, the Supreme Court held in *Tucker* and *Elstad* that failure to give warnings will not support exclusion of "fruits" derived from a confession. But both *Elstad* and *Tucker* recognized . . . that failure to give warning requires exclusion of even voluntary statements . . .. The tainted fruit holding of *Elstad* and *Tucker* therefore cannot support the panel's sweeping conclusion that *Miranda*'s warning requirement . . . was nevertheless without constitutional foundation.[199]

We can only speculate as to why the prosecution uses the traditional rhetoric of advocacy only intermittently. It is possible that the U.S. Attorney is not in agreement with the Department of Justice's *Miranda* policy, and its compelled obedience is reflected in argument lacking the traditional indicia of zealous appellate advocacy. The prosecution's rhetoric of advocacy may have suffered when it crossed boundary lines and assumed an unfamiliar role that required it to temper statements to accord with past postures or related department policies.[200] As Audi remarked, "[i]t is both prudentially unwise and morally undesirable to be valuationally fragmented."[201] It is equally possible, however, that the seriousness of the issue influenced the DOJ's decision to use language more respectfully. Perhaps a measured response is the government's proper response. Given its responsibility to effective law enforcement and a general respect for individual rights, in the long run, the Department of Justice's departure from traditional advocacy may be both ethical and persuasive.

### *3. Defense and amici briefs in support of rehearing*

Because counsel for Dickerson and the defense amici, ACLU and NACDL, are primarily concerned with preventing unwarranted restriction of liberty, some rhetorical flourish in their briefs is justified.[202] They, thus, all open with a focus on the big picture. For example, the defense opens with a direct reference to Congress's attempt to overrule *Miranda*, an attempt it characterizes as an abuse of power. It quotes extensively language in *Miranda* indicating that the Court was applying the Fifth Amendment's privilege against self-incrimination in the context of custodial interrogation and was engaged, therefore, in constitutional decisionmaking when it constructed a

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[199] Brief of the American Civil Liberties Union as Amicus Curiae in Support of Rehearing at 8-9, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No. 97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of Amicus Curiae ACLU].

[200] The WLF refers to some departmental inconsistency in its amicus brief in opposition to rehearing. Brief of the WLF in Opposition to Rehearing at 20 n.13, *Dickerson II* (No. 97-4750).

[201] Audi, *supra* note 32, at 270.

[202] It can, of course, be objected that they are also advocating the suppression of evidence, arguably a morally criticizable undertaking in that it can hardly be said to serve truth.

rule protecting it.[203] Similarly, the ACLU opens by characterizing the *Miranda* warnings as essential if the Fifth Amendment's protection against compelled self-incrimination is to be meaningful, describing that Fifth Amendment right as "essential to the preservation of our accusatorial system of criminal justice."[204] It closes by reminding the court that a 1988 American Bar Association study concluded that the warning requirement "does not have a significant impact on law enforcement's ability to solve crime or to prosecute criminals successfully."[205] The ACLU adds that *Miranda* has been "remarkably successful in the 30 years since it was announced . . .. [It] has created guidance for the police while at the same time ensuring that suspects are informed of their constitutional rights prior to questioning."[206] This emphasis on the importance of *Miranda* and its careful balancing of the interests reminds the readers what is at stake. As the NACDL says: "The panel's decision deprives citizens of this Circuit of the constitutional safeguards afforded all other citizens of this country."[207] Although this conclusion is *ad populem*, it is not unethical rhetoric because it does not appeal to feelings one would be ashamed of acting upon.

The WLF also ends with an *ad populem* argument, arguing that § 3501 protects the public from the "windfall" *Miranda* gives to dangerous felons. But Audi and Wasserstrom would distinguish between these two *ad populem* arguments. There is a difference between *ad populem* arguments mustered to protect civil rights when the government bears down on an individual and *ad populum* arguments that exploit fear and self interest to minimize those rights.

Unlike the WLF, which uses the defendant as a means to an end,[208] the defense tries to remind the court that justice to Dickerson is an end in itself. Dickerson's counsel reminds the court that fundamental fairness requires giving defendant a "full opportunity to brief and argue the issue."[209]

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[203] Appellee's Petition for Rehearing at 4, *Dickerson II* (No. 97-4750).

[204] Brief of Amicus Curiae ACLU at 1, *Dickerson II* (No. 97-4750); *see also* Brief of Amicus Curiae of the National Ass'n of Criminal Defense Lawyers in Support of Defendant-Appellee's Petition for Rehearing or Rehearing En Banc at 3, *Dickerson II*, 166 F.3d 667 (4th Cir. 1999) (No.97-4750), *rev'd*, *Dickerson III*, 120 S. Ct. 2326 (2000) [hereinafter Brief of Amicus Curiae NACDL] (stating that "the Fifth Amendment preserves . . . principles of humanity[,] civil liberty" and privilege fulfilled only when the accused is fully apprised of his rights); Appellee Petition for Rehearing at 5, *Dickerson II* (No.97-4750) (stating that *Miranda* "go[es] to the roots of our concepts of American criminal jurisprudence [and] the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime").

[205] Brief of Amicus Curiae ACLU at 13-14, *Dickerson II* (No. 97-4750) (citing American Bar Association, Criminal Justice in Crisis, 27, 33-34 (1988)).

[206] *Id.* at 13-14.

[207] Brief of Amicus Curiae NACDL at 2, *Dickerson II* (No. 97-4750).

[208] *See infra* note 177 and accompanying text.

[209] Appellee's Petition for Rehearing at 11 n.4, *Dickerson II* (No. 97-4750).

Additionally, he asks the court to refrain from deciding issues not raised by a party entitled to raise them when failure to consider the issues is not plain error. Thus, the defense attorney tries to contextualize the doctrinal issue and establish its import for the defendant.

Like the WLF, the defense and its amici occasionally overstate their arguments, using bold, unequivocal language. The NACDL, for example, says the cases the WLF rely upon "actually reaffirm *Miranda*: *Harris, Tucker,* and *Elstad* merely refuse to *extend* the holding of *Miranda*, and *Quarles* creates only a narrow exception for exigent circumstances. Thus . . . the cases offer no support for the conclusion that *Miranda* is not constitutionally compelled."[210] Yet, generally, hyperbolic certainty is avoided and arguments are made affirmatively but fairly. For example, whereas the WLF cites *Harris* for the proposition that "self-incriminating statements" given while in custody are admissible even though "the *Miranda* rules were not complied with,"[211] NACDL amicus carefully qualifies those holdings, noting that, in *Harris*, the statements made in violation of *Miranda* were deemed admissible for impeachment purposes, not as evidence of guilt, and thus, that "*Harris* reaffirms the core holding of *Miranda*, which 'barred the prosecution from making its case with statements of an accused . . . prior to . . . waiving counsel.'"[212] While the law is framed favorably by the defense and its amici, the cases and their context are fully given and cogently distinguished or circumscribed.

Moreover, these legal arguments are made with conviction but without excess – there are no *ad hominem* violations. Neither the attorney for the defense nor amici counsel for the ACLU and NACDL refer to opposing counsel, and they mention the Fourth Circuit panel only to summarize its decision or suggest an error.[213] Sarcasm and mockery are not employed – only the occasional exaggeration undermines the ethical persona the attorneys create in their briefs.

These attorneys benefit from role consistency in Audi's sense. Defending the Fifth Amendment's guarantee against compelled self-incrimination, they also defend the respect for the integrity and dignity of all persons in which that guarantee is grounded. In so doing, they merge their professional roles as defense counsel and lobbyist with the role of moral agent. This enables them to comply with Audi's motivational and proportionality principles and to adhere to an ethic of *logos, ethos*, and *pathos*. They give both their legal

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[210] Brief of Amicus Curiae NACDL at 11, *Dickerson II* (No. 97-4750).

[211] Brief of WLF in Opposition to Rehearing at 5-6, *Dickerson II* (No. 97-4750).

[212] Brief of Amicus Curiae NACDL at 11, *Dickerson II* (No. 97-4750).

[213] Brief of Amicus Curiae NACDL at 6, 9, 11, 14, 15, *Dickerson II* (No. 97-4750); Appellee's Petition for Rehearing at 4, 7 n.2, 8, 9, 10, *Dickerson II* (No. 97-4750).

and their policy arguments, and clearly articulate their premises and their reasoning.

An examination of these five briefs suggests that many characteristics common to advocacy rhetoric are not only unethical, but – to a critical and sensitive reader – ineffective. It is worth considering whether, as a profession, we may need to refine our notions of persuasiveness to improve both our image and our lawyering.[214]

### *C. The Rhetoric of Legal Scholarship*

The rhetoric of advocacy permeates legal scholarship. This may be a consequence of what has traditionally been its primary purpose, which is to analyze a legal problem and to prove the superiority of one of perhaps several solutions. Or it may be because legal scholars are trained to be advocates and become scholars without training in scholarly method or rhetoric. Whatever the reason, legal scholars adopt a rhetoric similar to that of advocate and judge.

> [T]he legal scholar adopts a voice that is objective, neutral, impersonal, authoritative, judgmental, and certain. It is a disembodied voice that implicitly denies any contingency upon the cultural or personal circumstances of the author . . . .
>
> In keeping with our objective and acontextual stance, we treat other people's texts as if they too were objective and acontextual. And in pursuing our purpose of finding the one right answer to our questions, we tend to approach other people's texts . . . as if they had one and only one true meaning. Thus, our rhetoric on the subject of texts is usually, at least implicitly, a rhetoric of exclusivity, of judgment and closure, and of one objective and ascertainable meaning . . . .
>
> [T]he rhetoric of legal scholarship is also distinguished by the style of its argument and proof. Our arguments are highly rational. They are made in the spirit . . . of deductive, syllogistic logic. They aspire to the linearity of a geometric proof . . .. We use them to control our reader at every point and essentially to compel her assent. Thus, we seek to prove, to a high level of certainty, that ours is the one right – or in any event the best – answer.[215]

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[214] There is some empirical research suggesting that traditional techniques of persuasion in appellate briefs do not, in fact, persuade judges. *See* James F. Stratman, *Investigating Persuasive Processes in Legal Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 23 DISCOURSE PROCESSES 1 (1994).

[215] Wetlaufer, *supra* note 4, at 1568-71.

Yet, this adversarial stance may not be particularly well-suited to " the disinterested pursuit of truth."[216] Although specious arguments "will doubtless be exposed and refuted in the end, [a] discipline would be better served if it could devote all of its energies to open, intellectually honest debate, rather than having to divert precious time to ferreting out the misrepresentations and other dishonest tactics employed . . . to win the debate by any means possible."[217]

*United States v. Dickerson* has not yet generated a body of scholarship upon which an analysis of scholarly rhetoric can be based. Yet, there is sufficient commentary on issues related to *Miranda* to make some general observations about how the language of legal scholarship echoes the rhetoric of advocacy. We focus here on an article by Paul G. Cassell,[218] on a short reply to Cassell's article by supporters of *Miranda*,[219] on an article deploring police over-reaction to *Miranda*,[220] and on an article outlining the dangers of interrogation outside of *Miranda*.[221]

Cassell's article is about the deleterious effect *Miranda* has on law enforcement generally, and on how it fails to protect victims and innocent suspects. He advances three propositions. First, he attempts to prove statistically that coerced false confessions are so rare they do not justify placing restrictions on police interrogation. Second, he argues that the *Miranda* warnings and waiver requirements hinder the police from obtaining confessions that could exonerate innocent suspects who gave false confessions and that could protect society from crimes committed by felons set free by *Miranda*. Finally, he proposes that the court substitute videotapes of confessions for *Miranda* warnings since videotaping can secure confessions while diminishing the chances of coercion.

In making these arguments, Cassell uses a number of rhetorical strategies that violate Audi's threshold and desirability principles. Cassell's first argument is based on a problematic premise, namely that the number of false confessions obtained through police coercion is so low that it does not justify

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[216] *Id.* at 1594-95.

[217] Nicholas Dixon, *The Adversary Method in Law and Philosophy*, 30 THE PHILOSOPHICAL FORUM 13, 22 (1999). The problem is not limited to legal scholarship; Dixon argues that the dirty tricks of adversarial debate have no place in philosophy.

[218] Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions, and from* Miranda, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998). Professor Cassell wrote the pro § 3501 briefs in *Dickerson II*; his scholarship is cited in *Dickerson II*. *See supra* note 108.

[219] *See* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda: *Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998).

[220] *See* Fred E. Inbau, *Over-Reaction – The Mischief of* Miranda v. Arizona, 73 J. CRIM. LAW & CRIMINOLOGY, 797 (1982).

[221] *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV 109 (1998).

*Miranda*-like restrictions on interrogation. There are both normative and empirical problems with this premise.

To begin with the empirical problem, Leo and Ofshe argue that Cassell's method of quantifying false confessions "has no credible empirical foundation."[222] They point out that it is impossible to estimate the number of police-induced false confessions because interrogations are not recorded in their entirety. Moreover, no record is made of the number of interrogations conducted, the number of confessions that result from interrogation, or the number of confessions sooner or later revealed to be false. Thus the numbers Cassell comes up with are speculative.

Indeed, Leo and Ofshe believe Cassell deliberately misreads their own study when he says that he will assume that Leo and Ofshe are correct that twenty-nine persons were wrongfully convicted from false confessions in the last quarter century. Leo and Ofshe never said there were only twenty-nine wrongful convictions resulting from false confessions.

> Cassell's decision to treat either our sixty case examples or the twenty-nine convictions as though they constitute what we believe to be the entire relevant population of false confessions resulting in wrongful convictions from 1973 to 1996 is both fallacious and ideology-serving. We were able to investigate only a small fraction of the disputed police interrogations that occurred in this twenty-three year interval. Cassell's implication that only twenty-nine wrongful convictions from false confessions occurred during this time period is therefore misleading. As we made clear in our article, our descriptive statistics summarize variation in the case outcomes of the set of false confessions we studied. We have no idea what proportion of the false confessions occurring during this twenty-three year period we have discovered.[223]

To misread a study and then refute it based on that misreading is to raise strawman arguments and avoid the issue.

Cassell's numbers are even less reliable and their premises less valid, Leo and Ofshe observe, because he arbitrarily shrinks the pool of false confessors only to those wrongfully convicted. In reality,

> the harms that the criminal justice system inflicts on false confessors are not limited to wrongful incarceration post-conviction, but also include wrongful (and sometimes lengthy) pre-trial deprivation of liberty, the stigma associated with criminal charges, the irrevocable loss of reputation, the stresses of standing trial and the sometimes bankrupting financial burdens of defending oneself in costly and drawn out proceedings against the state.[224]

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[222] Leo & Ofshe, *supra* note 219, at 558.

[223] *Id.* at 565. Indeed Leo's study was on "routine interrogation practices, not false confessions." *Id.* at 565.

[224] *Id.* at 564.

Cassell's speculative and arbitrary statistical manipulation is particularly dangerous when directed at an audience unfamiliar with statistical interpretation and vulnerable to false implicature. Such readers can be easily misled into believing that an argument has a solid scientific foundation when no such foundation exists.[225]

More to the point, and despite Cassell's contention that the risks of *Miranda* are "an empirical or 'numbers' issue that cannot be resolved . . . by theoretical reasoning,"[226] these quantifications are entirely irrelevant under one theory of constitutional interpretation because the public policy interests and constitutional rights implicated are largely indifferent to quantification of occurrence.[227] The issue is the unconstitutionality of coercion, not the number of coerced false confessions, or even the number of coerced true confessions. Thus, many readers would be unimpressed by Cassell's attempt to gain the reader's good opinion by articulating his willingness to "shoulder the burden of quantification" when he thinks that burden "is properly assigned"[228] to *Miranda*'s supporters. Proponents of *Miranda* would reject his innuendo that they bear the burden of empirical analysis or that they are evasive because they use "anecdotal example[s]."[229] They would not find it "curious" that "false confession literature never provides even a ballpark estimate of the frequency of false confessions"[230] because they would regard those estimates as both impossible to obtain and as irrelevant.

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[225] Consider the difficulty in assessing the truth of the following passage from Cassell:

> An alternative, second-best approach is to derive an estimate based on assumption about the frequency of wrongful convictions and the proportion of these convictions attributable to false confessions. The approach has the benefit of working even with extremely low probability events. In theory, estimating this number is straightforward:
>
> WC subFC = CV x ER x FC, where
> WC subFC is the number of wrongful convictions from false confessions,
> CV is the number of convictions in the system,
> ER is the error rate in the system, and
> FC is the proportion of the errors attributable to false confessions.
>
> The difficult part, of course, is in deriving empirically-based estimates of the error rate (ER) and the proportion due to false confessions (FC).

*Id.* at 513.

[226] *Id.* at 500.

[227] *See* Weisselberg, *supra* note 221, at 175-77; *see also* Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 91 NW. U. L. REV. 500 (1996); Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996); Leslie Lunney, *The Erosion of* Miranda: *Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 786 (1999).

[228] Cassell, *supra* note 218, at 501.

[229] *Id.* at 500.

[230] *Id.*

> By casting his argument in quantitative terms – no matter how flawed his assumptions, and no matter how contrived its reasoning – Cassell eschews the doctrinal arguments traditionally necessary to argue before legal scholars that a Supreme Court decision – one of the most famous and influential Supreme Court decisions, no less – should be overturned.[231]

Cassell also argues that the "exotic" problem of false confessions[232] is no trade off for the benefits of unrestricted interrogation or the harm of *Miranda* warnings. Leo and Ofshe maintain that the harms Cassell perceives are based on false dichotomies and speculation.

> According to Cassell, there are two scenarios that describe how *Miranda* harms the innocent. Under the first, Cassell's frustrated detective scenario, a guilty criminal suspect, who can be arrested only if he confesses, fails to do so, but instead invokes one of his *Miranda* rights and escapes arrest. Cassell supposes that in the absence of a rule requiring police to issue *Miranda* warnings to custodial suspects, the guilty party would not have refused to confess and would have been arrested and convicted. In the frustrated detective scenario, having failed to obtain a confession from the truly guilty party, the detective goes on and interrogates some conveniently available innocent suspect. The innocent not only waives Miranda, but thereafter gives a false confession. The innocent is then wrongly convicted.[233]

These scenarios are flawed, Leo and Ofshe argue, because they assume suspects who have not been *Mirandized* inevitably confess and that police officers who have been "foiled by a *Miranda* invocation"[234] give up a pursuit of a strong suspect to go after an innocent. The ensuing conclusion that *Miranda* is therefore a danger to innocents must be dismissed, say Leo and Ofshe, because it is based on false alternatives and questionable assumptions, violations of *logos*.

Leo and Ofshe conclude that if Cassell's goal is to protect the innocent from miscarriages of justice, his rhetoric backfires. Cassell should instead

> redirect his energies to the advocacy of tougher safeguards to protect custodial suspects and criminal defendants – not only against police-induced false confession, but also against other prominent sources of wrongful convictions such as eyewitness misidentification, the prosecutorial withholding of exculpatory evidence, the use of perjured testimony by so-called jailhouse informants, and ineffective assistance of counsel. For it is these kinds of abuses – not the constitutionally-based *Miranda* warnings – that lead to miscarriages of justice

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[231] Leo & Ofshe, *supra* note 219, at 574.
[232] Cassell, *supra* note 218, at 502.
[233] Leo & Ofshe, *supra* note 219, at 571-72.
[234] *Id.* at 572.

> in the first place and that prevent the exoneration of the wrongfully convicted incarcerated.[235]

If, however, Cassell's goal is to win, these misleading tactics are understandable.

Indeed, the very "conceit" of Cassell's article – abolishing *Miranda* warnings in order to protect innocents within the criminal justice system as well as innocent victims of crime – is both disingenuous and manipulative. Cassell is driven by the "misuse of our justice system by criminal defendants"[236] far more than he is by the plight of an innocent person frightened into false confession by coercive police tactics. This motivation is revealed when Cassell says "Blackstone's adage that ten guilty should go free rather than one innocent be convicted remains true today. But Blackstone's adage also reminds us that acceptable trade-offs are not unlimited. In evaluating an interrogation regime, the risks to innocents from inadequate crime control must also be assessed."[237] This misreading of Blackstone is not surprising given that, as amici curiae for the WLF/SSC in *Dickerson*, Cassell admits he is primarily concerned with "cases in which technical *Miranda* claims have resulted in the release of dangerous criminals."[238] Harm to innocent false confessors is but an excuse for Cassell to discuss confessions that are "lost" because of *Miranda*, a decision he, in an appeal from *pathos*, characterizes as "the epitome of Warren Court activism on behalf of criminal defendants."[239]

As we have seen, Cassell's emotional ploys and logical fallacies render much of Leo and Ofshe's critique valid, not the least because Cassell's tactics obscure the grounds on which the debate should center. Yet, Leo and Ofshe's critique is marred by their own attitude to their rival. Their reply confirms Dixon's suspicion that "the use of a hostile and belligerent tone" is "intrinsically undesirable, since it shows a lack of respect for one's opponent" – although it is unlikely a "friendly, non-confrontational approach" would make the opponents of this debate "more likely to be open-minded about the strength" of each other's arguments.[240] Nonetheless, honest argument and courteous discussion would certainly be more edifying and respectful of their audience.

Leo and Ofshe keep up a barrage of sarcastic *ad hominem* attacks on Cassell,[241] employing language that depicts him as out-of-control. He is

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[235] *Id.* at 576-77.

[236] Brief of Amici Curiae WLF/SSC at 2, *Dickerson II* (No. 97-4750).

[237] Cassell, *supra* note 218, at 499

[238] Brief of Amici Curiae WLF/SSC at 2, *Dickerson II* (No. 97-4750).

[239] Cassell, *supra* note 218, at 555.

[240] Dixon, *supra* note 217, at 18.

[241] Leo & Ofshe, *supra* note 219, at 557.

accused of launching a "single handed assault" on *Miranda*.[242] He is sneered at for his exaggeration, his "steady stream of speculative accusations that Miranda causes tens of thousands of guilty suspects to escape conviction."[243] He is accused of "*Miranda*-bashing,"[244] a term evocative of "gay-bashers." He ignores, we are told, "most researchers' preference for an honest 'I don't know' to the use of guesswork to arrive at specious estimates."[245] "Like the Emperor who wears no clothes, . . . Cassell's argument here is based solely on illusion."[246] His scenarios are so "highly implausible as to seem fanciful."[247] His argument that *Miranda* harms the innocent is but another "rhetorical weapon in his highly charged anti-*Miranda* crusade."[248]

There may be good reason to condemn speculative quantitative analyses because of the "fateful consequences" these analyses have on human lives, as Leo and Ofshe say.[249] Some indignation may even be appropriate, but the acrimonious and sarcastic name-calling in which these authors indulge results in a loss of ethical integrity that serves neither their audience nor their cause.

Not all legal scholarship is so deeply marred. Fred E. Inbau was one of the most vocal opponents of *Miranda*, yet, unlike Cassell, he makes his arguments without rhetorical excess.[250] Likewise Charles Weisselberg, a supporter of *Miranda*, uses no rhetorical dirty tricks despite his ideological commitment.[251]

In a representative article,[252] Inbau argues that *Miranda* displays a "lack of sound judicial reasoning."[253] He also decries the "mischief" that occurs when official "over-reaction" to *Miranda* convinces otherwise willing suspects not to confess.[254] Inbau's choice of the word "mischief" is typical of his rhetorical strategy; he uses a term that conveys gratuitous harm but does not raise the emotional decibel-level, deploring but not resorting to *ad populem* abuse of *pathos*. His anti-*Miranda* scholarship is also notable because it takes on the

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[242] *Id.*

[243] *Id.* at 558.

[244] *Id.* at 560.

[245] *Id.* at 561.

[246] *Id.* at 575

[247] *Id.* at 574

[248] *Id.* at 576.

[249] *Id.* at 575

[250] *See* Inbau, *supra* note 220, at 797. See *infra* notes 253-55 and accompanying text for discussion.

[251] *See* Weisselberg, *supra* note 221, at 109.

[252] *See generally* Inbau, *supra* note 220.

[253] He faults the Court for using the right to counsel, which by the text of the 6th Amendment applies to criminal *prosecutions* (and not to *investigations*), to protect against 5th Amendment violations during custodial interrogation. *Id.* at 808.

[254] *Id.* at 797-807.

Warren Court on its own terms, starting from the premise of universal respect that underlies *Miranda*.

> The *Miranda* doctrine . . . was created as a product of the Warren Court's pursuit of its egalitarian philosophy. Toward that objective the basic consideration was this: the rich, the educated, the intelligent suspect very probably knows from the outset that he has the privilege of silence, whereas the poor, the uneducated, or the unintelligent suspect is unaware of that privilege. Consequently, *all* persons in custody or otherwise deprived of their freedom, must receive the warnings prescribed in *Miranda*.
>
> As commendable as is much of what the Warren Court attempted or accomplished with its egalitarian philosophy in the area of social inequalities emanating from a disregard of clearly applicable constitutional provisions, the writer suggests that the same egalitarian philosophy does not lend itself to the field of criminal investigation. Foremost is the fact that a very high percentage of the *victims* of crime are from the ranks of the poor, the uneducated, or the unintelligent. It is of little comfort to them to be told that the warnings administered to the person suspected of robbing or raping them, or of burglarizing their homes while they were at work, was for the noble purpose of equalizing humanity, and this is especially so in those instances where the suspect, reasonably presumed to be guilty, accepted the invitation to remain silent, or where his conviction was reversed because the *Miranda* rights were not properly accorded him. The time to show compassion toward a criminal suspect's unfortunate background is *after* a determination of whether or not he committed the offense, not before.[255]

Inbau leaves the reader free to accept or reject his "suggestions," to make a hard choice between two moral high-grounds.

On the opposite side of the debate, but with similar courtesy, Weisselberg, in *Saving* Miranda, tries to capture the Warren Court's "vision" of *Miranda* and directly addresses the question of "whether this Article's characterization of the Court's 'original vision' is fair."[256] He attempts to convince us it is by laying out his reasons – by summarizing opposing readings and the grounds he has for rejecting them.[257] He similarly traces the encroachments on, and reinforcements of, *Miranda* that have been made since that ruling, acknowledging – like the Department of Justice in *Dickerson* – *Miranda*'s somewhat bewildering and ambiguous history.[258] In supplying the reader with

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[255] *Id.* at 808-09.

[256] Weisselberg, *supra* note 221, at 122.

[257] *Id.* at 122-24 (pointing to language in the opinion and exchanges between Chief Justice Warren and Justice Brennan that support his contention that *Miranda* governs police practices as well trial rights).

[258] *Id.* at 125-32. Weisselberg accepts *Harris v. New York*, 401 U.S. 222, 224-25 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), *Michigan v. Tucker*, 417 U.S. 433 (1974),and *New York*

his sources and reasoning, in providing – where applicable – alternative readings, and in making his refutations explicit, Weisselberg demonstrates his scholarly pursuit of truth. His subscriptive advocacy is stronger for it.

Weisselberg argues in this essay that encroachments on *Miranda* have created significant incentives for police to violate its strictures.[259] Because courts now admit "un-*mirandaized*" testimony for impeachment purposes, some police are now trained to interrogate "outside *Miranda*." He, thus, urges we return to *Miranda*'s original vision and bar confessions for impeachment purposes as well as evidence that results from "un-*mirandaized*" testimony. In other words, he advocates a return to the strict bright line rule vision.

In arguing this, Weisselberg, like Leo and Ofshe, takes on some of Paul Cassell's proposals. Cassell suggests the Court modify the warning to dispense with the offer of counsel and the requirement that police terminate interrogation when a suspect invokes his or her rights. In their place, Cassell suggests police officers videotape their interrogations since this is effective in preventing coercion. Weisselberg explains equably why this solution is not tenable.

> Telling officers that they need not cease questioning when a suspect invokes his or her rights simply sends police and courts back into the Fourteenth Amendment morass of soft standards. Without a bright line rule, how does an officer or a judge decide the point at which questioning overcomes a suspect's will? The number of times an accused asserts his or her rights certainly plays a role in the voluntariness inquiry. But must a suspect invoke several times to show that he or she is truly serious about remaining silent? *Miranda* simply presumes coercion when interrogation continues after a single invocation of the right . . .. Admittedly, videotaping would help resolve disputes about what was actually said and done during an interrogation; further, officers who know that they are on videotape also may refrain from clearly inappropriate conduct. Yet, in the end, videotaping cannot replace *Miranda*. A judge may review the videotape to decide a suppression motion, but will still decide the motion under a soft and value-laden standard.[260]

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*v. Quarles*, 467 U.S. 649 (1984), as cases establishing a new vision of *Miranda* in which the Court tries to "deconstitutionalize" the case and thereby allow statements taken in violation of *Miranda* to be used for impeachment and the collection of other evidence. *Id.* On the other hand, he regards *Withrow v. Williams*, 507 U.S. 680 (1993), as a significant counterweight; it places *Miranda* alongside other cases that establish the constitutional authority of prophylactic rules. *Id.*

[259] *Id.* at 111.

[260] *Id.* at 166.

Not only does Weisselberg spell out his reasons for rejecting Cassell's proposal, but he is careful to do so on the merits. Besides describing Cassell as "*Miranda*'s most ardent critic,"[261] he comments on him not at all.[262]

Inbau and Weisselberg's approach to scholarship has much to commend it and can help us to construct an ethic of rhetoric, one that is as appropriate for a judge as it is for a scholar.

## III. TRADITIONAL DEFENSES OF ROLE-DIFFERENTIATED LEGAL RHETORIC

Like role-differentiated behavior in general, role-differentiated legal rhetoric is not without articulate defenders and plausible defenses. In this section, we summarize those defenses and explain why, at the end of the day, we find them unconvincing.

Those who defend legal rhetoric speak from the viewpoint of the advocate and the adversary system. To the charge that legal roles disassociate speakers from their arguments and, thereby, obscure the truth and violate the duty of universal moral agency, defenders, such as Jack Sammons and J.B. White, reply that the legal system and legal culture justify some seeming abuses and provide constraints against the rest.

First, according to these defenders, the legal system renders the adversarial performances of advocates moral in that they provide jury and judge with the optimal arguments that each party can make, and, thus, help a decisionmaker to "think" through the case and arrive at a just decision.[263] Accordingly, even if an advocate uses weak or non-motivating arguments,

> to refuse to use them based on . . . personal assessment of their merit would be equivalent, in . . . [a] baseball analogy, to taking the ball and going home – a pretentious assertion of self in what is supposed to be a communal activity. I must instead leave such arguments to the judge or the jury for their consideration consistent with their particular roles within the legal conversation. These men and women may not be the measure of all things, but, for the lawyer as rhetorician, they are and must remain the measure of all things within the legal conversation.[264]

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[261] *Id.*

[262] Weisselberg also criticizes Cassell's quantitative analyses on both empirical and theoretical grounds. Weisselberg, *supra* note 221, at 170-77. But, although he observes that Cassell "provides the wrong answers to the wrong questions," *id.* at 176, he deals with Cassell's arguments on the merits. *Id.* at 170-77.

[263] James Boyd White, *Plato's Gorgias and the Modern Lawyer: A Dialogue on the Ethics of Argument*, *in* HERACLES' BOW 215, 226 (1995).

[264] *See* Jack L. Sammons, *The Radical Ethics of Legal Rhetoricians*, 32 VAL. U. L. REV. 93, 99 (1997). Sammons is an eloquent advocate respectful of opposing viewpoints. Yet his analogy of the adversary system – where the stakes can be as high as human life – to baseball seems to trivialize the debate. And the analogy of law to a game among men may say more than

This defense of legal rhetoric is problematic. First, the rhetoric of advocacy cannot be defended simply on the ground that it is required by the adversary system in that it assists in the truth-seeking function of a trial. In fact, there is a good likelihood that rhetorical excesses only compound the difficulty of ascertaining truth. It is a mistake to think that "conflicting biases and distortions will somehow cancel themselves out and result in a truthful verdict .... On the contrary, the more distortions that occur, the less likely the truth will emerge."[265]

Further, a defense of the rhetoric of advocacy as necessary to the functioning of the adversary system is only as good as that institution. Indeed, justice will prevail "only if the contest is a balanced one – that is, if each side has roughly equal access to relevant legal information, resources and capabilities."[266] Even then, the very effectiveness of partisanship is unproven, "a mix of a priori theories of inquiry and armchair psychology."[267]

Finally, even if the adversary system justifies a litigator's use of an unchecked rhetoric of persuasion, such justifications do not pertain to other legal players. The problem here is that lawyers seem to change roles more easily than they change their behavior, and, as we have seen in Part II of this article, the win-at-all-costs rhetoric rooted in the adversary system finds fertile ground in judicial and scholarly prose.[268]

A second defense of legal rhetoric holds that advocacy rhetoric is not as unbridled as some legal ethicists allege, but rather, that it is constrained by institutional and practical considerations.

> The game of lawyering is a particular conversation about certain social disputes. If lawyers are to continue to play this game, that is, if they are to continue to be lawyers . . ., they must accept the responsibility, as all game players must, of maintaining the game. . . .
>
> Accordingly, I am always obligated, as a lawyer, to speak as persuasively as I can, but I am also obligated to maintain the legal conversation and the quality of it. Part of this constraint is that I can only utilize the means of persuasion available within this particular rhetorical culture, just as a baseball player can only use a bat within a certain size and weight range. My ethical obligation, then, as a good rhetorician, my integrity as a lawyer, if you will, is that I always

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the writer intends.

[265] Dixon, *supra* note 217, at 21.

[266] Deborah L. Rhode, *Institutionalizing Ethics*, *in* THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 203 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode, eds., 3d ed. 1994).

[267] David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS AND LAWYERS' ETHICS 91 (David Luban ed., 1983).

[268] As Gerald Wetlaufer observes: "Within the discipline of law, there are systematic similarities between the rhetorical conventions of advocacy, judging, scholarship, and teaching." Wetlaufer, *supra* note 4, at 1587.

> present myself as honestly offering the best means of persuasion available within this particular rhetorical culture on behalf of my client.[269]

Sammons identifies some of the constraints on rhetoric imposed by the legal context.

> There are great constraints on rhetoric found in the efficiencies of the forms of persuasion most successful within this particular rhetorical community; great constraints on rhetoric in the nature of the particular audiences – judge, jury, and opposing counsel – addressed; great constraints in the particular casuistical and interpretive requirements of legal decision-making; great constraints in the necessary imposition of this rhetorical game upon the clients who enter it; great constraints in the representative nature of the advocacy with its requirement that the lawyer speak well for others, and the counseling and relationship essential to this speaking.[270]

Defenders also cite the constraints imposed by the profession on specific rhetorical practices: "lying, certain forms of deception, perjured testimony, preventing opposing arguments, misstating the law, tempting the judge to make decisions based upon means of persuasion that are not part of the rhetorical culture, and any other conduct that can fairly be described as 'not playing the game.'"[271]

We believe that the constraints Sammons identifies as ensuring ethical language behavior are not fully effective: both the nature of legal rhetoric and its practice are impediments to meaningful constraint.

The rhetoric of law aims to convince its audiences that the legal system and the decisions it engenders are impersonal, objective, forthright, reasonable, and fair.[272] It does this, Gerald Wetlaufer argues, by compelling acceptance and forestalling critique through reliance on

> authority, hierarchy, intellectual unity, the impersonal voice, coercive argumentation, appeals to the narrowly rational faculties, the one right answer, the best solution, the disciplines of closure, and the one objective and ascertainable meaning of texts . . .. [and to ] the extinguishment of contingency, to acontextuality, to the one objective perspective, to an audience . . . perfectly rational and thus perfectly undifferentiated . . ..[273]

Moreover, as we have undertaken to show, these rhetorical practices are present in all types of legal documents: to varying degrees, briefs, opinions,

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[269] Sammons, *supra* note 264.

[270] *Id.* at 101.

[271] *Id.* at 99.

[272] Admittedly, legal rhetoric is not always successful in its goal. A close and expert reader can often detect rhetorical manipulation.

[273] Wetlaufer, *supra* note 4, at 1587.

and scholarly articles present themselves as the "last word," even when those words offer a feigned and imperfect resolution.

Militating against legal rhetoric's impulse to closure, Sammons reassures, are restraints on rhetoric that the legal community has allegedly placed upon itself. Model rules and codes of conduct eschew the practice of lies, deception, misstatement of law and fact, concealment of adverse decisions.[274] Yet, perhaps because the very practices condemned serve closure so well, these rules are clearly unequal to the task. Advancing, as they so often do, aspirational rather than mandatory standards, and so often relying on legal rather than moral or rhetorical notions of deceit, they fail to prevent all but the most egregious misconduct. As a result, the profession does not consistently practice what it preaches.

Finally, defenders have faith that any ethical improprieties that survive these constraints can be rectified by an ongoing and honest conversation about the nature and the practice of law.[275]

> That we are responsible for how we speak and who we are; that self-conscious thought on these questions is among the most important tasks of a mature mind (or people); and that to establish a place of our own making from which cultural and ethical criticism can go on is essential to responsible life . . . and . . . the life of the lawyer."[276]

Moreover, as one defender notes, "[t]he character required for this inquiry into the profession is broader than the practice, but still required by it. This is, I believe, the way in which our professional roles are integrated with the rest of our lives"[277] and, he might add, the way moral fragmentation is avoided.

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[274] *See e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT (1999). Rule 3.1 bars a lawyer from asserting an issue unless there is a basis for doing so that is not frivolous. Model rule 3.3 prohibits making a false statement of material fact or law to the tribunal, failing to disclose adverse authority, and knowingly offering false evidence. Model rule 3.4 prohibits obstructing access to or altering evidentiary material. Rule 4.4 prohibits a lawyer from using means that have no substantial purpose other than to embarrass, delay, or burden a third person. Rule 8.4 make it professional misconduct to violate the professional rules, to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, or to engage in conduct prejudicial to the administration of justice. Canon EC-1-5 of the Model Code of Professional Responsibility (1982) urges lawyers to be temperate and dignified, and to refrain from all illegal and morally reprehensible conduct. The Disciplinary Rules of the ABA Model Code of Professional Responsibility (1982) make a lawyer subject to discipline for making a materially false statement (DR 1-101), for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, or in conduct prejudicial to the administration of justice (DR 1-102).

[275] *See* Sammons, *supra* note 264, at 100; White, *supra* note 70, at 867.

[276] White, *supra* note 263, at 237.

[277] Sammons, *supra* note 264, at 100.

Dialogue about legal culture and ethics is undoubtedly a good thing. But the conversation must be broad-based, encompassing not just academics, but practitioners and judges as well, and it must be implemented, not just examined. To curb ethical improprieties in any meaningful way, the profession must erect "a normative scale on which to judge legal behavior" and perform "a forthright analysis of such behavior as it is practiced."[278] The standards adopted must reflect "the strength of an ethical system" rather than the "professional accommodation of the bad."[279] In other words, rhetorical practices that allow a lawyer to evade or misrepresent what Richard Weisberg calls the "central reality of the situation" are practices that protect clients and positions at the expense of truth.[280] Credibility, predictability, and justice require commitment to ethical language practice.

## IV. CONCLUSION

The solution to the problem of disrespectful legal rhetoric is as clear as it is next to impossible: We have to change the way we talk and write, an enterprise that begins with a profession-wide commitment to avoid rhetorical practices that, by their nature, violate Audi's threshold and desirability principles.

Like all solutions to complicated questions, this solution raises more questions. To what extent, if at all, should there be different rules for different roles? Should litigators be exempted from the duty of respectful rhetoric? Should any such exemption be made only for criminal defense? Would a defendant whose counsel conceded the weaknesses of an argument have her rights to counsel and due process compromised? Before we make any exemptions, should we conduct empirical research to determine whether traditional advocacy rhetoric is in fact a more effective method of persuasion than forthrightness and balance? Should judges be held to the highest ethical standards because their words are so consequential? Although nothing justifies aggression and nastiness in judicial rhetoric, might there nonetheless be circumstances that justify violating the motivational and evidential principles – to get a majority, to spare the feelings of the court below, or to avoid hierarchical conflict, for example? Are these institutional arguments sufficiently strong to override the constraints on otherwise undesirable behavior? These are hard questions.

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[278] White, *supra* note 263, at 237.

[279] Richard H. Weisberg, *Three Lessons from Law and Literature*, 27 LOY. L.A. L. REV. 285, 300 (1993).

[280] Weisberg, *supra* note 70, at 10.

What seems certain, however, is that scholars should be held to the highest ethical-rhetorical standard, because truth-seeking is a scholar's primary goal. There are strong reasons for holding judges to the same high standard. Equally certain is that reform will not come from wishful thinking or from rules of professional conduct but from a commitment to an ethic of universal respect that is reflected in our use of language. The distinctions between persuading and silencing and between putting something in its best light and putting it in a false light are too important for mere lip service.

# Evolution of Controversy: The *Daubert* Dilemma: The Application of *Daubert v. Merrell Dow Pharmaceuticals Inc.* to Expert Testimony of Law Enforcement Officers in Narcotics-related Cases

by Walter G. Amstutz* and Bobby Marzine Harges**

*Federal Rule of Evidence 702 permits the admission of the opinion testimony of a witness qualified by the court as an expert if the witness' specialized knowledge will assist the trier of fact to understand the evidence in the case. The operations of drug dealers are generally an appropriate subject for expert testimony. Because the clandestine nature of narcotics trafficking is likely to be outside the knowledge of the average layman, law enforcement officers may testify as experts in order to assist the jury in understanding these transactions.*[1]

## I. INTRODUCTION

The scene unfolds daily in virtually every courtroom across our country. And no court of law is immune from the ramifications of the actions filed. State and federal courts share the concerns, more particularly the issues and problems, arising from the litigation. Civil and criminal matters alike are affected by the concerns of the parties and the posturing by the attorneys. Among the decisions to be made during the course of trial preparation are the selection, order and testimony of witnesses designed to give one side an edge over the other. One area to which we speak is the consideration to use experts to shed a clearer, brighter or, generally, a better light toward a case's easier understanding – which translates into how each litigant, plaintiff or defendant in a civil action or prosecutor or defendant in a criminal matter, wants the trier of fact to be persuaded (within the bounds of law) by an expert hired by one side or the other to give his version of the facts within a certain acceptable realm of expertise.

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[1] United States v. Navarro, 90 F.3d 1245, 1261 (7th Cir. 1996) (internal citation omitted).

Consider the following scenario: A prosecutor is trying a case involving allegations of possession with intent to distribute a controlled dangerous substance. A twelve-person jury is seated to hear the case. The government intends to call the usual gamut of witnesses: police officers and a chemist. The government also intends to call a veteran narcotics officer who has been trained and experienced in narcotics-related issues such as packaging, quantities, paraphernalia found near the narcotics, proximity of weapons, ready cash on the scene or in the possession of the defendant, the meaning of narcotics code language and amounts of the drug consistent with personal use. That same officer has also been qualified as an expert in those fields several times previously. The government is calling the expert, expecting him to use his knowledge, skill, experience, training, or (specialized) education to assist the trier of fact to understand the evidence or to determine a fact in issue.

Essentially the prosecution wants to use the police officer to show the differences in the laws applicable to the case with the idea to also plant the seed of "intent" based on the evidence found and presented – but in accordance with the acceptable written law as well as the established "extra-judicial" legal practices. The defense, recognizing where the testimony is headed, raises an objection based on notions of improper foundation, relevance, prejudice, or improper qualification of the expert witness. The trial court must then consider the police officer's ability to testify in light of the statutory law, the specific expertise urged, and the relevant case law presented.

Outside of the presence of the jury the officer may be queried by the prosecution on his knowledge, skill, experience, training, or education in conformance with Rule 702 of the Federal Rules of Evidence[2] or its state counterpart. In response, the officer testifies that he is an experienced police veteran with the majority of his career having been served in the narcotics division. He further urges that he has investigated street level sales, surveilled small time hand-to-hand transactions, controlled undercover buys, managed informants, participated in acquiring search and arrest warrants, arrested those charged with relatively minor possession offenses as well as conspirators engaged in large scale operations, and supervised other officers conducting similar activities. The officer has indicated to the court that he has attended numerous schools and training seminars, has lectured at the police academy, and has trained newer narcotics agents in proper field procedures and testing.

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[2] Rule 702 provides:

Testimony by Experts

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702.

Additionally, the officer informs the court that he has been qualified a number of times as an expert in narcotics-related activities including instances related to sales and distributions, narcotics operations and investigations, packaging, personal use, training and procedures, and management of evidence.

The defense then asks the officer several questions regarding (1) the testability of the officer's theory or technique; (2) whether that theory or technique has been subjected to peer review or publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique; and (5) whether the methodology employed is generally accepted in the scientific community.[3]

After the officer fails to adequately answer the defense's questions, he points out that his expertise was obtained from his many years of serving as an officer in the narcotics division. The defense objects to the officer's testimony, arguing that the expert is not qualified to testify under Rule 702 of the Federal Rules of Evidence because his technique or methodology has failed the mandates of *Daubert v. Merrell Dow Pharmaceuticals Inc.*[4] and *Kumho Tire Company, Ltd. v. Carmichael.*[5] In *Daubert*, the United States Supreme Court held that trial judges must act as gatekeepers using the above mentioned five factors to determine the admissibility of expert testimony based on scientific evidence,[6] while in *Kumho*, the Supreme Court held that trial judges must act as gatekeepers using the above mentioned five factors to determine the admissibility of expert testimony based on non-scientific evidence.[7] The government responds, relying on the literal language of Rule 702 of the Federal Rules of Evidence, and argues that the expert's testimony is admissible. The government advocates that a common sense approach to its argument is to look at our world around us and consider what we see and recognize that some things can be explained by science and some by experience within a certain field. Furthermore, the government argues that both types of expert testimony, scientific and non-scientific, may be reliable based on factors other than the five factors mentioned in *Daubert* and *Kumho*.

The argument boils down to a simple issue with complex possibilities: Should a previously and acceptable qualified expert whose methodology or technique has not necessarily been tested, or subjected to peer review, does not necessarily have a known or potential rate of error, or generally has no standards controlling its operation, be precluded from testifying as an expert?

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[3] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 593-94 (1993). The Supreme Court announced these five factors as the factors to be used by the trial judge in determining the reliability of expert scientific testimony. *See id.*

[4] *Id.*

[5] 526 U.S. 137 (1999).

[6] *Daubert*, 509 U.S. at 593-94.

[7] *Kumho*, 526 U.S. at 147.

The scenario mentioned above has become a reality in many courts since the United States Supreme Court decided the *Daubert* case on June 28, 1993. In *Daubert*, the Supreme Court rejected the general acceptance test, first articulated in *Frye v. United States*,[8] as the standard for the admissibility of scientific expert testimony.[9] In *Daubert*, the court held that the Federal Rules of Evidence superseded the *Frye* test.[10] The Supreme Court replaced the *Frye* general acceptance test with a test based primarily on the reliability and relevance of scientific expert testimony.[11] Prior to *Daubert*, the admissibility of scientific expert testimony seemed to be derived from *Frye* and the federal and state rules of evidence.[12]

Since the Court decided *Daubert* in 1993, questions have arisen as to whether the principles of *Daubert* pertaining to the admissibility of scientific expert testimony apply as well to the admissibility of non-scientific expert testimony. In other words, when an expert's testimony is not based on scientific knowledge but on technical or other specialized knowledge, do the *Daubert* principles apply when the trial judge rules on the admissibility of such testimony? Courts have not been consistent in answering this question. Some courts have held that *Daubert* applies to all expert testimony whether based on scientific knowledge or otherwise. Other courts have held that *Daubert* does not apply beyond scientific expert testimony.

The Supreme Court seemingly settled this controversy when it decided *Kumho Tire Co. v. Carmichael*.[13] In *Kumho*, the Supreme Court decided that the trial court's gatekeeping function regarding the admission of expert testimony applies to scientific experts as well as to non-scientific experts.[14] However, exactly how lower courts are to apply the Court's mandate in *Kumho* remains uncertain.

This article discusses the application of *Daubert* and *Kumho* to the expert testimony of law enforcement officers in narcotics-related cases. Section II of this article explains the use of expert testimony at a trial. Section III discusses the *Daubert* decision and the potential impact it had on expert testimony of law enforcement officers in narcotics-related cases before *Kumho* was decided. Section IV examines selected federal court decisions in this area to determine how lower courts applied the *Daubert* principles to the expert testimony of law

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[8] 293 F. 1013, 1014 (D.C. Cir. 1923).

[9] *Daubert*, 509 U.S. at 597; *see also* Bobby Marzine Harges & Gaynell Williams, *Evidence*, 40 LOY. L. REV. 637, n.1 (1994) (summarizing recent evidentiary developments in the Fifth Circuit Court of Appeals from April 1, 1993 through March 31, 1994).

[10] *Daubert*, 509 U.S. at 585-89.

[11] *Id.* at 593-94.

[12] *Id.* at 585.

[13] 526 U.S. 137, 141 (1999).

[14] *Kumho*, 526 U.S. at 147.

enforcement officers in narcotics-related cases prior to the *Kumho* decision. Section V reviews the *Kumho* decision and the Supreme Court's mandate that the *Daubert* principles must be utilized by the trial court in determining the admissibility of all expert testimony, both scientific and non-scientific. Section VI assesses the mandate of *Kumho* that the *Daubert* principles should be applied flexibly and offers guidance to trial courts that may be faced with ruling on the admissibility of expert testimony of law enforcement officers in narcotics-related cases. This section also contains a list of preliminary questions to be asked of law enforcement officers in order to assess their abilities to qualify as expert witnesses in a narcotics-related case. Section VII concludes with an appendix of federal cases where courts have dealt with the issues surrounding the expert testimony of law enforcement officers in narcotics-related cases.

## II. THE USE OF EXPERT TESTIMONY AT A TRIAL

Rule 702 of the Federal Rules of Evidence[15] allows witnesses qualified and designated as experts because of their scientific, technical or otherwise specialized knowledge to assist the trier of fact in two separate and distinct ways.[16] Expert witnesses may express opinions on subjects within their area of expertise if such testimony will (1) assist the trier of fact to understand the evidence or (2) determine a fact in issue.[17] The first type of expert witness is an educator.[18] The second type of expert witness provides and evaluates data.[19]

The educating expert witness teaches the trier of fact about an area of science, technology, or other specialized knowledge with which the trier of fact may have little or no understanding.[20] When an educating expert witness testifies, he acts as an advisor to the trier of fact, "much like a consultant might advise a business."[21] This type of expert will usually "testify in the form of a mini-lecture concerning [his] general area of expertise."[22] While this expert may talk to other witnesses, run tests and form conclusions regarding the facts

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[15] FED. R. EVID. 702. The Federal Rules of Evidence are applicable in proceedings brought in federal courts such as federal district courts and bankruptcy courts. FED. R. EVID. 101.

[16] Cathleen C. Herasimchuk, *A Practical Guide to the Admissibility of Novel Expert Evidence in Criminal Trials Under Federal Rule 702*, 22 ST. MARY'S L.J. 181, 207 (1990).

[17] FED. R. EVID. 702.

[18] Herasimchuk, *supra* note 16, at 208.

[19] *Id.*

[20] *Id.* at 208-09.

[21] *Id.* at 209 (quoting S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 632 (4th ed. 1986)).

[22] *Id.*

concerning a particular trial, it is not necessary that he do so.[23] Additionally, he is not necessarily there to give opinions or conclusions.[24]

The second type of expert witness assists the jury in determining a fact in issue.[25] This expert "provides new information as well as his expert opinion on the significance of that information in a particular lawsuit."[26] Examples of this type of expert include a Special Agent of the FBI opining that the defendant's "sneaker corresponded to the size and design of a bloody shoe print depicted in a photograph,"[27] a medical examiner in a homicide prosecution testifying as to his expert medical opinion regarding the victim's cause of death,[28] a ballistics expert testifying that a particular bullet was or was not fired from a specific pistol,[29] and a fingerprint expert testifying that a certain person was present at a particular place.[30]

Occasionally, a witness may testify in a single case as both a fact witness and an expert witness. This may occur in a criminal trial where a narcotics officer testifies as both types of witnesses. For example, in *United States v. Valle*,[31] a case involving a prosecution for possession of cocaine with intent to distribute, an experienced narcotics officer testified about a search he conducted of the defendant's apartment for cocaine and other contraband.[32] The court then qualified the officer as an expert narcotics officer in trafficking and testified as to the approximate street value of the 148 straws of crack found during the search.[33] "He also explained that so large a quantity of crack was consistent with distribution of cocaine as opposed to personal use."[34]

In those instances where a law enforcement officer testifies in a single case as both a fact witness and an expert witness, some courts have recognized that there is a significant risk that the jury will be confused by the officer's dual role – the jury may not understand its own function in evaluating the evidence.[35] However, it is not improper for the government to elicit expert

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[23] *Id.* at 210.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See, e.g.*, State v. Green, 735 So. 2d 723, 735 (La. Ct. App. 1999).

[28] *See, e.g.*, State v. Koon, 730 So. 2d 503, 508 (La. Ct. App. 1999).

[29] *See, e.g.*, State v. Catchings, 440 So. 2d 153, 158 (La. Ct. App. 1983).

[30] *See, e.g.*, State v. Walker, 650 So. 2d 363, 367 (La. Ct. App. 1995); *see also* Herasimchuk, *supra* note 16, at 210-11.

[31] 72 F.3d 210 (1st Cir. 1995).

[32] *Id.* at 212.

[33] *Id.* at 214.

[34] *Id.*

[35] *See, e.g.*, United States v. Thomas, 74 F.3d 676, 682-83 (6th Cir. 1996), *modified*, Morales v. American Honda Motor Company, 151 F.3d 500, 514-16 (6th Cir. 1996) (narcotics officer who witnessed a drug deal testified as an expert witness "that drug dealers who sell crack at the street level normally do not keep written records, front drugs to their customers, or use

testimony from law enforcement officers who also testify as fact witnesses. Furthermore, there is no prohibition against this practice. Nevertheless, some courts have stated that in these cases, the district court and the prosecutor should exercise special caution to ensure that the jury understands its function in evaluating the evidence and is not confused by the witness's dual role.[36] The district court may exercise caution by ensuring that the expert's testimony does not become so broad that it speaks to matters that the jury can evaluate for itself, by instructing the expert not to overemphasize his role as an expert and by instructing the jury on the use of expert testimony.[37] The district court may also prevent juror confusion by allowing the defendant the opportunity to test the accuracy of the expert's testimony through thorough cross-examination.[38] The prosecutor can assist the court in preventing jury confusion by conducting his examination of the expert in a manner that sufficiently distinguishes the factual from the expert testimony. For example, the prosecutor could delineate the transition between the examination of the officer as an expert witness and questions relating to his role as a fact witness.[39]

Before any witness can testify as an expert witness, his competence must be established to the satisfaction of the trial judge.[40] In qualifying an expert witness, the usual procedure is to call the witness and question him concerning his qualifications. The burden of establishing the expert's qualifications is on the party calling the expert. After the party calling the witness has questioned

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scales, and that they generally do use pagers and carry "rocks" that sell for approximately twenty dollars each"). *Id.* at 680; United States v. Solis, 923 F.2d 548, 549-50 (7th Cir. 1991) (narcotics officer testified as an expert with respect to use of beepers by drug dealers to allow mobility and anonymity).

[36] *Thomas*, 74 F.3d at 683 (6th Cir. 1996); United States v. DeSoto, 885 F.2d 354, 360-61 (7th Cir. 1989). In this case, a narcotics officer who witnessed a drug deal testified as an expert to "counter surveillance" techniques employed by drug dealers to avoid detection by competitors or the police. The court noted that the prosecutor did delineate the transition between the examination of the officer as an expert witness and questions relating to his role as a fact witness. *Id.*; *see also* Note, Deon J. Nossel, *The Admissibility of Ultimate Issue Expert Testimony By Law Enforcement Officers in Criminal Trials*, 93 COLUM. L. REV. 231, 266 (1993) (suggesting that the investigating officer should not testify as an expert because the jury might infer that his conclusions are based on the officer's special knowledge of the case).

[37] United States v. Foster, 939 F.2d 445, 453 (7th Cir. 1991). A narcotics officer who arrested defendant was allowed to testify as an expert about the methods used by narcotics traffickers. To prevent juror confusion, the trial court instructed jurors that they were free to credit as much or as little of the expert's testimony as they saw fit. *Id.*

[38] *Id.*

[39] *Thomas*, 74 F.3d at 683 (6th Cir. 1996).

[40] *See generally* BOBBY MARZINE HARGES & RUSSELL JONES, HARGES AND JONES' LOUISIANA EVIDENCE 133 (3d ed. 1997) (commenting on the procedure under the Louisiana Code of Evidence which is based on the Federal Rules of Evidence).

the witness about his qualifications and experience, the opposing party has a right to cross-examine the witness on his qualifications. Under Rule 702, the expert may be qualified based on his knowledge, skill, experience, training or education. The trial judge then determines if the witness is competent to qualify as an expert.[41]

The purpose of an expert witness is to give an opinion based on his professional qualifications, experience and knowledge. Experts are used to simplify complex and technical matters for the finder of facts. These complex and technical matters are usually beyond the knowledge of the average layperson. For example, in a products liability case, an expert may be called to testify that a particular drug can cause certain ailments, while in a medical malpractice case, a cardiologist may be called to testify about the appropriate standards for cardiovascular medicine. Additionally, in a homicide case, a medical examiner may be called to testify about the cause of death. In each of the above instances, the experts are said to be basing their testimony on science. In presenting the scientific evidence, the expert witness usually explains the data or test results, or explains the scientific principles that establish the reliability of the evidence.[42]

Other examples of expert testimony include a roofer in a construction case explaining the proper way to install a roof on a house, a certified public accountant testifying in a real estate matter about the fair market value of a partnership interest in a real estate development company, and a narcotics officer in a criminal case testifying about the use of plastic bags to package crack cocaine. In these scenarios, the expert witnesses are not testifying about scientific matters, but rather, they are testifying about non-scientific matters based on their experience or expertise in a particular field. These scenarios illustrate the technical or other specialized knowledge referred to in Rule 702. When the Supreme Court decided the *Daubert* case, the Court specifically dealt with the standard for the admissibility of scientific expert testimony and left for another day the standard for the admissibility of non-scientific expert testimony.

Narcotics officers who testify as expert witnesses in criminal trials do not usually base their testimony on science. Narcotics officers are trained and experienced in narcotics-related issues such as packaging and quantities of narcotics, paraphernalia found near the narcotics, the proximity of weapons, ready cash on the scene or in the possession of the defendant, the meaning of narcotics code language, and amounts of the drug consistent with personal use. Officers usually gain this expertise from the "field" and generally do not learn

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[41] *Id.*

[42] GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 12.4, at 493 (2d ed. 1987).

these matters from a textbook. Officers gain this expertise from investigating street level sales, surveilling small time hand-to-hand transactions and controlled undercover buys, managing informants, participating in acquiring search and arrest warrants, arresting those charged with relatively minor possession offenses as well as conspirators engaged in large scale operations, and supervising other officers conducting similar activities. Narcotics officers also may attend numerous schools and training seminars, lecture at the police academy, and train newer narcotics agents in proper field procedures and testing.

Notwithstanding the wide variety of experience or expertise that a narcotics officer may have, it cannot be said that the narcotics officer will base his trial testimony on science. Therefore, the five *Daubert* reliability factors relative to the admissibility of scientific expert testimony may not easily apply to the expert testimony of an experienced narcotics officer. This is because the narcotics officer's methodology or technique has not necessarily been tested or subjected to peer review, does not necessarily have a known or potential rate of error, and generally has no standards controlling its operation. The only factor that can be said to apply to the methodology or technique used by narcotics officers is that it may have been generally accepted in the relevant community. Therefore, the question becomes, exactly how are trial judges to apply the *Daubert* reliability factors to the admissibility of expert testimony of experienced narcotics officers? This question will be addressed in the next three sections.

## III. SCIENTIFIC EXPERT TESTIMONY AND *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.*[43]

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[44] the United States Supreme Court defined the standard for admitting expert scientific testimony at trial. The plaintiffs in *Daubert* were minors who were born with birth defects.[45] Their parents brought suit against defendant Merrell Dow Pharmaceuticals, alleging that the birth defects resulted from their mothers' ingestion of an anti-nausea drug manufactured by the defendant.[46] The defendant moved for summary judgment based on the affidavit of a well-credentialed expert that stated that no published study had found that the drug caused birth defects in humans.[47] The plaintiffs responded with experts who proffered testimony that animal studies, pharmacological studies of the

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[43] 509 U.S. 579 (1993).

[44] *Id.*

[45] *Id.* at 582.

[46] *Id.*

[47] *Id.*

chemical structure of the drug, and re-analysis of the previously published human statistical studies indicated that the drug could cause birth defects.[48] The trial court granted the defendant's motion for summary judgment, stating that the studies proffered by the plaintiffs did not meet the *Frye* general acceptance test.[49] The Ninth Circuit Court of Appeals affirmed and agreed with the district court that the plaintiffs' studies were not generally accepted as reliable in the relevant scientific community.[50]

Thus, the Supreme Court examined whether the *Frye* "general acceptance" test[51] survived codification of the Federal Rules of Evidence. The Court held that the adoption of the Federal Rules of Evidence superseded the *Frye* test and that the Federal Rules of Evidence provide the standard for admissibility of expert scientific testimony.[52] The Court did acknowledge that the *Frye* test had been the dominant standard for determining the admissibility of novel scientific evidence at trial.[53] "However, the Court found that the rigid 'general acceptance' requirement was at odds with the 'liberal thrust' of the Federal Rules of Evidence and that nothing in the Federal Rules establishes general acceptance as an absolute prerequisite to admissibility of scientific evidence."[54]

After rejecting the *Frye* test, the Court explained that the Federal Rules of Evidence provided the standard for admitting expert scientific testimony.[55] The Court emphasized that although it rejected the exclusive use of the general acceptance test, the Federal Rules themselves have placed limits on the admissibility of purportedly scientific testimony.[56] Thus, the reliability and

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[48] *Id.* at 582-83.

[49] *Id.* at 583-84.

[50] *Id.* at 584; *see also* Harges & Williams, *supra* note 9, at 641.

[51] The general acceptance test originated in 1923 in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), as the standard for the admissibility of scientific evidence. Typically, scientific evidence is presented by an expert witness who explains the data, or test results, or explains the scientific principles which establish the reliability of the evidence. According to the *Frye* test, when an expert witness testifies about a scientific test, finding, or principle, the proponent must show that the principle or technique has received general acceptance in the scientific community. The *Frye* standard became the dominant standard applied in federal courts to determine whether scientific evidence was admissible. A proponent of a scientific principle or technique could prove general acceptance by surveying scientific publications or judicial decisions, by practical applications, or by presenting testimony of scientists regarding the attitudes of their fellow scientists.

Harges & Williams, *supra* note 9, at 641 (footnotes omitted).

[52] *Daubert*, 509 U.S. at 586-89; *see also* Harges & Williams, *supra* note 9, at 641.

[53] *Daubert*, 509 U.S. at 585; *see also* ERIC D. GREEN & CHARLES R. NESSON, PROBLEMS, CASES AND MATERIALS ON EVIDENCE 649 (1983).

[54] Harges & Williams, *supra* note 9, at 641; *see also Daubert*, 509 U.S. at 588.

[55] *Daubert*, 509 U.S. at 588-89; Harges & Williams, *supra* note 9, at 641.

[56] *Daubert*, 509 U.S. at 589.

relevancy requirements under Federal Rule of Evidence 702 are the keys to the admissibility of scientific testimony.[57] Furthermore, the Supreme Court noted that to ensure both the relevancy and reliability of scientific testimony and evidence, the trial judge must fulfill a gatekeeping role.[58] "In other words, the trial judge has an obligation to screen unreliable and irrelevant evidence."[59]

After *Daubert*,

> [w]hen a trial judge is presented with scientific testimony, he must first determine, pursuant to Rule 104(a),[60] 'whether the expert is proposing to testify to (1) scientific knowledge[61] that (2) will assist the trier of fact to understand or determine a fact in issue.'[62] In making this preliminary determination, the trial judge should consider several factors, including, but not limited to: (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the technique's 'known or potential rate of error;' (4) 'the existence and maintenance of standards controlling the technique's operation;' and (5) whether the technique has been generally accepted in the relevant scientific community.[63]

The Supreme Court emphasized that the inquiry envisioned by Rule 702 is a flexible one and that the factors to be considered by the trial judge are not limited to the ones previously mentioned.[64] Further, in applying this standard, the trial judge should also be mindful of other rules of evidence that may exclude relevant evidence.[65] "For example, under Rule 403, evidence may be excluded if its probative value is outweighed by its potential for prejudice."[66] In addition, "evidence may also be excluded under Rule 703 if the facts or data

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[57] *Id.*

[58] *Id.*

[59] Harges & Williams, *supra* note 9, at 642.

[60] Rule 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

FED. R. EVID. 104(a).

[61] *Daubert*, 509 U.S. at 592.

> The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.'

*Id.* (internal citation omitted).

[62] *Id.* at 592.

[63] Harges & Williams, *supra* note 9, at 642 (footnote omitted); *Daubert*, 509 U.S. at 592-94.

[64] *Daubert*, 509 U.S. at 594.

[65] Harges & Williams, *supra* note 9, at 642; *see also Daubert*, 509 U.S. at 595.

[66] Harges & Williams, *supra* note 9, at 642; *see also Daubert*, 509 U.S. at 595.

are not of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[67]

Thus, while the Court specifically rejected the *Frye* "general acceptance" standard as a necessary condition for the admissibility of scientific testimony, it did not completely obliterate it. "The Frye standard, i.e., whether a technique has been generally accepted in the relevant scientific community, remains one factor to be considered by the trial judge in determining admissibility."[68]

After the *Daubert* decision, it was clear that the Federal Rules of Evidence had replaced the general acceptance test as the standard for the admissibility of scientific testimony.[69] What remained unclear after *Daubert* was whether the five factors enumerated by the Supreme Court in *Daubert* were to be used by trial judges in determining whether a proposed non-scientific technique constitutes admissible evidence. The next section discusses the approaches used by federal courts in determining the admissibility of non-scientific expert testimony.

## IV. How Courts Applied *Daubert* to the Admissibility of Non-Scientific Expert Testimony

After the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals Inc.*[70] and prior to *Kumho Tire Co. v. Carmichael*,[71] there was no agreement among the lower federal courts as to the standard for admissibility of non-scientific testimony of expert witnesses. Some appellate courts held that *Daubert* does not apply beyond scientific expert testimony while other appellate courts held that the *Daubert* factors apply to both scientific and non-scientific testimony. Still most appellate courts resolved the controversy over the admissibility of expert testimony in narcotics cases without any reference to *Daubert* at all. This section examines the approaches used by appellate courts to determine the admissibility of the scientific and non-scientific testimony of expert witnesses in both civil and criminal trials prior to the *Kumho* case being decided by the Supreme Court. Particular emphasis will be paid to the appellate court decisions where courts ruled on the admissibility of the testimony of law enforcement officers who testified as expert witnesses in criminal trials. Because a few civil appellate decisions contain particularly enlightened discussions of the *Daubert* decision, their synopses will also be included here.

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[67] Harges & Williams, *supra* note 9, at 642; *see also Daubert*, 509 U.S. at 594-95.

[68] Harges & Williams, *supra* note 9, at 643 (footnote omitted).

[69] *Id.*

[70] 509 U.S. 579 (1993).

[71] 526 U.S. 137 (1999).

### *A. Cases Holding that the Daubert Principles Do Not Apply Beyond Scientific Expert Testimony*

Typical of the decisions that held that *Daubert* does not apply beyond scientific expert testimony is *United States v. Webb*,[72] a criminal case decided by the Ninth Circuit Court of Appeals. In *Webb*, the defendant appealed his conviction for possession of ammunition by a felon claiming that the district court abused its discretion by admitting police expert testimony regarding the reasons criminals conceal weapons in the engine compartments of their cars.[73] The defendant claimed the testimony was unreliable and prohibited by *Daubert*.[74] The expert testimony was tendered in the field of "criminal modus operandi."[75]

On the issue of admitting the police officer's expert testimony, the court reasoned,

> "If 'specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,' a qualified expert witness may provide opinion testimony on the issue in question . . . . In analogous cases, we have held that drug-enforcement experts may testify that a defendant's activities were consistent with a common criminal modus operandi."[76]

The court further reasoned that such testimony "helps the jury to understand complex criminal activities, and alerts it to the possibility that combinations of seemingly innocuous events may indicate criminal behavior."[77] The court analyzed the contested testimony and concluded that expert police testimony was offered and allowed in other cases to explain how drug traffickers often employ counter-surveillance driving techniques, register cars in others names, deliver narcotics and cash in public parking lots, and frequently use pagers and public telephones; how some people use apartments as "stash pads" for drugs and money; how criminal narcotics conspiracies operate; how drugs are transported; and the significance of the types of weapons found at a defendant's home and the weapons' connexity to the usefulness and availability for use in a drug business.[78] The purpose of allowing the expert testimony was easily explained by the court – "[i]n the drug cases, the

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[72] 115 F.3d 711 (9th Cir. 1997).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* (citations omitted).
[77] *Id.* at 714 (citation omitted).
[78] *Id.*

testimony was necessary to inform the jury of the techniques employed by drug dealers in their illegal trade."[79]

In admitting the police officer's expert testimony the court found that the officer was particularly qualified to give such an opinion, finding that his expertise was based on his nineteen years as a police officer, training and experience in the field, and interviews with criminal defendants.[80] The court concluded that "the officer's experience qualified him to render an opinion regarding one of the most important concerns faced by police officers – [the] where, how, and why [criminals do as they do]."[81]

It is important at this time to note an argument by the defense consistent with the ongoing evolution of the developing law in this area. The defendant argued that *Daubert* governed the admission of expert testimony regarding the modus operandi of criminals, and that the district court abused its discretion by failing to follow the *Daubert* procedures for admitting such testimony.[82] However, the appellate court disagreed and stated that, "[b]ecause the expert testimony in this case constitutes specialized knowledge of law enforcement, not scientific knowledge, the *Daubert* standards for admission simply do not apply."[83] The Supreme Court, in *Kumho*, proved this last statement by the *Webb* court to be erroneous.

Perhaps the most accurate assessment made by the court in *Webb* was not its erroneous majority opinion that the *Daubert* standards do not apply to expert testimony based on non-scientific specialized knowledge, but the assessment made by District Judge Bruce S. Jenkins, who concurred in the *Webb* opinion.[84] Judge Jenkins stated:

> The "gatekeeper" function finds description in *Daubert*, but it finds its source in Rule 702. Rule 702 makes the trial judge no less the gatekeeper when counsel characterizes proffered expert testimony as "technical" or "specialized," rather than "scientific."
>
> In saying that "the *Daubert* standards for admission simply do not apply" "to specialized knowledge of law enforcement," we cannot be suggesting that the district court examine less rigorously the specialized knowledge underlying proffered non-scientific testimony, or that the district court may abdicate its role as gatekeeper where the subject matter does not depend upon the scientific method. The trial court's role as gatekeeper concerning nonscientific "specialized knowledge" proves equally crucial to the integrity of the trial

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 714-15.

[82] *Id.* at 715.

[83] *Id.*

[84] *Id.* at 711. Judge Jenkins is the Senior District Judge for the District of Utah, and sat by designation. *Id.*

> process, particularly where, as here, the proffered testimony's potential for prejudice to the defendant runs so high.[85]

Judge Jenkins intimated that an expert in the field should do some things to convince the gatekeeper that he or she possesses the particular knowledge required in the first place and then maintain some current level of proficiency within that area.[86] Gathering data, surveying data within the area of expertise, or anything designed to show an interest in maintaining a level of knowledge within the field in order to both eliminate error and to solidify an opinion predicated on current activity will go a long way in resolving expert status before the trial court.[87]

The Supreme Court in *Kumho* later adopted Judge Jenkins' assessments of the role of the trial judge as gatekeeper and the standards to be used by the trial judge in screening expert testimony based on non-scientific knowledge as the correct analysis and procedures to be used.[88]

In *McKendall v. Crown Control Corp.*,[89] a civil case, the Ninth Circuit again held that the *Daubert* factors are relevant only to testimony bearing on scientific knowledge.[90] In that case, a warehouseman was injured when a sofa slid from a cargo area onto a stock picker that he was operating causing injury to his leg and back.[91] The warehouseman sued the manufacturer of the machinery under theories of strict liability, negligence, and breach of warranty.[92] As part of his case, the plaintiff hired an expert who would have testified that a safety device should have been in place to prevent the accident and that such a device was feasible.[93]

The manufacturer filed a motion in limine to exclude the expert's testimony pursuant to Federal Rule of Evidence 702 and *Daubert* on the ground that the proposed expert testimony was not based on scientific knowledge, was not derived by a reliable and accepted scientific method, and did not amount to good science.[94]

The district court granted the motion to exclude the expert testimony, finding it inadmissible under both *Daubert* and Federal Rule of Evidence 702.[95] The court found that the expert's proffer failed the *Daubert* test because

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[85] *Id.* at 717.
[86] *Id.* at 718.
[87] *Id.*
[88] *See infra* section V.
[89] 122 F.3d 803 (9th Cir. 1997).
[90] *Id.* at 806.
[91] *Id.* at 804.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 805.

there was no showing that the expert's conclusions were based on sound scientific principles.[96] The plaintiff appealed.[97]

Upon review, the Ninth Circuit, reviewing the grant of summary judgment de novo, concluded that the expert's testimony, based on his engineering experience and having investigated similar incidents for over thirty years is both "facially helpful and relevant" and seemingly reliable.[98] Additionally, the court found that the defense would have every opportunity on cross-examination to point out weaknesses with the expert's methodology.[99] Thus, the Ninth Circuit ruled that the district court erred in excluding the expert's testimony based on *Daubert* because *Daubert* applies only to the admission of scientific testimony.[100] Since the expert's testimony in this case was based on specialized knowledge, *Daubert* simply did not apply, according to the court.[101]

In *Compton v. Subaru of America, Inc.*,[102] another civil case, the Tenth Circuit held that *Daubert* applies when an expert witness offers testimony based upon a particular methodology or technique, but that *Daubert* does not apply in cases where expert testimony is based solely on experience or training.[103] The Court in *Compton* held that *Daubert* did not apply to the proposed testimony of an automotive engineer in a car rollover case because he was relying on general engineering principles and twenty-two years of experience as an automotive engineer, not some particular methodology or technique.[104]

The approach used by the Ninth Circuit in *Webb* and *McKendall*, that the *Daubert* principles apply only to the admission of scientific testimony, and by the Tenth Circuit Court in *Compton*, that the *Daubert* principles do not apply when the expert testimony is based solely on experience or training, are indicative of the erroneous approaches used by some federal courts of appeal prior to the *Kumho* decision.

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[96] *Id.*
[97] *Id.*
[98] *Id.* at 805, 807.
[99] *Id.* at 807-08.
[100] *Id.* at 806.
[101] *Id.* at 806-08.
[102] 82 F.3d 1513 (10th Cir. 1996).
[103] *Id.* at 1518.
[104] *Id.* at 1519.

### B. *Cases Holding that the Daubert Principles Apply Both to Scientific and Non-Scientific Expert Testimony*

Prior to the *Kumho* decision, some federal appellate courts recognized the dilemma as to whether *Daubert* applied outside the field of hard science. Perhaps the best statement of this dilemma came from the Fifth Circuit Court of Appeals in *Moore v. Ashland Chemical, Inc.*[105] There, the dissenters stated:

> After *Daubert*, federal courts have become balkanized on important questions that confront federal trial judges daily, e.g., whether *Daubert* applies outside the field of hard science; if so, whether *Daubert* 's gatekeeping function applies to the admission of any or all of the other types of expert testimony; if so, whether application of the *Daubert* "factors" is required in the admission of any or all testimony based on knowledge not derived by hard scientific methodology.[106]

In *Moore*, a toxic torts case, the Fifth Circuit correctly held that an expert's opinion is governed by "Federal Rule of Evidence 702 and *Daubert*, even though the opinion is not grounded in 'hard science,' assuming such a distinction exists."[107] The Court explained that the application of the *Daubert* factors is warranted in cases where expert testimony derives solely from experience or training.[108] Thus, using Rule 702 and the *Daubert* factors, the Fifth Circuit excluded the opinion of a physician on the causal relationship between plaintiff's exposure to industrial chemicals and his pulmonary illness.[109]

In another civil case decided by the Fifth Circuit, *Watkins v. Telsmith, Inc.*[110] the court stated that,

> [W]hether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline."[111]

The pronouncements of the Fifth Circuit in *Moore* and *Watkins* correctly state the approach to be used by trial judges when they assess the admissibility of expert testimony. This is true whether the expert's testimony is based on scientific, technical or other specialized knowledge.

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[105] 151 F.3d 269 (5th Cir. 1998).
[106] *Id.* at 280 (Dennis, J. dissenting).
[107] *Id.* at 275, n.6
[108] *Id.* at 275.
[109] *Id.* at 277-79.
[110] 121 F.3d 984, 991 (5th Cir. 1997).
[111] *Id.* at 991 (citing *Daubert*, 509 U.S. at 592).

### C. Cases Holding that the Expert Testimony of Law Enforcement Officials Is Admissible Without Reference to Daubert

Prior to *Kumho Tire Co. v. Carmichael*,[112] most federal appellate courts that ruled on the admissibility of expert testimony of law enforcement officials in criminal trials decided the issue without any reference to the *Daubert* decision at all.[113] These courts ruled by stating simply that a district court has broad discretion in admitting or excluding expert testimony, and that the court's decision will be sustained on appeal unless it is manifestly erroneous.[114] In ruling on the admissibility of expert testimony of law enforcement officials in criminal trials, the courts would sometimes refer to Rule 702 of the Federal Rules of Evidence.[115] Other times courts would make no reference to Rule 702 at all.[116]

For example, in *United States v. Brown*,[117] the government prosecuted the defendant for possession of cocaine with the intent to distribute.[118] At the trial, the prosecution called law enforcement officials who testified that the defendant's apartment "was a stash house for drugs," and that his actions immediately before his arrest "were consistent with that of someone engaging in counter-surveillance activities and attempting to destroy evidence."[119] The defendant appealed his conviction claiming that the district court erred in admitting the opinion testimony of the narcotics officers.[120] In affirming the conviction, the Court of Appeals concluded that the lower court had not erred in allowing the officers to offer expert testimony because the officers' testimony helped the jury understand the significance of the defendant's specific actions in the case. [121]

The court also concluded that the expert testimony was admissible because the district court determined that the officers were "trained, experienced

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[112] 526 U.S. 137 (1999).

[113] *See* Appendix for a list of cases where federal appellate courts ruled on the admissibility of expert testimony of law enforcement officials in criminal trials without any reference to the *Daubert* decision.

[114] *See, e.g.*, United States v. Garcia, No. 95-1224, 1995 WL 712757, at *5 (6th Cir. Dec. 4, 1995) (court allowed expert testimony about jargon used by Hispanic drug dealers).

[115] *Id.*

[116] *See, e.g.*, United States v. Strydom, No. 94-50645, 1995 WL 761697, at *2 (9th Cir. Dec. 21, 1995) (court allowed expert testimony regarding the value, purity, and projected dosage units of heroin).

[117] 110 F.3d 605 (8th Cir. 1997).

[118] *Id.* at 607.

[119] *Id.* at 610.

[120] *Id.*

[121] *Id.* at 610-11.

narcotics investigators, and they qualified as experts whose opinions were helpful to the jury."[122] These pronouncements by the court were made referring to Rule 702 of the Federal Rules of Evidence without any reference at all to the *Daubert* decision.

Thus, the district court did a number of things to satisfy appellate scrutiny. It performed its role as "gatekeeper" by viewing the reliability and relevancy of the expert testimony. It then decided that because of their "experience" in the field, the officers could testify as "experts." The Court of Appeals was satisfied with the effort of the district court and affirmed the conviction.[123]

As a practical matter, in many criminal prosecutions, experienced law enforcement officials routinely give opinions about their investigations without ever being qualified as experts. Before a law enforcement official gives an opinion, he simply testifies to his background and experience and proceeds to render opinions. In narcotics cases, the prosecutor usually calls the narcotics officer to the witness stand, allows him to elaborate on his qualifications, background and experience, and proceeds to ask him questions that elicit the officer's opinion. Generally, there is no attempt to qualify the officer as an expert and no objection at the trial by the defendant when the prosecutor fails to do so. For example, in *United States v. Griffith*,[124] the trial judge, in a prosecution for conspiracy to possess marijuana with intent to distribute, allowed a federal narcotics agent to testify about the jargon used by drug dealers.[125] The agent testified interpreting cryptic dialogues between several speakers for the jury explaining that the conversations concerned available quantities of narcotics, prices, and qualities of marijuana.[126] On appeal, the defendant alleged that the trial judge erred by allowing the expert to give improper opinion testimony.[127] The Court of Appeals allowed the testimony, stating that "[d]rug traffickers' jargon is a specialized body of knowledge, familiar only to those [who are] wise in the ways of the drug trade, and therefore a fit subject for expert testimony."[128] The court found that it was "implausible to think that jurors can understand such arcane allusions without expert assistance."[129]

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[122] *Id.* at 611.

[123] *Id.* at 607.

[124] 118 F.3d 318 (5th Cir. 1997).

[125] *Id.* at 321-22.

[126] *Id.* at 320, 322.

[127] *Id.* at 322.

[128] *Id.* at 321.

[129] *Id.* The court stated,

> Language evolves to reflect the preoccupations of a culture. As the scourge of drug abuse took root in the United States, a vivid slang vocabulary developed to describe various illegal drugs, their consumption, and their effects. Just as the Eskimos reputedly have 22 different words for snow, we now have, by one count, 223 terms for marijuana.

The interesting aspect of this proffered testimony was that the expert had never been tendered as an expert by the prosecution.[130] Nor had she been accepted as an expert by the trial court.[131] Nevertheless, the Court of Appeals concluded that "[a]t worst, the district court committed a technical error by failing to state that [the agent] was qualified as an expert and by not requiring the government to establish her credentials at the start of her testimony."[132] The Court of Appeals held that, even assuming that an abuse of discretion occurred, it would provide no ground for reversal because the "'erroneous admission of expert testimony is subject to harmless error analysis.'"[133] In so deciding, the court affirmed the conviction.[134]

What the court did in *Griffith* was to allow a witness who could have easily qualified as an expert witness under Federal Rule of Evidence 702 to give opinions on specialized matters without first being qualified as an expert. This appears to be common practice among the circuits.[135] However, this practice appears to be a misapplication of Rule 701 of the Federal Rules of Evidence.[136]

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> The most common of these terms, such as "grass" and "pot," are no doubt familiar to millions of Americans, and may be understood by juries without the aid of expert witnesses.
>
> On the other hand, there is a specialized jargon endemic to the illegal drug distribution industry. A primary purpose of this jargon is to conceal from outsiders, through deliberate obscurity, the illegal nature of the activities being discussed. Drug traffickers will often refer to ordinary items of commerce in lieu of illegal narcotics. The Seventh Circuit informs us that drug dealers have referred to their merchandise as "three pairs of boots" and as "pianos" sold by the kilogram. ... Traffickers also have referred to a supply of heroin as "the boy" or "the boyfriend," and as "briefs" and "motions."

*Id.* at 321 (citations and footnotes omitted).

[130] *Id.* at 322.

[131] *Id.*

[132] *Id.* at 323. With reference to the expert's qualifications, the Court of Appeals stated,

> We have little doubt that Nave was qualified to give expert testimony regarding the ways of drug dealers. Her experience at the time of trial included eight-and-one-half years as a DEA agent, during which she participated in 50 investigations, working at times in an undercover capacity. In her career, Nave surely has had ample opportunity to listen to drug dealers converse and to decipher the nuances of their conversations. Moreover, we are not convinced that the government, having established Nave's qualifications as an expert in drug trafficking generally, was required to prove her particular knowledge of drug dealers' jargon. Defense counsel could have questioned Nave's credentials at trial, but chose not to traverse or cross-examine her on this issue.

*Id.*

[133] *Id.* (quoting U.S. v. Krout, 66 F.3d 1420, 1433 (5th Cir. 1995)).

[134] *Id.* at 320, 328.

[135] See Appendix *infra*, for a list of cases where federal courts allowed witnesses who could have easily qualified as experts to render opinions on technical or specialized matters without first qualifying as experts.

[136] Rule 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.[137] Rule 701 allows a lay witness to express only those opinions or inferences that are rationally based on the firsthand perceptions of the witness and are helpful in understanding the witness' testimony or resolving a fact in issue. In other words, Rule 701 is designed to allow the lay witness to render opinions on matters that he personally observed in an effort to assist the jury better understand the evidence. Rule 701 is not designed to allow witnesses who are not qualified as expert witnesses to give opinions on specialized matters.[138]

The better procedure in these cases is for the prosecutor to call the narcotics expert to the witness stand and question him concerning his qualifications, tender the witness as an expert, and allow the opposing party to cross-examine the witness on his qualifications before eliciting opinions from the expert witness.[139] The proper foundation for qualifying such an expert in compliance

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or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

FED. R. EVID. 701.

[137] *Id.*

[138] *See* United States v. Figueroa-Lopez, 125 F.3d 1241, 1244-46 (9th Cir. 1997) (court held it was error for trial court to admit expert opinion testimony without first qualifying witness as expert).

[139] Michael Graham, HANDBOOK ON FEDERAL EVIDENCE, (4th ed. supp. 1999). It is suggested that rather than impose expert witness admissibility requirements upon a so-called technical lay witness, it would be much easier and more in accord with the text of Rules 701 and 702 to treat such witnesses as experts under Rule 702, i.e., if it looks like a duck, etc., it's a duck. Also see the proposed amendment to Rule 701, which, if enacted, would ensure that actual expert testimony is admissible under Rule 702. Proposed Rule 701 states the following:
Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702.

Preliminary Draft of Proposed Amendments to Federal Rules of Evidence Rule 701, *available at* http://www.uscourts.gov./rules/propevid.pdf.

The Proposed Advisory Committee's Note to Proposed Rule 701 states in part:

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule

with the *Daubert* and *Kumho* decisions is explained more fully in Section V of this article.

## V. *KUMHO TIRE COMPANY, LTD. V. CARMICHAEL*[140]

In *Kumho Tire Company, Ltd. v. Carmichael*,[141] the United States Supreme Court decided whether the *Daubert* factors apply to the testimony of engineers and other experts who are not scientists. *Kumho* was a products liability action brought against the maker and distributor of a tire after the tire blew out causing severe injuries and a death to passengers riding in a minivan.[142] The plaintiffs' case relied significantly upon the deposition of Dennis Carlson, Jr., an expert in tire failure analysis who intended to testify in support of the plaintiffs' conclusion that the tire on the minivan was defective.[143] Although an examination of the tire revealed that the tire had significant mileage and had at least two punctures that had been inadequately repaired, Carlson "concluded that a defect in its manufacture or design caused the blow-out."[144]

Kumho Tire moved the district court to exclude Carlson's testimony on the ground that his methodology failed Federal Rule of Evidence 702's reliability test.[145] Noting that Carlson's testimony would be considered technical rather than scientific, the district court acknowledged that it should act as a *Daubert*-type reliability gatekeeper.[146] After applying the *Daubert* reliability-related factors, "the District Court found that all those factors argued against the

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702. See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in FED. R.CIV. P. 26 and FED.R.CRIM.P.16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"); *see also* United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

Preliminary Draft of Proposed Amendments to Federal Rules of Evidence 701, *available at* http://www.uscourts.gov/rules/propevid.pdf.

140 526 U.S. 137 (1999).

141 *Id.*

142 *Id.* at 142.

143 *Id.*

144 *Id.* at 143.

145 *Id.* at 145.

146 *Id.*

reliability of Carlson's methods, and it granted the motion to exclude the testimony (as well as the defendants' accompanying motion for summary judgment.)"[147] On reconsideration, the district court agreed with the plaintiffs that *Daubert* should be applied flexibly, that the reliability factors were simply illustrative and that other factors could argue in favor of admissibility of the expert's testimony.[148] However, after considering the methodology employed by Carlson in analyzing the data obtained in the visual inspection and the scientific basis, if any, for Carlson's analysis, the district court reaffirmed its earlier order declaring Carlson's testimony inadmissible and granting the defendants' motion for summary judgment.[149]

The Eleventh Circuit Court of Appeals reversed the district court after reviewing de novo the district court's decision to apply *Daubert* to Carlson's methodology.[150] The court held that the *Daubert* court explicitly limited its holding to cover only the scientific context, and that a *Daubert* analysis applies only where an expert relies on the application of scientific principles rather than on skill or experience-based observation.[151] The court found that Carlson's testimony fell outside the scope of *Daubert* and held that the district court erred as a matter of law by applying *Daubert*.[152]

The Supreme Court granted certiorari "in light of uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon 'scientific' knowledge, but rather upon 'technical' or 'other specialized' knowledge."[153] Upon reviewing the decision of the Eleventh Circuit, the Supreme Court reversed, holding that *Daubert*'s general principles apply to all expert matters described in Federal Rule of Evidence 702, including scientific, technical, or other specialized matters.[154] The Supreme Court found that "it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized knowledge.'"[155] The Court also stated that it did "not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts."[156] In its final analysis, the Court held that the district

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147 *Id.*
148 *Id.* at 145-146.
149 *Id.* at 146.
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.* at 146-47.
154 *Id.* at 149.
155 *Id.* at 148.
156 *Id.* at 151.

court did not abuse its discretionary authority in holding that Carlson failed to satisfy any of *Daubert*'s or any other set of reasonable reliability criteria.[157] Consequently, the Court reversed the judgment of the Court of Appeals.

## VI. THE IMPACT OF *KUMHO* AND *DAUBERT* ON EXPERT TESTIMONY IN NARCOTICS-RELATED CASES

After the *Kumho* decision, the role of the trial judge in ruling on the admissibility of expert testimony is clear. When a trial judge makes a determination regarding the admissibility of expert testimony, he must act as a gatekeeper to ensure the reliability and relevancy of all expert testimony.[158] Pursuant to Federal Rule of Evidence 104(a), the trial judge must determine, whether the expert is proposing to testify to (1) scientific, technical or other specialized knowledge that will (2) assist the trier of fact to understand or determine a fact in issue.[159] In acting as a gatekeeper, the trial judge must first examine the expert's qualifications. Then the trial judge must use the *Daubert* factors, not as a definitive checklist or test, but as helpful criteria in assessing the reliability of expert testimony.[160] The inquiry is a flexible one that is tied to the facts of a particular case.[161] The gatekeeping requirement is designed to make sure that any expert, whether his testimony is based on professional studies or personal experience, "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[162]

The *Daubert* factors in any given case may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's

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[157] *Id.* at 158.

[158] *Id.* at 149. The proposed amendment to Federal Rule of Evidence 702 appears to codify the holding of *Daubert* and makes no distinction between scientific and other forms of expert testimony. Mjr. Victor Hansen, *Rule of Evidence 702: The Supreme Court Provides a Framework for Reliability Determinations*, 162 MIL. L. REV. 1, 35 (1999).
Proposed Rule 702 reads as follows:
Rule 702. Testimony By Experts

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Preliminary Draft of Proposed Amendments to the Federal Rules of Evidence Rule 702, App.at B-53, *available at* http://www.uscourts.gov./rules/propevid.pdf.

[159] FED. R. EVID. 702.

[160] *Kumho*, 526 U.S. at 150.

[161] *Id.*

[162] *Id.* at 152.

particular expertise and the subject of his testimony.[163] Does this mean that the trial judge can look beyond the *Daubert* factors in assessing the reliability of an expert's theory? If so, what are other factors that may be used by the trial judge? Because the trial judge as gatekeeper is given considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable,[164] the trial judge should look beyond the *Daubert* factors. Other factors that may be used by the trial judge include:

(1) Whether the expert is proposing to testify about matters growing naturally and directly out of research he conducted independent of the litigation, or whether he has developed his opinions expressly for purposes of testifying.

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

(3) Whether the expert has adequately accounted for obvious alternative explanations.

(4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[165]

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors remain relevant.[166] Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony.[167]

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[163] *Id.* at 150.

[164] *Id.* at 152.

[165] Proposed Advisory Committee's Note to Rule 702, App. at B-55, *available at* http://www.uscourts.gov/rules/proprevid.pdf. These factors have been used by courts before and after *Daubert* in determining whether expert testimony is reliable enough to be considered by the trier of fact.

[166] *Kumho*, 119 S. Ct. at 1176 ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable").

[167] *See, e.g.*, Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999) (explaining that "not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules"); Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 n.5 (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to

After the trial judge has determined whether the expert testimony is reliable, his decision to admit or exclude the testimony is viewed on appeal by an abuse-of-discretion standard.[168] This provides the trial judge with a sufficient amount of discretionary authority needed to both avoid unnecessary reliability proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, as well as "to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises."[169]

Finally, in determining whether the expert's testimony is reliable, the trial judge should not focus only on the expert's principles and methodology. The trial judge should also scrutinize the expert's conclusions because "conclusions and methodology are not entirely distinct from one another."[170] Furthermore, the trial judge should be mindful of other rules of evidence such as Rules 403 and 703, which may exclude relevant evidence.[171]

When a prosecutor calls a law enforcement officer in a criminal prosecution for a narcotics-related offense, the prosecutor has the burden of proving that the officer is competent and qualified as an expert in the particular field.[172] The prosecutor must establish, to the satisfaction of the trial judge, through questioning of the officer, that the officer's testimony is both reliable and relevant. The areas of inquiry should include the officer's general and specialized law enforcement experience, the education and training he has received in narcotics-related matters, whether he has trained or supervised others in narcotics-related matters, whether he has written any narcotics-related articles, whether he has qualified and/or testified as an expert in court before, and the methodology he used to arrive at his conclusions. The prosecutor should also probe whether this methodology and data are used by other experts in the field. Additionally, the prosecutor should use the *Daubert* factors to evaluate the reliability and relevance of the witness's testimony. The

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these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration"); Preliminary Draft of Advisory Committee's Note to Proposed Amendments to the Federal Rules of Evidence Rule 702, App. at B-55-56 *available at* http://www.uscourts.gov/rules/propevid.pdf.

[168] *Kumho*, 526 U.S. at 152 (citing General Electric Co. v. Joiner, 522 U.S. 136, 138-39 (1997)).

[169] *Id.* at 152.

[170] General Electric Company v. Joiner, 522 U.S. 136, 146 (1997).

[171] Harges & Williams, *supra* note 9, at 642. "[U]nder Rule 403, evidence may be excluded if its probative value is outweighed by its potential for prejudice. Evidence may also be excluded under Rule 703 if the facts or data are not of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." *Id.*

[172] Of course, if the defendant desires to call a witness as an expert in narcotics prosecutions, he has the burden of establishing the witness's qualifications and the reliability and relevance of the witness's methodology or technique.

prosecutor should then move the court to declare the witness an expert in the appropriate narcotics-related field.

After the prosecutor questions the officer, the defendant will then have an opportunity to vigorously cross-examine the witness on his qualifications and methodology. In conducting the voir dire of the witness, the defense should conduct extensive cross-examination in order to point out any weaknesses in the witness's qualifications or methodology.

The trial judge will then act as a gatekeeper and determine if the witness is competent to testify as an expert and if his testimony and methodology are both relevant and reliable. The trial judge should exclude a witness from testifying as a narcotics expert where there is no basis for the witness's findings; where the witness is unfamiliar with the field of expertise; where the witness failed to remain current in the field of expertise; where the witness failed to take advantage of courses offered or training within the field of expertise; where the expert failed to observe firsthand the experiences to which he is testifying; where the witness has exhibited no real world and hands on experience in the field of expertise; or where the witness has made no effort to update or refine changes in the field of expertise.

When the witness is qualified as an expert, he may generally suggest inferences that should be drawn from the facts, including inferences embracing the ultimate issue in the case.[173] However, it is important that the expert witness not express a direct opinion concerning whether the defendant did or did not have the mental state or condition constituting an element of the crime charged for this may violate Federal Rule of Evidence 704.[174] No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are

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[173] *See* United States v. Boissoneault, 926 F.2d 230, 232 (2d Cir. 1991); *see also* FED. R. EVID. 704(a). Federal Rule of Evidence 704(a) states, "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704(a).

[174] Federal Rule of Evidence 704(b) states:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704(b).

matters for the trier of fact alone.[175] Rule 704 prevents an expert witness from testifying about a defendant's mental state.

The following is a list of questions that may be utilized by the prosecutor when qualifying a law enforcement officer in a criminal prosecution for a narcotics-related offense in compliance with the mandates of the *Daubert* and *Kumho* decisions:

**GENERAL LAW ENFORCEMENT EXPERIENCE:**

[ ] Where are you currently employed?
[ ] In what capacity?
[ ] How long have you been so employed?
[ ] What are your current duties?
[ ] How long have you been involved in those duties?
[ ] Have you been employed by other law enforcement agencies in addition to the one you just described?
[ ] What were your duties with that agency?
[ ] How many years total have you been involved in law enforcement?
[ ] Did you receive basic law enforcement training?
[ ] Where?
[ ] From what agency?
[ ] When?
[ ] Have you maintained your skills and proficiencies in general law enforcement since that time?
[ ] When?
[ ] Where?
[ ] In what areas?

**SPECIALIZED LAW ENFORCEMENT EXPERIENCE:**

[ ] Have you received any specialized law enforcement training?
[ ] When?
[ ] Where?
[ ] How long was the course?
[ ] Who taught the course?
[ ] What were the specialized areas of training that you received?
[ ] As a result of that training have you been transferred or made a part of a specialized unit within your department or another agency?

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[175] FED. R. EVID. 704. *But see* Nossel, note 36, at 261-62 (suggesting that ultimate issue testimony by law enforcement officers should not be routinely admitted because it poses a risk of prejudice to defendants and has low probative value in many cases).

[ ] Which unit or agency?
[ ] What are your duties within that unit or agency?
[ ] As a result of your assignment in that unit or agency have you had the occasion to participate in any specialized investigations?
[ ] In what areas or related fields of law enforcement?
[ ] Has that experience included narcotics-related investigations?
[ ] How many such investigations have you conducted or assisted in?
[ ] What types of narcotics did those investigations involve?
[ ] How many narcotics-related arrests have you participated in or personally made?
[ ] Have you had the occasion to conduct investigations into narcotics "possession" related activities?
[ ] Have you had the occasion to conduct investigations into narcotics "possession with the intent to distribute" related cases?
[ ] Have you had the occasion to conduct investigations into narcotics "distribution" related cases?
[ ] Can you approximate a number of investigations that you have personally conducted in each matter?
[ ] Have you had the occasion to conduct investigations into narcotics trafficking operations?
[ ] Have you had the occasion to conduct investigations into narcotics conspiracy related operations?
[ ] Have you conducted surveillances in narcotics-related matters?
[ ] Have you had the opportunity to work in an undercover capacity?
[ ] How many times have you been an undercover officer in narcotics-related matters?
[ ] Have you had the occasion to assist in undercover operations?
[ ] Have you had the occasion to assist in drug "roundups"?
[ ] Have you had the occasion to collect narcotics-related evidence?
[ ] Have you had the occasion to personally witness people abusing drugs?
[ ] Have you had the occasion to personally witness people selling drugs?
[ ] Have you interviewed drug suspects?
[ ] Have you interviewed persons arrested and/or charged with narcotics-related offenses?
[ ] Have you participated in drug related search warrants?
[ ] Have you been trained in drug recognition and/or testing techniques?

**EDUCATION AND TRAINING:**

[ ] What is your educational background?
[ ] What schools have you attended in basic narcotics-related matters?
[ ] Have you ever received advanced narcotics-related training?

[ ] Have you maintained your proficiency in narcotics-related training?
[ ] What certifications have you received?
[ ] Can you provide us with a list of your schools and the dates attended?
[ ] How often do you receive updated training?
[ ] Does your department or agency encourage you to maintain your proficiency in such fields?
[ ] Do you take advantage of such opportunities?

**SUPERVISION OF OTHERS & PUBLICATIONS:**

[ ] Have you used your experience to train others?
[ ] Have you ever taught in a police academy or other law enforcement setting?
[ ] In what areas?
[ ] When?
[ ] Where?
[ ] Approximately how many students have you taught?
[ ] In what fields of training?
[ ] Have you actively supervised other narcotics officers?
[ ] How?
[ ] When?
[ ] How many?
[ ] As a supervisor what do your duties involve?
[ ] Have you ever written any narcotics-related articles?
[ ] How do you stay current in the field?

**METHODOLOGY:**

[ ] To your knowledge does your department or agency subscribe to what the education in the field of narcotics in law enforcement suggests?
[ ] Does your agency often conduct investigations with other local, state or federal agencies?
[ ] Does your agency and/or the officers involved exchange current information regarding narcotics-related information?
[ ] As a result does your department or agency keep current with changes in the field regarding narcotics-related information?
[ ] Does your department use the suggestions and/or information from other agencies to update its own practices in narcotics-related matters?
[ ] Would that information entail changes in the law?
[ ] Would that information entail changes in the way you conduct investigations?

[ ] As a result of the changes in procedures and/or tactics of narcotics traffickers does your department also change in response to current narcotics activities?

[ ] Does your department and/or agency engage in activities and or investigations from which to derive input or criticism for future operations?

[ ] Is there a school or academic facility that teaches such tactics or changes in tactics?

[ ] What agencies are identified as the leaders in teaching narcotics-related tactics and techniques?

[ ] Have you or your department received specialized training by those agencies?

[ ] Do you often exchange information with the staff or agents of those agencies either in a classroom setting or field setting?

[ ] Is that in an effort to develop a peer review of the practices currently in place?

[ ] Has your methodology been subjected to peer review?

[ ] Are the practices you use currently used by other experts in the area?

[ ] Has your technique or methodology been generally accepted in the relevant community?

[ ] Has your technique or methodology been derived naturally and directly out of research you conducted independent of this litigation, or have you developed your opinions expressly for purposes of testifying?

[ ] Have you adequately accounted for obvious alternative explanations than yours?

[ ] Is your field of expertise known to reach reliable results for the type of opinion given?

## HONORS AND COMMENDATIONS:

[ ] Have you ever been honored for your work in the field of narcotics-related activities?

[ ] When?

[ ] By whom?

## EXPERT TESTIMONY:

[ ] Have you ever been qualified in court as an expert?

[ ] When?

[ ] What court(s)?

[ ] What was your field of expertise?

[ ] Approximately how many times have you testified as an expert in narcotics-related fields?

If questions of the type listed above are asked by the prosecutor of the law enforcement officer he wishes to tender as an expert in narcotics-related matters, the mandates of *Daubert* and *Kumho* can easily be satisfied. As gatekeeper, the trial judge will then rigorously examine the specialized knowledge underlying the proffered non-scientific testimony of the law enforcement officer to determine if it is relevant and reliable. During the hearing on the proposed expert testimony, the trial judge will be able to examine not only the expert's qualifications but also his technique or methodology.

## VII. CONCLUSION

Prior to *Kumho*, there was no agreement among the lower federal courts as to the standard for admissibility of non-scientific testimony of expert witnesses. After *Kumho*, it should be clear that the *Daubert* factors, as well as other appropriate factors, apply to the admissibility of all expert testimony whether it is based on scientific or non-scientific principles. Moreover the factors should be applied flexibly by trial judges who may be faced with ruling on the admissibility of expert testimony. As gatekeeper, the trial judge has the responsibility to ensure that all expert testimony is both relevant and reliable.

In cases such as narcotics-related prosecutions, where the expert testimony is not based on science, but on experience and specialized knowledge, trial judges should rigorously examine the specialized knowledge underlying the proffered expert testimony just as they would when examining the scientific knowledge underlying proffered scientific expert testimony. In acting as a gatekeeper in narcotics-related matters, the court should consider such things as the witness's years of general law enforcement experience; years of specialized experience; undercover experience; participation in narcotics-related investigations; number of narcotics arrests; interviews conducted with defendants and suspects; schools attended and training received; lectures as part of the training process; supervision of others in the field; real world experience; agencies involved in training; duration of training; firsthand observation; and efforts to remain current in the field.

Trial judges should exclude a witness from testifying as a narcotics expert where there is no basis for the witness's findings; where the witness is unfamiliar with the field of expertise; where the witness failed to remain current in the field of expertise; where the witness failed to take advantage of courses offered or training within the field of expertise; where the expert failed to observe firsthand the experiences to which he is testifying; where the witness has exhibited no real world and hands on experience in the field of expertise; or where the witness has made no effort to update or refine changes in the field of expertise.

Because of the considerable discretion given to the trial judge as gatekeeper, the trial judge should be able to ensure that any narcotics expert, whether his testimony is based on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the narcotics field.

## APPENDIX

This appendix summarizes federal cases that were decided after *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[176] which discussed the use of expert testimony of law enforcement officers in narcotics-related cases. This summary is intended to show the diversity of topics that law enforcement officers have testified about in narcotics-related cases as well as to show the different approaches that were used by federal courts in discussing this issue.

### Selected Narcotics Cases Holding That The *Daubert* Principles Do Not Apply Beyond Scientific Expert Testimony

#### Fifth Circuit Court of Appeals

*United States v. Griffith*, 118 F.3d 318, 320-22 (5th Cir. 1997) (expert testimony on the meaning of jargon used in wiretapped conversations with another suspect).

#### Ninth Circuit Court of Appeals

*United States v. Plunk*, 153 F.3d 1011, 1016-19 (9th Cir. 1998) (expert testimony regarding narcotics code terminology).

*United States v. Ochoa*, No. 96-50007, 1997 WL 312601, at *1 (9th Cir. Jan. 7, 1997) (expert testimony regarding the modus operandi of drug dealers).

*United States v. Hale*, No. 96-10358, 1997 WL 599674, at *2 (9th Cir. Sept. 23, 1997) (expert testimony regarding the modus operandi of narcotics traffickers).

*United States v. Cordoba*, 104 F.3d 225, 229-30 (9th Cir. 1997) (expert testimony regarding the modus operandi of narcotics traffickers).

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[176] 113 S. Ct. 2786 (1993).

**Narcotics Cases Holding That The *Daubert* Principles Apply Both to Scientific and Non-scientific Expert Testimony**

**Sixth Circuit Court of Appeals**

*United States v. Harris*, 192 F.3d 580, 588-89 (6th Cir. 1999) (expert testimony describing methods and operations of street level drug dealers).

*United States v. Love*, No. 97-6360, 1999 WL 115523, at *8-9 (6th Cir. Feb. 8, 1999) (expert testimony on the slang terms, words and phrases used by individuals engaged in drug trafficking and about various methods of operations utilized by drug traffickers).

**Eighth Circuit Court of Appeals**

*United States v. Molina*, 172 F.3d 1048, 1056-57 (8th Cir. 1999) (post *Kumho* case) (expert testimony on indicia of drug trafficking such as drug distribution amounts, the use of guns, the use of aliases, and the use of surveilling partners).

**Tenth Circuit Court of Appeals**

*United States v. Muldrow*, 19 F.3d 1332, 1337-38 (10th Cir. 1994) (expert testimony about the amounts of cocaine commonly held for personal use and distribution).

**Narcotics Cases Holding That the Expert Testimony of Law Enforcement Officials is Admissible Without Any Reference to *Daubert* Factors**

**First Circuit Court of Appeals**

*United States v. Crass*, 50 F.3d 81, 83 (1st Cir. 1995) (expert testimony on value of street drugs).

*United States v. Valle*, 72 F.3d 210, 214-16 (1st Cir. 1995) (expert testimony on approximate street of straws of crack cocaine).

**Second Circuit Court of Appeals**

*United States v. Spencer*, Nos. 96-1280 (L), 97-1067, 1997 WL 592849, at *3 (2nd Cir. Sept. 23, 1997) (expert testimony about the typical practices of illegal narcotics organizations).

*United States v. Akinrosutu*, No. 96-1097, 1996 WL 414458, at *1 (2d Cir. July 25, 1996) (expert testimony regarding the fair market value of heroin in New York City between 1991 and 1993 and various factors, including the source country, which determine the price on the street).

*Headley v. Tilghman*, 53 F.3d 472, 475-76 (2d Cir. 1995) (expert testimony concerning drug-related use of items seized in apartment).

*United States v. Tapia-Ortiz*, 23 F.3d 738, 740-42 (2d Cir. 1994) (expert testimony regarding use of beepers and code numbers by narcotics traffickers and accounting books).

*United States v. Taylor*, 18 F.3d 55, 59 (2d Cir. 1994) (expert testimony that submachine guns are preferred by drug dealers as they offer good protection for a "very dangerous profession").

*United States v. Quiroz*, 13 F.3d 505, 514 (2d Cir. 1993) (expert testimony on the price of a kilogram of cocaine in New York City and the common practice of drug dealers to keep detailed financial records of their drug transactions, including "running tabs").

**Third Circuit Court of Appeals**

*United States v. Gibbs*, 190 F.3d 188, 211-14 (3d Cir. 1999) (expert testimony on the meaning of coded drug language).

**Fourth Circuit Court of Appeals**

*United States v. Alexander*, No. 99-4072, 1999 WL 694576, at *1 (4th Cir. Sep 08, 1999) (expert testimony on the methods of narcotics operations - why drug dealers would want to listen to police scanners).

*United States v. Borda*, Nos. 96-4752, 96-4807, 96-4753, 96-4856, 96-4806, 1999 WL 294540, at 9-10 (4th Cir. May 11, 1999) (expert testimony on language and codes of drug traffickers, although translations were in English and conversations were in Spanish)

*United States v. Wardrick*, Nos. 96-4831, 96-4908, 1998 WL 169223, at *4-5 (4th Cir. Apr.13, 1998) (expert testimony concerning specifics of the heroin trade such as drug traffickers using pagers, cellular phones and phone cards for communication).

*United States v. Gastiaburo*, 16 F.3d 582, 588-89 (4th Cir. 1994) (expert testimony that it is not uncommon for people transporting controlled substances to grant consent of law enforcement officers to search their possessions or their persons).

*United States v. Brewer*, 1 F.3d 1430, 1435-36 (4th Cir. 1993) (expert testimony regarding significance of extensive phone traffic between defendant and members of alleged drug ring).

**Fifth Circuit Court of Appeals**

*United States v. Speer*, 30 F.3d 605, 609-10 (5th Cir. 1994) (expert testimony that possession of 30 grams of cocaine and scale was consistent with narcotics trafficking).

*United States v. Washington*, 44 F.3d 1271, 1282-83 (5th Cir. 1995) (expert testimony regarding significance of certain conduct or methods of operation unique to drug distribution business).

**Sixth Circuit Court of Appeals**

*United States v. Flowal*, 163 F.3d 956, 961-62 (6th Cir. 1998) (expert testimony regarding cocaine distribution practices and street values of cocaine).

*United States v. Smith*, No. 96-1885, 1998 WL 385471, at *4-5 (6th Cir. June 29, 1998) (expert testimony that crack seized from defendant was intended for distribution).

*United States v. Garcia*, No. 95-1224, 1995 WL 712757, at *4-5 (6th Cir. Dec. 4, 1995) (expert testimony about jargon used by Hispanic drug dealers).

**Seventh Circuit Court of Appeals**

*United States v. White*, No., 97-3923, 1998 WL 447303, at *2 (7th Cir. July 15, 1998) (expert testimony on why perpetrators in drug transactions commonly use older vehicles).

*United States v. Brown*, 7 F.3d 648, 651-654 (7th Cir. 1993) (expert testimony that crack cocaine found in defendant's possession was intended for distribution).

*United States v. Doe*, 149 F.3d 634, 636-38 (7th Cir. 1998) (expert testimony on profile of Nigerian drug traffickers).

*United States v. Hubbard*, 61 F.3d 1261, 1274-75 (7th Cir. 1995) (expert testimony concerning cocaine trade in Chicago and employment by narcotics dealers of devices like secret compartment in automobiles).

*United States v. Lipscomb*, 14 F.3d 1236, 1239, 1242 (7th Cir. 1994) (expert testimony as to whether cocaine found on defendant was for street-level distribution).

*United States v. Mancillas*, 183 F.3d 682, 704-06 (7th Cir. 1999) (expert testimony regarding 420 grams of marijuana found in trunk of an automobile would be intended for distribution rather than personal consumption; the evidence that constitute the tools of the drug trade in the world of drug trafficking).

*United States v. Navarro*, 90 F.3d 1245, 1260-61 (7th Cir. 1996) (expert testimony regarding narcotics trafficking and the tools of the trade in the cocaine distribution industry).

*United States v. Nobles*, 69 F.3d 172, 182-84 (7th Cir. 1995) (expert testimony regarding clandestine nature of narcotics trafficking).

*United States v. Penny*, 60 F.3d 1257, 1260-61 (7th Cir. 1995) (expert testimony that drug dealers often use coffee beans in door frames to hide scent of drugs from dogs; techniques and methods used by drug dealers).

*United States v. Romero*, 57 F.3d 565, 570-72 (7th Cir. 1995) (expert testimony about amount and value and appearance of cocaine, and code words used in drug deal).

*United States v. Sanchez-Galvez*, 33 F.3d 829, 832 (7th Cir. 1994) (expert testimony on use of counter-surveillance in drug transactions).

*United States v. Stevenson*, 6 F.3d 1262, 1266-67 (7th Cir. 1993) (expert testimony on question of whether quantity that was seized qualified as a "distribution amount").

**Eighth Circuit Court of Appeals**

*United States v. Howard*, 169 F.3d 1127, 1130 (8th Cir. 1999) (expert testimony that trailer had been used to extract ephedrine from cold tablets and that it was probable that the white powder found in defendant's truck was the waste product from the cold tablets processed in the trailer).

*United States v. Brown*, 110 F.3d 605, 610-11 (8th Cir. 1997) (expert testimony that an apartment was a stash house for drugs; modus operandi of drug dealers).

*United States v. Cotton*, 22 F.3d 182, 184-85 (8th Cir. 1994) (expert testimony that amount of crack cocaine seized from defendant's house was indicative of distribution).

*United States v. Delpit*, 94 F.3d 1134, 1144-45 (8th Cir. 1996) (expert testimony on meaning of code words and slang terms).

*United States v. Fraga*, 172 F.3d 1048, 1056-578 (8th Cir. 1998) (expert testimony regarding indicia of the drug trafficking trade, such as drug distribution amounts, the use of guns, the use of aliases and the use of surveillance partners).

*United States v. Gibson*, 105 F.3d 1229, 1234-35 (8th Cir. 1997) (expert testimony regarding modus operandi of drug dealers).

*United States v. Hunter*, 95 F.3d 14, 17 (8th Cir. 1996) (expert testimony that a certain quantity of drugs suggests distribution rather than use).

*United States v. Mabry*, 3 F.3d 244, 247-48 (8th Cir. 1993) (expert testimony by experienced undercover narcotics buyer concerning amounts of phencyclidine (PCP) for users and sellers).

*United States v. Ortega*, 150 F.3d 937, 943-44 (8th Cir. 1998) (expert testimony on substances used by drug traffickers as cutting agent).

*United States v. Parker*, 32 F.3d 395, 400 (8th Cir. 1994) (expert testimony that certain entries in notebook were "drug notes").

*United States v. Santana*, 150 F.3d 860, 863 (8th Cir. 1998) (expert testimony on frequency with which fingerprints are recovered from plastic bags).

**Ninth Circuit Court of Appeals**

*United States v. Washington*, No. 97-10329, 1998 WL 231105, at *1 (9th Cir. May 1, 1998) (expert testimony about the circumstances often associated with narcotics sales).

*United States v. Langston*, No. 94-50519, No. 94-50519,1996 WL 39993, at *1 (9th Cir. Mar. 4, 1996) (expert testimony that it is common for purchasers of chemicals used to manufacture PCP to have knowledge of the intended use).

*United States v. Perkinson*, No. 98-10064, 1999 WL 191381, at *1 (9th Cir. Mar. 19, 1999) (expert testimony about the typical behavior of narcotics smugglers and smuggling operations).

*United States v. Turpin*, No. 95-10296, 1996 WL 218646, at *1 (9th Cir. Apr. 30, 1996) (expert testimony explaining the meaning of the coded language used by those in the drug trade).

*United States v. Yepez*, Nos. 94-50182, 94-50188, 1996 WL 337208 (9th Cir. June 18, 1996) (expert testimony on modus operandi of cocaine trafficking operations).

*United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995) (expert testimony that drug traffickers often employ counter-surveillance driving techniques, register cars in others' names, make narcotics and cash deliveries in public parking lots, and frequently use pagers and public telephones).

*United States v. Matte-Ballesteros*, No. 91-50165, 1995 WL 746007 (9th Cir. Dec. 15, 1995) (expert testimony on jargon used by drug dealers)

*United States v. Strydom*, 73 F.3d 371, 372 (9th Cir. 1995) (expert testimony regarding the value, purity, and projected dosage units of heroin).

*United States v. Lennix*, 18 F.3d 814, 821 (9th Cir. 1994) (expert testimony on length and time to grow marijuana, amount of marijuana it takes to make a cigarette, and amount of marijuana one could obtain from a single plant).

*United States v. Taren-Palma*, 997 F.2d 525, 528 (9th Cir. 1993), overruled on other grounds, *United States v. Shabani*, 513 U.S. 10 (expert testimony regarding use of guns in narcotics transactions).

**Tenth Circuit Court of Appeals**

*United States v. Peach*, 113 F.3d 1247, 1252-55 (10th Cir. 1997) (expert testimony on crack cocaine sales and differences between drug dealers and simple drug users).

*United States v. Qunitana*, 70 F.3d 1167, 1171 (10th Cir. 1995) (expert testimony on meaning of conversations recorded on wiretap tapes).

**District of Columbia Court of Appeals**

*United States v. Clark*, 24 F.3d 257, 268 (D.C. Cir. 1994) (expert testimony regarding the value of drugs).

*United States v. Moore*, 104 F.3d 377, 384 (D.C. Cir. 1997) (expert testimony that duct tape of sort found under hood of automobile was used by drug traffickers to restrain victims).

*United States v. Ramsey*, 165 F.3d 980, 984 (D.C. Cir. 1999) (expert testimony on drug trafficking).

*In Re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996) (expert testimony concerning modus operandi of individuals involved in drug trafficking).

*United States v. Watson*, 171 F.3d 695, 703 (D.C. Cir. 1998) (expert testimony regarding modus operandi of drug dealers).

# A New Segregation? Race, *Rice v. Cayetano*, and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools

John Tehranian*

## I. INTRODUCTION

It is the second-richest educational institution in the United States, yet many Americans have never heard of it; its multi-billion dollar endowment[1] is said to be larger than that of any institution of higher learning save Harvard University, yet it does not involve itself in post-secondary education; and years after *Brown v. Board of Education*[2] moved to put an end to racial segregation, it denies admission to all who do not meet its ancestry/blood-quantum requirement. It is the Kamehameha Schools Bishop Estate[3] ("KSBE")–a charitable educational trust that owns a startling ten percent of the Hawaiian Islands and commands an investment empire stretching from Beijing to Wall Street.[4]

Founded through the 1884 will of Princess Bernice Pauahi Bishop, the last of the *ali'i* descended directly from King Kamehameha, the KSBE has traditionally limited admissions to those of Hawaiian descent. As a result, Native Hawaiians alone have enjoyed the benefits of this affluent charitable trust. However, in the wake of two landmark Supreme Court decisions–*City*

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[1] Randall W. Roth, *Selected Estate and Gift Tax Developments*, SD51 A.L.I.-A.B.A. Course of Study Materials 823, 849 (Feb. 1999). Roth estimates a value of $10 billion, but there is no precise data available. *Id.*

[2] 347 U.S. 483 (1954).

[3] The KSBE has recently changed its official name to Kamehameha Schools in order to reflect its educational mission more clearly. For the purposes of this article, however, I am using its long-held name, Kamehameha Schools Bishop Estate, to retain consonance with prior court cases and scholarship.

[4] KSBE holds a whopping eleven percent stake in Goldman Sachs. Roth, *supra* note 1, at 849.

*of Richmond v. J.A. Croson Co.*[5] and *Adarand Constructors, Inc. v. Peña*[6]–and in light of the ambiguous racial/political status of Native Hawaiians, many have questioned the continued viability of Hawaiian-only education, and, in particular, the continued survival of the KSBE.

### *A. The Rising Constitutional Threat to Hawaiian-Only Educational Programs: The Legacy of Croson and Adarand*

The rising tide of attacks against Hawaiian-only education has come in three forms. First, direct federal government sponsorship of Hawaiian-only education, via such programs as the Native Hawaiian Education Act ("NHEA") of 1994,[7] may be unconstitutional. Adherents to this view argue that *Croson* and *Adarand* have radically altered the constitutional landscape of racial preferences by making any government support of racially-based programs, even remedial ones, subject to strict scrutiny and likely to fail a challenge on equal protection grounds. In the words of noted constitutional scholar Gerald Gunther, such scrutiny is typically "'strict' in theory, fatal in fact,"[8] and ordinarily cannot pass constitutional muster.[9]

At the same time, some observers have even argued that *Croson* and *Adarand* undermine the continued viability of the *Mancari* doctrine,[10] which immunizes special programs for American Indians[11] from equal-protection scrutiny. According to *Morton v. Mancari*,[12] American Indians are a political, rather than racial, group and programs according them special treatment come under the plenary powers granted to Congress in the Indian Commerce Clause.[13] However, in the quarter-century since *Mancari* was decided, the Supreme Court has grown increasingly hostile to any program that appears to accord special treatment on the basis of race. Moreover, there is a growing

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[5] 488 U.S. 469 (1989).

[6] 515 U.S. 200 (1995).

[7] *See* Native Hawaiian Education Act of 1994, 20 U.S.C. §§ 7901-12 (1998).

[8] Gerald Gunther, *The Supreme Court, 1971 Term–Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in part).

[9] It should be noted, however, that Justice O'Connor went out of her way in *Adarand* to suggest that this should not and need not be the case in the future. *See Adarand*, 515 U.S. at 237; *infra* section V.B.3.

[10] Referring to *Morton v. Mancari*, 417 U.S. 535 (1974).

[11] While I much prefer to use the word "Native American," I have chosen to use "American Indian" for the purposes of this article to avoid unnecessary confusion and to retain consonance with the vast majority of laws, which use the term "American Indian."

[12] 417 U.S. 535 (1974).

[13] *Id.* at 551-52.

view arguing that even if *Mancari* is still good law, Native Hawaiians do not come under its purview, as they do not constitute American Indians.[14]

Secondly, indirect government sponsorship of racially discriminatory organizations such as the KSBE, through the granting of non-profit, tax-exempt status, can constitute state action impermissible under the Constitution. Despite its restrictive admissions policy, the KSBE enjoys tax-exempt status from the federal government.[15] However, this status has come under fire in recent years.

Based on the "national policy to discourage racial discrimination in education,"[16] the IRS has, since 1970, refused to grant tax-exempt/charitable status[17] to any private school "not having a racially nondiscriminatory policy as to students."[18] Moreover, the IRS has announced that it will apply the *Bob Jones University v. United States* decision[19] to revoke tax-exemption to all racially restrictive trusts.[20] In the past, the Supreme Court has indicated that granting tax-exempt status in such instances, would constitute discriminatory state action prohibited by the Fifth and Fourteenth admendments.[21] Yet until recently, only invidious, white-only discrimination came under such constitutional scrutiny.

Third, and most seriously, should the courts find that the KSBE itself constitutes a state actor, the KSBE would be directly subjected to the Equal Protection Clause. Unlike the two prior methods of attack, this potential challenge is the most damaging to both the KSBE and the cause of Hawaiian-only education. If direct federal grants or continued tax-exempt status are declared unconstitutional, the KSBE can continue to survive, albeit with fewer economic resources. However, a court determination that the KSBE is a state actor could put the KSBE entirely out of the business of Hawaiian-only education. Future courts may draw upon this theory, first advanced by Hawai'i Supreme Court Justice Abe in his concurring opinion in *In Re Estate*

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[14] *See, e.g.*, Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996). *But see* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE LAW & POL'Y REV. 95 (1998).

[15] *See* Rick Daysog, *IRS Wants Bishop Trustees Out*, HONOLULU STAR BULLETIN, Apr. 28, 1999, at A1.

[16] Rev. Rul. 71-447, 1971-2 C.B. 230-1.

[17] *See* I.R.C. § 501(c)(3) (2000).

[18] Rev. Rul. 71-447, 1971-2 C.B. 231.

[19] 461 U.S. 574 (1983).

[20] Gen. Couns. Mem. 39,702 (July 13, 1989).

[21] *See* Bob Jones Univ. v. United States, 461 U.S. 574, 566-69 (1983); Green v. Connolly, 330 F. Supp. 1150, 1161-63 (D. D.C.) *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971) (per curiam).

*of Bishop*,[22] as Hawaiian-only education comes under attack in the litigation process.

### *B. Recent Developments: The KSBE Investigation and Rice v. Cayetano*

Within this general legal setting, the issue of Hawaiian-only education policies has grown even more controversial as a result of two recent events. First of all, since 1997, the Attorney General of Hawai'i has engaged in a large-scale investigation of the administration of the KSBE.[23] This investigation has produced evidence of mismanagement and waste by the KSBE's trustees and corrupt KSBE entanglements with the State of Hawai'i.[24] As a result, all of the KSBE's prior trustees have resigned and several have faced the threat of civil and criminal charges.[25] These events have garnered national media attention, with featured articles on the subject in the *Wall Street Journal* and *New York Times*,[26] and have led to calls for massive reform of the charitable educational trust.

One key area of focus has been the Schools' admissions policy–which limits acceptance to only those students who, *inter alia*, can trace their ancestry to the pre-1778 inhabitants of the Hawaiian Islands. Legal technicalities aside, this is tantamount to the possession of a minimum quantum of Native Hawaiian blood, as only the Native Hawaiian people inhabited the islands prior to 1778, the year of Captain Cook's arrival. In late 1997, Harold F. Rice, a Caucasian who traces his roots in Hawai'i back to 1837, and twenty other plaintiffs filed suit in federal court against former Secretary of Treasury, Robert Rubin, alleging that Rubin had improperly accorded tax-exempt status

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[22] *In re* Estate of Bishop, 53 Haw. 604, 611-12, 499 P.2d 670, 675 (1972) (Abe, J., concurring).

[23] *See* Paul M. Barrett, *Legal Beat: Tempest Erupts over Secretive Hawaiian Trust*, WALL STREET. J., Oct. 10, 1997, at B1.

[24] *See* Samuel King et al., *Broken Trust*, HONOLULU STAR BULLETIN, Aug. 9, 1997, at A1; Roth, *supra* note 1, at 849-56.

[25] For a synopsis of the events surrounding the trustee resignations, see Judge Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393, 396 n.18 (1999).

[26] *See* Barrett, *supra* note 23; Alix M. Freedman & Laurie P. Cohen, *Bishop's Gambit: Hawaiians Who Own Goldman Sachs Stake Play Clever Tax Game*, WALL STREET. J., Apr. 25, 1995, at A1; Todd S. Purdum, *Hawaiians Angrily Turn on a Fabled Empire*, N.Y. TIMES, Oct. 14, 1997, at A1. The KSBE scandal has even received coverage in legal textbooks. The new edition of Dukeminier and Johanson's popular *Wills, Trusts & Estates* textbook features a multi-paged spotlight on the investigation of KSBE's trustees and the charges they face for breach of fiduciary duties. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, & ESTATES 896-900 (6th ed. 2000).

to KSBE.[27] In his complaint, Rice claimed that tax-exempt status was impermissible because KSBE "enforces a strict policy of racial exclusion in the admission of students" to the Kamehameha Schools.[28] Consequently, Rice maintained that government support for the tax-exemption constitutes a violation of the equal protection component of the Fifth Amendment's Due Process Clause. Though dismissed on standing grounds, the case did not mark an end to the issue. The IRS, already in the midst of a massive audit of the KSBE since 1995,[29] has also looked into the possibility of revoking KSBE's tax-exempt status.[30] In late March of 1999, it announced that it had, for the time being, agreed to settle with the KSBE and allow it to retain its tax-exempt status. However, the issue could be reopened at any time. In part, the IRS was prevented from revoking tax-exempt status as it waited for clear legislative or judicial guidance on the constitutionality of the KSBE admissions policy.

This leads to the second recent event which threatens the continued viability of federal support for Hawaiian-only education: the decision of the Supreme Court in the case of *Rice v. Cayetano*.[31] The case, brought by the very same Harold F. Rice in the case of *Rice v. Rubin*,[32] alleges the unconstitutionality of the voting procedures for the Office of Hawaiian Affairs ("OHA"), a state agency which administers a $300 million trust benefiting approximately 200,000 descendants of the islands' original inhabitants.[33] As Rice contends, OHA voting requirements, as determined by the State of Hawai'i, violate the Fourteenth and Fifteenth Amendments of the United States Constitution by creating an explicit racial requirement for suffrage: Currently, only state residents with a quantum of Native Hawaiian blood are eligible to elect OHA officials. Rice garnered no support for his position from the federal court for the District of Hawai'i, which granted summary judgment in the case to the State,[34] and the Ninth Circuit,[35] which affirmed the lower court decision by finding no constitutional shortcoming in the OHA voting requirements. However, Rice obtained reversal at the Supreme Court.[36] Granted a writ of

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[27] *See* Rice v. Rubin, Civ. No. 97-01628 DAE (D. Haw. filed Dec. 17, 1997).

[28] Plaintiff's Complant ¶ 2, *Rice* (NO.97-01628 DAE).

[29] *See* DUKEMINIER & JOHANSON, *supra* note 27, at 899. The IRS has been investigating the KSBE and its trustees for self-dealing, conflicts of interest, and the use of improper perquisites. *Id.*

[30] *See* Roth, *supra* note 1, at 849.

[31] 528 U.S. 495 (2000).

[32] Civ. No. 97-01628 DAE (D. Haw. filed Dec. 17, 1997).

[33] *See Akana Ousted as OHA Chair; Hee Regains Leadership*, ASSOCIATED PRESS NEWSWIRES, Jan. 3, 2000, at 1.

[34] Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997).

[35] Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998).

[36] Rice v. Cayetano, 528 U.S. 495 (2000).

certiorari in March of 1999[37]–the same time at which the IRS declared a temporary settlement in its investigation of KSBE's tax-exempt status–oral arguments were heard in early October[38] and a decision was recently handed down. As expected by observers of the oral arguments,[39] the Supreme Court held that the blood-quantum requirement for OHA voting was unconstitutional under the Fifteenth Amendment.[40]

Though *Rice* does not deal explicitly with the issue of Native Hawaiian education, it has profound implications for the future of federal support for Hawaiian-only education. As a result, it is not surprising that KSBE hired Sidley & Austin and its chief appellate attorney Carter Phillips, one of the nation's most experienced Supreme Court litigators, to file an amicus brief supporting the respondents in the case.[41] Indeed, the High Court's ruling in *Rice* provides guidance as to whether Native Hawaiians truly come under the same political-status protections as other Native Americans and whether *Mancari* itself is still good law. This, in turn, plays a crucial role in determining the viability of Hawaiian-only education programs.

### *C. The KSBE and Hawaiian-Only Education in the Post-Rice Era*

This article will examine the constitutional viability of direct and indirect federal support for Hawaiian-only education programs as well as the very constitutionality of the KSBE itself. As I will argue, the rising constitutional assault on Hawaiian-only education is misguided. First, a direct suit against the constitutionality of the KSBE should fail on the grounds that it is not a state actor for the purposes of the Fourteenth Amendment. Moreover, a challenge against direct and indirect federal support for Hawaiian-only education should fail. Native Hawaiians, like other indigenous peoples of the United States, do indeed enjoy a special trust relationship with the federal government and consequently the courts should view them as constituting a political group, not a racial category. Thus, despite *Croson*, *Adarand*, and *Rice*, the rational basis test continues to apply to policies according preferential treatment to indigenous peoples, and a clear link between the Hawaiian-only education programs and the policy goals of the trust relationship appears to exist. Specific support earmarked by the federal government for Native

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[37] Rice v. Cayetano, 526 U.S. 1016 (1999).

[38] Transcript of Oral Argument, *Rice v. Cayetano*, 528 U.S. 495 (NO.98-818); 1999 WL 955376.

[39] *See* DeWayne Wickham, *Native Hawaiians Face Another Insult*, USA TODAY, Oct. 11, 1999, at 19A.

[40] *Rice*, 528 U.S. at 1048.

[41] Brief of Amicus Curiae Kamehameha Schools Bishop Estate, *Rice v. Cayetano*, 528 U.S. 495 (2000)(No. 98-818); 2000 WL 201127.

Hawaiian education, whether in the form of direct (outright grant programs) or indirect (tax-exempt status to institutions such as KSBE) subsidies by the federal government, is not in violation of the equal protection component of the Fifth Amendment's Due Process Clause.

Critics of Hawaiian-only education policies have misread *Mancari* and its progeny, which should apply to Native Hawaiians. Admittedly, the KSBE and its trustees may have wasted valuable resources that could have gone towards the betterment of the Native Hawaiian community. Moreover, the KSBE's performance as an educational institution has been less than stellar.[42] It is in desperate need of reform–reform that has only just begun. Nevertheless, its admissions policy must be respected. Indeed, the KSBE's admissions policy and direct federal programs for Native Hawaiian education play a vital role in the promotion of self-governance, self-sufficiency, and linguistic and cultural preservation for the Native Hawaiian people, a fact only strengthened in light of the events of the past century. Even if the courts apply strict scrutiny to Hawaiian-only education, there is a sufficiently compelling state interest in the benefits of the KSBE being exclusively derived by Native Hawaiians to enable Hawaiian-only education policies to pass constitutional muster. For these reasons, federal-government support of Hawaiian-only education, whether through direct spending programs or KSBE tax-exemption, is constitutional.[43]

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[42] Of course, this does not necessarily suggest that trustee mismanagement is solely or even primarily responsible for KSBE's educational shortcomings. The literature on the economics of education suggests a number of alternate explanations. For example, economists have found negative returns to scale at schools as large as KSBE. *See* Ilyana M. Kuziemko, *Does Elementary School Enrollment Size Affect Student Performance: Evidence from Panel and Instrumental-Variable Analysis* (2000) (unpublished manuscript)(on file with author). The low level of inter-school competition in Hawai'i may also reduce pressure on KSBE teachers and administrators to maximize student achievement. *See* Geoffrey C. Rapp, *Agency and Choice in Education: Does School Choice Enhance the Work Effort of Teachers?*, 8 EDUC. ECON. 37 (2000).

[43] One important caveat bears mentioning before proceeding any further. On a metanarrative level, the merits of the seemingly capricious distinction between racial and political groupings are ripe for criticism. *See generally*, John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000)(arguing that the Supreme Court jurisprudence has repeatedly reified the concept of race, inventing an arbitrary semiotic system through which to organize the world). For better or worse, however, race remains a critical notion in our society, and a concept around which our law is still organized. Thus, despite intellectual objections to the construction of racial groupings, I have utilized traditional conceptions of race for the purposes of this article. After all, in addressing the very real threat to the continued viability of Hawaiian-only education, this piece seeks to be more policy-oriented, less esoteric, and pointed towards real change now. However, this is not to suggest that broader critiques of the very distinction between racial and political groupings are either unwarranted or invalid. *See id.*

## II. THE CONSTITUTIONALITY OF THE KSBE

To begin with, the most serious threat to the KSBE and the future of Hawaiian-only education comes from the view that the KSBE represents a state actor directly subject to due process and equal protection requirements. If federal support of the KSBE and Native-Hawaiian education is found to be unconstitutional, whether directly through grants or indirectly through tax-exempt status, the KSBE could live on as a result of its tremendous wealth and could continue to limit admissions to Native Hawaiians. However, should the courts find the KSBE to constitute a state actor, the KSBE itself would be prohibited from maintaining its admissions policy. Thus, if opponents of Hawaiian-only education could win on this issue, they could remove the KSBE from its critical role in this area.

### *A. The KSBE as State Actor*

Whether the KSBE constitutes a state actor is a notoriously difficult determination to make, as no hard rules apply. The Supreme Court has held that inquiries about state action must be made on a case-by-case basis. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[44] The Ninth Circuit has also taken this position, holding that "there is no specific formula for determining state action."[45] Traditionally, the courts have muddled through four different state-actor tests:[46] [1] the traditional public function test;[47] [2] the state compulsion test;[48] [3] the nexus test;[49] and [4] the joint action test.[50] More recently, however, the Supreme Court has fused these four tests into three primary variables that lower courts should weigh: "[1] the extent to which the actor relies on governmental assistance and benefits; [2] whether the actor is performing a traditional governmental function; and [3] whether the

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[44] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[45] Howerton v. Gabica, 708 F.2d 380, 383 (9th Cir. 1983); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 501 (9th Cir. 1979); Melara v. Kennedy, 541 F.2d 802, 805 (9th Cir. 1976).

[46] *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982).

[47] *See* Lombard v. Louisiana, 373 U.S. 267 (1963); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

[48] *See* Adickes v. S.H. Kress & Co. 398 U.S. 144, 170 (1970).

[49] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79 (1972).

[50] *See* Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978); United States v. Price, 383 U.S. 787, 794 (1966).

injury caused is aggravated in a unique way by the incidents of governmental authority."[51]

On the first consideration, the KSBE has an abundance of wealth and can potentially refuse all federal assistance and benefits so as to immunize it from this prong of the state-actor test. On the second consideration, however, KSBE faces a more difficult challenge. In fact, in his concurring opinion in the *Estate of Bishop* case, Justice Abe finds the KSBE to be a state actor on the exclusive basis of the public-function test.[52]

According to Justice Abe, "education is perhaps the most important function of state and local government."[53] Based on this fact, and his observation that the KSBE is virtually indistinguishable from the public school system, Abe asserts KSBE's state-actor status. However, this syllogism does not hold up under scrutiny. No matter how important a public function education represents, it does not follow that all educational institutions constitute state actors. Otherwise, all parochial education would be unconstitutional. Justice Abe recognizes this point when he attempts to distinguish parochial schools from public schools, noting that "Kamehameha Schools is indistinguishable from any public school in the State of Hawaii . . . . Its curriculum is substantially identical to the curriculum of any public school. Students are not required to be of any particular religious affiliation for admission, and the school is not run by any religious sect."[54] However, the division between public and private schools is not necessarily religiously-based. According to Justice Abe's logic, all non-denominational private schools would be subject to the Fourteenth Amendment, as they would be deemed state actors. Besides the detrimental consequences this would have on parental choice and educational freedom, no court has ever upheld this proposition.

Furthermore, though elementary and secondary education has historically been a vital public function, there is less truth to this observation with each passing year. Given the increased support for school choice, educational privatization, and voucher plans, the direct operation of schools is becoming less of a public function in the twenty first century.

Moreover, it is a matter of great dispute whether KSBE is truly indistinguishable from a public school. First of all, unlike a Hawai'i public school, the KSBE actually involves itself in post-secondary education by providing substantial sums of money through scholarships and grants to Native Hawaiian students for post-secondary education, including post-collegiate degree programs. Thus, the KSBE has a much more extensive scope than a

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[51] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991) (citations omitted).

[52] *In re* Estate of Bishop, 53 Haw. 604, 610-13, 499 P.2d 670, 674-76 (1972)(Abe, J., concurring).

[53] *Id.* at 613, 499 P.2d at 676 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[54] *Id.*

typical grade school or high school. Secondly, while there is no religious affiliation requirement for admission to the school, the educational mission of the school does contain an explicitly Christian component that would be impermissible at public schools.[55] This component goes to the core of the separation of private schools from public ones, and the exemption that private schools receive from due process and equal-protection application.

Most importantly, in the years since Justice Abe's opinion, the Supreme Court has allowed private schools to continue to enforce policies that are blatantly discriminatory without subjecting them directly to the requirements of the Fourteenth Amendment. In *Bob Jones University v. United States*,[56] the Supreme Court held that nonprofit private schools that enforce racially discriminatory policies, even if they are based on religious doctrine, do not qualify for tax-exempt status on the basis of the equal protection component of the Fifth Amendment's Due Process Clause.[57] As the Court ruled, the granting of tax-exemption by the federal government constitutes state action.[58] However, the Court refused to go the way of *Brown v. Board of Education*[59] and take the additional step of nullifying the racially discriminatory policies. Neither school was seen as a state actor in and of itself.

### *B. Attacking the KSBE as a Private Entity*

Thus, the KSBE likely does not constitute a state actor for the purposes of the Fourteenth Amendment. However, the federal government has forced wholly private entities to end discriminatory policies before. Such suits have come under 42 U.S.C. § 1981, a statute that passed pursuant to the federal government's enforcement power in section two of the Thirteenth Amendment[60] and a statute that consequently has no state actor requirement. The most salient case in this area, *Runyon v. McCrory*,[61] involved a § 1981 action[62] against a series of private Virginia schools with racially discriminatory admissions policies. As the Supreme Court held in *Runyon*, the schools' discriminatory admissions policies constituted a violation of federal law even though the schools were wholly private entities, as § 1981 forbids all racial

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[55] *See* Loring Gardner Hudson, *The History of the Kamehameha Schools* 17 (1935)(unpublished M.A. thesis, University of Hawai'i)(on file at Hamilton Library, University of Hawai'i, Manoa).

[56] 461 U.S. 574 (1983).

[57] *See id.* at 604.

[58] *See id.* at 603.

[59] 347 U.S. 483 (1954).

[60] U.S. CONST. amend. XIII, § 2.

[61] 427 U.S. 160 (1976).

[62] Referring to actions brought under 42 § 1981.

discrimination in both private and public contracts.[63] For better or worse,[64] however, § 1981's language is inapplicable to the KSBE's admissions policy. As § 1981 dictates:

> All 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 enjoy by the white citizens.[65]

Thus, the baseline for a § 1981 violation is the rights and privileges enjoyed by white citizens. The KSBE, on the other hand, denies admission to any individuals of wholly caucasian descent who cannot trace their ancestry back to 1778 Hawai'i. Thus, no one can pursue a legitimate § 1981 action against the KSBE, since the KSBE is not denying anyone a privilege given to white citizens.

All told, the KSBE does not appear to constitute a state actor for the purposes of the equal protection doctrine. Moreover, due to the limitations of § 1981, it appears immune from Thirteenth Amendment enforcement under current federal law. No matter how discriminatory some individuals view its admissions policy, the KSBE itself is not unconstitutional. However, Hawaiian-only education faces a very real threat on two constitutional fronts–an equal protection challenge to the KSBE's tax-exempt status and an equal protection challenge to such programs as the NHEA which provide funding for Hawaiian-only education.

## III. RACIAL VERSUS POLITICAL CLASSIFICATION: SHOULD THE COURTS VIEW NATIVE HAWAIIANS AS CONSTITUTIONALLY AKIN TO AMERICAN INDIANS?

In order to analyze the viability of Hawaiian-only education programs, it is first necessary to examine the constitutional issues that make up federal policy towards indigenous peoples of the United States. In particular, the viability of Hawaiian education programs rests largely on whether Native Hawaiians are viewed as a race or a political group for purposes of equal-protection law. The answer to this question determines the scrutiny to which Hawaiian-only policies will be subjected; this, in turn, largely determines the ability of such policies to pass constitutional muster.

As the Supreme Court has repeatedly affirmed, American Indians constitute a political, rather than racial, group, for they possess a special trust relationship

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[63] *See id.* at 168, 174-75.

[64] For a critical assessment of §1981, see Tehranian, *supra* note 43, at 842-46.

[65] 42 U.S.C. § 1981 (1998).

with the federal government. Moreover, case law suggests that this special political status applies to all American Indians, regardless of tribal membership. This point is crucial to the applicability of American Indian precedent to the case of Native Hawaiians, who were never organized in strict tribal structures in the American Indian sense.

### *A. The Political Classification of American Indians*

First of all, the Supreme Court has long recognized the unique legal status of American Indians.[66] In *Morton v. Mancari*,[67] the Court solidified this unique legal status. The *Mancari* court rejected an equal protection challenge to an employment preference for American Indians at the Bureau of Indian Affairs ("BIA").[68] The Court held that the preference, codified in the Indian Reorganization Act ("IRA") of 1934,[69] did not conflict with the Equal Employment Opportunity Act of 1972 ("EEOA"), which proscribes discrimination in federal government employment of the basis of race.[70] As the Court held, American Indians constitute a political, not racial, group,[71] for the federal government has a trust obligation towards American Indian tribes.[72] This special relationship stems from the unique history between the federal government and American Indians, since the United States "overcame the Indians and took possession of their lands, sometimes by force . . . ."[73] In response to this history of war and conquest, the United States has undertaken the duty to "prepare the Indians to take their place as independent, qualified members of the modern body politic" through the creation of special programs for American Indians.[74] With their emphasis on political self-determination and self-sufficiency, American Indian programs constitute a specific response to the issues of sovereignty long plaguing relations between the federal government and the indigenous peoples of the United States. As a result, programs geared towards fulfilling the government's trust obligation to the American Indians constitute political, rather than race-based, preferences.

Critics of federal government support for preferential treatment of Native Hawaiians contend that *Mancari* does not apply to Native Hawaiians, since they do not possess a tribal form of organization. However, the special

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[66] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[67] 417 U.S. 535 (1974).

[68] *Id.* at 555.

[69] 25 U.S.C. § 472 (1998).

[70] *Mancari*, 417 U.S. at 552-55.

[71] *Id.* at 553 n.24.

[72] *See id.* at 541-42, 551-54.

[73] Bd. of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

[74] *Id.* (quoting *Mancari*, 417 U.S. at 552).

relationship between the federal government and American Indians that makes American Indians a political rather than racial group applies not only to tribes but to individuals as well. "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself," wrote the *Mancari* court.[75] Admittedly, a central portion of the decision relied on the trust relationship between the federal government and the American Indian tribes and Congress's plenary power–derived from the Constitution–to "regulate Commerce . . . with the Indian Tribes."[76] This has lead some observers, such as Stuart Minor Benjamin, to argue that the *Mancari* court:

> found that the relevant definition [used to allocate preferences to American Indians in the case] was political, even though it was effectively limited to members of a particular ethnic group, because there was a further limitation to tribal members; those individuals who were racially American Indians but who were not members of a tribe were excluded from the definition.[77]

Robert Bork has also concurred in this position, arguing that *Mancari* only provided rational-basis review to legislation dealing exclusively with American Indian tribes and reservations.[78]

However, this description is only partly accurate. First, the *Mancari* court may have actually upheld a congressional statute that gave preferences to American Indians whether they were members of a recognized tribe or not, even though the implementing BIA regulation applied to only members of federally-recognized tribes.[79]

Moreover, both Benjamin and Bork completely ignore the implications of Supreme Court decisions subsequent to *Mancari*. In fact, both *United States v. John*[80] and *Delaware Tribal Business Committee v. Weeks*[81] held that no constitutional problems arose from the provision of benefits or the establishment of separate legal regimes for *individual* American Indians who

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[75] *Mancari*, 417 U.S. at 551-52.

[76] U.S. CONST. art. I, § 8, cl. 3.

[77] Benjamin, *supra* note 14, at 569-70.

[78] *See* Brief of Amicus Curiae Center for Equal Opportunity ("CEO") et al., *Rice v. Cayetano*, 528 U.S. 495 (2000)(No. 98-818); 1999 WL 345639, at * 27.

[79] Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1762 (1997). The statute at issue, the Indian Reorganization Act, applied to members of federally recognized Indian tribes and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479 (1998). It should also be noted that the preference upheld contained an explicit, individualized racial component. *Mancari*, 417 U.S. at 553 n.24. Thus, "[e]ven under the regulation, then, race, as measured by blood quantum, was a but-for requirement of eligibility for the preference." *Id.*

[80] 437 U.S. 634 (1978).

[81] 430 U.S. 73 (1977).

are *not* members of federally recognized tribes, so long as the programs related rationally to the advancement of self-government, self-sufficiency, or native culture.[82] Thus, the Supreme Court has upheld preferential treatment of American Indians on the basis of political status without regard to tribal membership.[83]

In *Weeks*, the Court upheld a policy that distributed funds authorized by an act of Congress[84] to the heirs of two federally recognized tribes–the Cherokee Delaware Tribe and the Absentee Delaware–even though many of the heirs receiving the benefits were not members of any tribe.[85] Justice Blackmun, who wrote the majority opinion in *Mancari*, concurred in the ruling, arguing that:

> we must acknowledge that there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong . . . . In light of the difficulty in determining appropriate standards for the selection of those who are to receive the benefits, I cannot say that the distribution directed by the Congress is unreasonable and constitutionally impermissible.[86]

With *John*, Justice Blackmun and the Supreme Court further affirmed the view that preferential treatment of tribal and non-tribal American Indians alike does not violate the Equal Protection Clause.[87] In a unanimous opinion written by Justice Blackmun, the Court acknowledged that the Mississippi Choctaws were not a federally recognized tribe.[88] Nevertheless, the Court upheld the power of Congress to establish a separate legal regime for the non-tribal American Indians, thereby rejecting a strict interpretation of the plenary powers contained in the Indian Commerce Clause.[89] As Blackmun reasoned, the federal action was permissible since it contained a rational link to the advancement of self-government for the indigenous people in question.

Thus, both *Weeks* and *John* make it clear that the *Mancari* ruling on the rational-basis test applies to both tribal and non-tribal American Indians. What is particularly significant about the *Weeks* and *John* decisions is the fact that they were supported by Blackmun, who authored the *Mancari* decision. As Professor Jon Van Dyke notes, "[n]o absolutes–certainly not the rigid limitation against aiding nontribal natives which Professor Benjamin erroneously promotes–have emerged to limit the power of Congress."[90]

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[82] *See* Van Dyke, *supra* note 14, at 115-17.

[83] *See* Rice v. Cayetano, 941 F. Supp. 1529, 1542 (D. Haw. 1996).

[84] 25 U.S.C. §§ 1291-1297 (1970 ed., Supp. V).

[85] *See Weeks*, 430 U.S. at 82 n.14.

[86] *Id.* at 91 (Blackmun, J., concurring).

[87] *See John*, 437 U.S. at 652-54.

[88] *See id.* at 650 n.20.

[89] *Id.* at 652 (interpreting U.S. CONST. art. I, § 8, cl. 3).

[90] Van Dyke, *supra* note 14, at 117-18.

Simply put, the plenary power granted to Congress via the Indian Commerce Clause is not limited to tribal American Indians. Furthermore, the special trust relationship between the federal government and American Indians extends beyond tribal boundaries. Thus, the fact that native Hawaiians are not organized into tribes is irrelevant to a *Mancari* analysis, as *Mancari* and its progeny apply to both tribal and non-tribal Native Americans like.

### *B. The Political Classification of Native Hawaiians*

Although the Supreme Court has never spoken directly to the issue, Hawaiian history, legislative precedent, and prior case law all suggest that Native Hawaiians constitute an indigenous people representing a political class for the purposes of equal-protection challenges. Admittedly, the administrative procedures used to establish federal recognition of a tribe exclude indigenous people living outside of the continental United States.[91] However, as *Mancari* and its progeny dictate, tribal status is not necessary for American Indians to receive political, rather than racial, recognition by the courts. The federal government can provide preferential treatment for both tribal and non-tribal American Indians so long as the preferences are rationally related to the advancement of self-sufficiency, self-government, and native culture. Thus, recognition of tribal status is not dispositive in determining whether Native Hawaiians constitute a political or racial group.[92] The admissions policy of the Kamehameha Schools Bishop Estate and the eligibility requirements of the Native Hawaiian Education Act of 1994 both engage in political classification, not racial discrimination, and Native Hawaiians are sufficiently akin to American Indians for the purposes of equal protection challenges.

Congress, of course, derives its plenary, politically-based authority to deal with American Indians from the Constitution's Indian Commerce Clause.[93] As Jon Van Dyke argues, the Clause "must be understood in the generic sense, referring to historical and cultural groupings of native people."[94] This view is strongly affirmed by the consistent use of the term "Indian tribe" by courts to refer to any indigenous people who originally occupied lands that have now become a part of the United States. As established above,[95] the Supreme Court has interpreted the Indian Commerce Clause broadly, applying its terms to non-tribal Indians.[96] Moreover, in favoring an expansive view of who

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[91] *See* 25 C.F.R. § 83.3 (1978).

[92] *See* Rice v. Cayetano, 941 F. Supp. 1529, 1542 (D. Haw. 1996).

[93] U.S. CONST. art. I, § 8, cl. 3.

[94] Van Dyke, *supra* note 14, at 113.

[95] *See supra* section III.A.

[96] *See* United States v. John, 437 U.S. 634 (1978); Del. Tribal Bus. Comm. v. Weeks, 430

qualifies as American Indians, the Ninth Circuit has stated that "the word 'Indian' is commonly used in this country to mean 'the aborigines of America.'"[97] Thus, the word could encompass those groups originally inhabiting the current United States properties prior to the arrival of Europeans. Such a group would include those individuals residing in the Hawaiian Islands prior to the landing of Captain Cook in 1778. Indeed, there is ample evidence that this is what the Founding Fathers meant by the term "Indian tribes."[98] Consequently, it is quite ironic that a constitutional originalist such as Robert Bork[99] should be so quick to adopt the more restrictive, modern ethnographic meaning of the term "tribe"[100] and so eager to ignore what the Framers themselves meant by the term.

The case of Alaskan Natives is particularly instructive on the prevailing interpretation of the Indian Commerce Clause. Alaskan Eskimos have repeatedly received status as American Indians, enjoying rational basis review in preferential programs geared towards them, even at the Supreme Court level.[101] Yet, Alaskan Eskimos are viewed by modern scholars as linguistically, culturally and ancestrally distinct from American Indians, and their nomadic villages are not described as tribes.[102] Thus, the courts have explicitly rejected a narrow understanding of Congress' plenary powers with respect to the "Indian tribes."

Furthermore, in the limited number of cases examining equal protection issues related to Native Hawaiians, the courts have held that Native Hawaiians, like other American Indians, enjoy a unique political status for the purposes of equal protection challenges.[103] For example, in upholding the

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U.S. 73 (1977).

[97] Pence v. Kleppe, 529 F.2d 135, 139 (9th Cir. 1976); *see also* Naliielua v. Hawaii, 795 F. Supp. 1009, 1013 (D. Haw. 1990).

[98] For an excellent perspective on the Founding Father's use of the word "tribe" as compared to its modern ethnographic meaning, see Brief of Amicus Curiae Alaska Federation of Natives, at 3-11, *Rice v. Cayetano*, 528 U.S. 495 (2000)(No. 98-818); 2000 WL 201127.

[99] Bork's originalist constitutional persuasions are well documented. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA (1990).

[100] *See* Brief of Amicus Curiae CEO et al., *supra* note 78, at *27.

[101] *See* Alaska Pac. Fisheries v. United States, 348 U.S. 78 (1918); Williams v. Babbit, 115 F.3d 657, 665 (9th Cir. 1997); Native Vill. of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992); Alaska v. Annete Island Packing Co., 289 F. 671 (9th Cir. 1923), *cert. denied*, 263 U.S. 708 (1923); Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Eric v. Dep't of Hous. & Urban Dev., 464 F. Supp. 44 (D. Alaska 1978).

[102] *See* Brief of Amicus Curiae Alaska Federation of Natives, *supra* note 98, at *1-2.

[103] *See* Naliielua v. Hawaii, 795 F. Supp. 1009, 1013 (D. Haw. 1990); Rice v. Cayetano, 941 F. Supp. 1529, 1541-42 (D. Haw. 1996); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338-39, 640 P.2d 1161, 1168 (1982).

constitutionality of the Hawaiian Homes Commission Act against an equal-protection challenge, the court in *Naliielua v. Hawaii*[104] ruled that:

> Although Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, . . . for purposes of equal protection analysis, the distinction plaintiffs seek to draw [between Native Hawaiians and American Indians] is meritless . . . . Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States . . . .[105]

Contrary to the claims of Harold Rice and Robert Bork,[106] the absence of a specific "Hawaiian Commerce Clause" in the Constitution is not dispositive. After all, the Constitution was framed only a few years after the Hawaiian Islands were discovered by Westerners and a century before the Hawaiian Islands became a territory of the United States.[107]

Moreover, the courts have consistently acknowledged a special responsibility to the Native Hawaiian people. In *Pai 'Ohana v. United States*,[108] the courts recognized the special duty that the government has to protect certain access rights of Native Hawaiians to land for subsistence, cultural, and religious purposes, thereby upholding the Hawai'i Constitution's specific enumeration of rights reserved exclusively for Native Hawaiians.[109] Although this responsibility was ultimately transferred from the federal government to the State of Hawai'i with the Statehood Admission Act,[110] the trust obligation is still rooted in federal law.[111] Although the state has become the primary trustee of the Native Hawaiians, this does not preclude a federal role in the relationship.

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[104] 795 F. Supp. 1009 (D. Haw. 1990).

[105] Id. at 1012-13.

[106] Brief of Amicus Curiae CEO et al., *supra* note 78, at *29.

[107] The absence of a Hawaiian Commerce Clause in the Constitution is not surprising since Hawai'i was not a part of the United States in 1787. It is instructive to note that Alaska was not a part of the United States at that time either and the courts have had no problem applying the Indian Commerce Clause to Alaskan Natives. *See* Alaska Pacific Fisheries v. United States, 348 U.S. 78 (1918); Williams v. Babbit, 115 F.3d 657, 665 (9th Cir. 1997); Native Vill. of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992); Alaska v. Annete Island Packing Co., 289 F. 671 (9th Cir. 1923), *cert. denied*, 263 U.S. 708 (1923); Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Eric v. Dep't of Hous. & Urban Dev., 464 F. Supp. 44 (D. Alaska 1978).

[108] 875 F. Supp. 680 (D. Haw. 1995), *aff'd*, 76 F.3d 280 (9th Cir. 1995).

[109] *Id.* at 687-88 (citing to HAW. CONST. art. XII, § 7).

[110] Pub. L. No. 86-3, 73 Stat. 4 (1959).

[111] *See* Keaukaha-Paneawa Cmty. Assoc. v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1472 (9th Cir. 1984).

Indeed, the Joint Resolution on the Overthrow of Hawai'i ("Apology Bill")[112] explicitly supports a continuing federal role in the relationship by acknowledging the "deprivation of the rights of Native Hawaiians to self-determination" by agents and citizens of the United States and by expressing the federal government's "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."[113] These reconciliation efforts are political in nature, not racial, for the Apology Bill recognizes that the "inherent sovereignty,"[114] of the Native Hawaiian people was never properly relinquished to the United States. It is of crucial significance that the Apology Bill couches the relationship with the Native Hawaiian people in political rather than racial terms.

The Apology Bill also undermines the revisionist views embraced by opponents of preferential programs for Native Hawaiians. Contrary to the claims of some observers, preferential programs for Native Hawaiians are not enacted as benign racial programs seeking to remedy past discrimination. A history of discriminatory, second-class status, however real, is not charged here. Instead, what is at issue is the illegitimate overthrow of a sovereign kingdom in violation of international law and rectification measures for the destruction of a peoples' language, culture, autonomy, self-sufficiency, and self-governance. It is now well-established that the Hawaiian people never consented to American annexation.[115] Instead, a small group of expatriate Americans of European descent forcibly overthrew the Native Hawaiian monarchy and then petitioned for annexation by the United States.[116] Like other indigenous peoples living on the land that now makes up the United States, the Native Hawaiians lost their land involuntarily, through a process of coercion and conquest. Thus, in the Apology Bill, Congress recognized the illegitimate "overthrow of the Kingdom of Hawaii," a term that admits the absence of consent in the annexation process, and declared that the "inherent sovereignty"[117] of the Native Hawaiian people was never properly relinquished to the United States. The special trust relationship between the federal government and the Native Hawaiian people exists, just as it does with the

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[112] Joint Resolution on the Overthrow of Hawai'i ("Apology Bill"), Pub. L. 103-150, 107 Stat. 1512 (1993).

[113] *Id.* § 1.

[114] *Id.*

[115] *See* Jennifer M.L. Chock, Note, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995).

[116] *See* Mark A. Inciong, Note, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, 8 ARIZ. J. INT'L & COMP. L. 171, 174 (1991).

[117] Apology Bill, § 1.

American Indian people, in order to rectify some of the injustices that were perpetuated upon the prior sovereign. Congressional authority via the Indian Commerce Clause therefore extends to the Hawaiian people, especially in light of their history of interaction with the federal government.

The courts have acknowledged the unique and special nature of the relationship between the federal government and American Indians to justify the group's treatment as a political, rather than racial, category. But it is possible that future jurisprudence could exclude Native Hawaiians from such a relationship by arguing that American Indians alone enjoy a unique status both as a separate people with their own political and cultural institutions and as a group with whom the federal government shares a trust-like obligation. Indeed, courts could look to *Williams v. Babbit*[118] to support this proposition, for it reads *Mancari* as "shielding only those statutes that affect uniquely Indian interests."[119] However, such a view would ignore the historical context of federal government relations with the Hawaiian people.

First of all, programs intended to benefit Native Hawaiians have consistently been viewed as political extensions of a special trust relationship, not racial preferences subject to strict scrutiny. Like Native Americans from the forty-eight contiguous states, Native Hawaiians enjoy a special relationship with the federal government, even though they lack formal recognition as a tribe. The Hawaiian Homes Commission Act ("HHCA"), which set aside some public lands as Hawaiian home lands, recognizes this special trust relationship between Hawaiians and the federal government:

> In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and the Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the provisions of this Act on behalf of the Native Hawaiian beneficiaries of the Act.[120]

Indeed, according to the House Report drafting the HHCA:

> The Hawaiian home lands are placed under the control of the commission to be used and disposed of for the purpose of aiding Native Hawaiians . . . . The commission is required to pay all delinquent taxes upon such lands in order to prevent their being sold and thus passing out of the control of the commission.[121]

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[118] 115 F.3d 657 (9th Cir.1997).

[119] *Id.* at 665.

[120] Hawaiian Homes Commission Act of 1920, ch. 42, § 101(c), 42 Stat. 108 (responsibility ultimately transferred to the State of Hawai'i via the Statehood Admission Act of 1959); *see also* Rice v. Cayetano, 963 F. Supp. 1547, 1551 (D. Haw. 1997).

[121] H.R. REP. NO. 66-839, at 8 (1920).

It is crucial to note that "[t]he above two duties, control of the 'corpus' of the trust and payment of taxes on trust lands, are classic duties of a trustee in a trust relationship."[122] Thus, most courts and commentators have agreed that a trust relationship exists between the Native Hawaiian people and the federal government.[123]

Furthermore, a Supreme Court ruling that *Mancari* is inapplicable to Native Hawaiians would ignore the existence of this trust relationship, evidenced in the host of public assistance programs and preferential policies to which the trust relationship has given rise. To start with, Hawaiians have repeatedly received classification as American Indians and received benefits in a wide variety of public programs administered by the federal government since statehood.[124] The Native Hawaiian Education Act of 1994[125] even targets Native Hawaiians alone. Drawing on the spirit of the Apology Bill, the Act notes that Congress has repeatedly "affirmed the special relationship between the United States and the native Hawaiians."[126] The choice of words in the statute is particularly significant, as "special relationship" is the term historically used by Congress to denote the political relationship between the federal government and American Indians.[127] It is this term that removes preferential and separate programs for American Indians from the sphere of racial discrimination.[128]

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[122] Inciong, *supra* note 116, at 176; *see also* GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 541, 602 (2d ed. 1980).

[123] *See* S. REP. NO. 100-36, at 9-11 (1987); Inciong, *supra* note 116, at 176.

[124] *See* National Historical Preservation Act of 1966, 16 U.S.C. §§ 470-71 (1998); National Museum of the American Indian Act of 1989, 20 U.S.C. § 80q (1998); Drug Abuse Prevention, Treatment, and Rehabilitation Act of 1983, 21 U.S.C. § 1177(d) (1998); American Indian Languages Act of 1990, 25 U.S.C. § 2901 (1998); American Indian Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001 (1998); American Indian Employment and Training Programs in the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, § 302, 92 Stat. 1909 (1978) (codified as amended in scattered section of 29 U.S.C.); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1998); American Indian Programs Act of 1974, 42 U.S.C. §§ 2991 (1998); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1983, 42 U.S.C. § 4577(c)(4) (1998); Cranston-Gonzalez National Affordable Housing Act of 1990, 42 U.S.C. § 12701 (1998). The legislation cited here clearly undermines the claim that every statute dealing with special treatment of Native Americans singles out only those tribal Native Americans on or near reservations for that special treatment.

[125] 20 U.S.C. §§ 7901-12 (1998).

[126] 20 U.S.C. § 7902 (1998).

[127] *See* Van Dyke, *supra* note 14, at 108.

[128] *See* Morton v. Mancari, 417 U.S. 535, 552-53 (1974).

In all, courts have continually upheld special treatment of Native Hawaiians against equal-protection challenges. Although the Supreme Court has not spoken directly to the issue:[129]

> the state and federal court in Hawai'i, as well as the United States Court of Appeals for the Ninth Circuit, have applied the *Mancari* approach broadly to cover all native people, and have consistently ruled that separate and preferential programs for Native Hawaiians are 'political' rather than 'racial' and thus must be evaluated under the 'rational basis' level of judicial review that applies to other native people.[130]

The justification for this body of precedent is simple: Native Hawaiians constitute American Indians for the purposes of equal protection challenges. They have "developed their own trust relationship with the federal government as demonstrated by the passage of the [Hawaiian Homes Commission Act and a host of other legislation] and because Native Hawaiians were not being excluded from beneficial legislation in the same manner as unacknowledged mainland United States Indian tribes."[131]

## III. APPLYING THE CORRECT STANDARD OF REVIEW: ADARAND, CROSON, AND THE THREAT OF STRICT SCRUTINY TO HAWAIIAN-ONLY REQUIREMENTS IN EDUCATION POLICY

### *A. The Reach of Mancari and Its Progeny: American Indian Legislation and Beyond*

With *Morton v. Mancari*,[132] the Supreme Court specified that rational-basis review would apply to preferential legislation geared towards the indigenous peoples of the United States.[133] As the Court argued, the EEOA did not apply to the case at hand since employment preferences to American Indians under the IPA constituted political, not racial, classifications and preferences:[134] "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[135] Thus, the Supreme Court established a rational basis test to ascertain the equal protection status for such preferential treatment of American Indians.

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[129] The Supreme Court decided *Rice* on narrow, Fifteenth Amendment grounds. *See infra* section IV.C.

[130] Van Dyke, *supra* note 14, at 119.

[131] Rice v. Cayetano, 963 F. Supp. 1547, 1553 (D. Haw. 1997).

[132] 417 U.S. 535 (1974).

[133] *Id.* at 555.

[134] *Id.* at 554 n.24.

[135] *Id.* at 555.

Since *Mancari*, the Supreme Court has never overturned a federal statute or treaty affecting indigenous people and has consistently upheld the constitutionality of benefit programs aimed at indigenous peoples.[136] Indeed, the Supreme Court has followed *Mancari* in unanimously upholding federally-based programs for native peoples.[137] *Washington v. Yakima Nation*[138] represented one of the last cases to address the constitutionality of laws that single out American Indians. With an air of finality, the case concluded that "it is settled that 'the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.'"[139]

The Court has not heard cases involving equal protection and the constitutionality of preferential-benefit programs for American Indians in a number of years. Indeed, with *Livingston v. Ewing*,[140] the Court began to deny certiorari to such cases. However, on related issues, the Court has continued to cite *Mancari* favorably, reaffirming its solidity as controlling law.[141] Furthermore, judicial preferences for American Indians have continued to receive the Court's blessing.[142]

### *B. Croson and Adarand: The Viability of the Mancari Doctrine in the World of Strict Scrutiny for All Racial Preferences*

In recent years, two landmark Supreme Court decisions, *City of Richmond v. J.A. Croson Co.*[143] and *Adarand Constructors, Inc. v. Peña*[144] have radically altered the constitutional landscape of racial preferences. Both cases apply a strict scrutiny/compelling-state-interest standard to all racial classifications and

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[136] *See* Benjamin, *supra* note 14, at 548.

[137] *See* Washington v. Wash. State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); Washington v. Confederated Bands of the Yakima Indian Nation, 439 U.S. 463 (1979); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Fisher v. Dist. County Court, 424 U.S. 382 (1976); Moe v. Confederated Salish of Flathead Indian Reservation, 425 U.S. 463 (1976); Antoine v. Washington, 420 U.S. 194 (1975).

[138] 439 U.S. 463 (1979).

[139] *Id.* at 500-01 (quoting *Mancari*, 417 U.S. at 551-52).

[140] 601 F.2d 1110 (10th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) (upholding a New Mexico law that allowed only American Indians to sell and display handicrafts on state-owned property since it advanced their education and cultural interest).

[141] *See* Rice v. Cayetano, 528 U.S. 495, 519-20 (2000); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985); Duro v. Reina, 495 U.S. 676, 692 (1980).

[142] *See, e.g.*, Three Affiliated Tribes v. Wold Eng., 467 U.S. 138, 149 (1984) (arguing that it is a settled principal that vague language in statutes dealing with American Indians should be liberally construed in favor of American Indians).

[143] 488 U.S. 469 (1989).

[144] 515 U.S. 200 (1995).

preferences supported by the government. In *Croson*, the Court ruled that a city's policy to set aside thirty percent of all construction contracts for minority-owned businesses violated the Equal Protection Clause.[145] As the Court ruled, a strict-scrutiny analysis applied to all state and local government classifications by race, even if the government classification was allegedly remedial and benign.[146] Subsequent to *Croson*, the Supreme Court applied an intermediate scrutiny to any federally-mandated, benign racial classifications, holding in *Metro Broadcasting v. FCC*[147] that congressional classifications "are subject to a different standard than such classifications prescribed by state and local governments."[148] With *Adarand*, however, the Court quickly overruled *Metro* and extended the strict-scrutiny standard to any and all racial classifications made by the federal government.[149] Thus, *Adarand* and *Croson* firmly established that all racial preferences, whether invidious or benign and remedial, faced a strict-scrutiny analysis.

Contrary to such commentators as Stuart Minor Benjamin,[150] however, *Croson* and *Adarand* have not radically altered the constitutional landscape for preferential policies aimed specifically at American Indians, including educational programs. Admittedly, both *Adarand*[151] and *Croson*[152] dealt with preferences to groups that included American Indians. However, it is irrelevant to claim, as Benjamin does, that "in none of these cases did the Supreme Court intimate in any way that the benefits for American Indians would be subject to rational basis review."[153] In fact, neither case deals with preferences specifically to American Indians; in both cases, treatment of American Indians was an incidental by-product of the legislation at issue. As *Mancari* and its progeny demonstrate, the Supreme Court has repeatedly upheld any case dealing with the constitutionality of legislation singling out Native Americans alone.[154] Furthermore, the Supreme Court has already established that preferential treatment of American Indians is subject to rational review since American Indians can constitute a political class.[155] By contrast, however, the legislation in *Adarand* and *Croson* treated American Indians as a race, clumping them together with those of African, Asian, and Hispanic descent. Helping those of African, Asian, and Hispanic descent more

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[145] 488 U.S. at 505-06.
[146] *Id.*
[147] 497 U.S. 547 (1990).
[148] *Id.* at 565.
[149] *See Adarand*, 515 U.S. at 225-27, 233-35.
[150] *See* Benjamin, *supra* note 14, at 565.
[151] *See* 515 U.S. at 205.
[152] *See* 488 U.S. at 478.
[153] Benjamin, *supra* note 14, at 567.
[154] *Supra* notes 136-37 and accompanying text.
[155] *Mancari*, 417 U.S. at 554-55.

easily obtain government construction contracts has little to do with the advancement of self-determination or cultural autonomy of Americans Indians.

Additionally, the Court's ruling in *Adarand* tacitly acknowledged *Mancari*'s place as controlling law. In *Adarand*, the Court expressed its profound reluctance to reopen issues in areas "in which we found special deference to the political branches of the Federal Government to be appropriate."[156] Indeed, American-Indian policy, as settled by *Mancari*, represents one of the areas, as the Court tacitly acknowledged in the *Oklahoma Tax Commission v. Chickasaw Nation*,[157] *Seminole Tribe v. Florida*,[158] and *Alaska v. Native Village of Venetie*,[159] decisions issued after *Adarand*. Meanwhile, the Ninth Circuit's decisions in the wake of *Adarand* more explicitly uphold *Mancari*'s standing as good law and support the use of rational basis review in determining the constitutionality of preference programs for indigenous peoples. Three recent cases from the Ninth Circuit, discussion below, all issued in the post-*Croson* era, shed light upon the current thinking of the courts on preferences for indigenous peoples.[160]

First, *Johnson v. Shalala*[161] asserted that American Indian preferences continue to be constitutionally permissible as long as they are rationally linked to the special trust obligation of the government toward American Indians.[162] For support of this proposition, *Shalala* cited *Mancari* and *Preston v. Keckler*,[163] a case which upheld separate and independent qualifications for Indians in employment at Indian Health Services, as controlling law.[164]

Meanwhile, *Williams v. Babbit*[165] also affirmed the principles of *Mancari*, despite upholding an equal protection challenge to an American Indian preference program. In the case, the Ninth Circuit held that the Interior Board of Indian Appeals ("IBIA") could not interpret the Reindeer Industry Act of 1937[166] as prohibiting herding by nonnatives in Alaska without violating the Constitution.[167] However, in upholding the equal protection challenge, the court applied a rational basis test, just as *Mancari* dictates.[168] As the *Williams* court noted:

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[156] *Adarand*, 515 U.S. at 217-18.
[157] 515 U.S. 450, 457-62 (1995).
[158] 517 U.S. 44, 62, 72 (1996).
[159] 522 U.S. 520, 529 (1998).
[160] *See* Johnson v. Shalala, 35 F.3d 402, 406 (9th Cir. 1994).
[161] 35 F.3d 402 (9th Cir. 1994).
[162] *Id.* at 406.
[163] 734 F.2d 1359 (9th Cir. 1984).
[164] *Shalala*, 35 F.3d at 406-07.
[165] 115 F.3d 657 (9th Cir. 1997).
[166] 25 U.S.C. § 500 (1998).
[167] *Williams*, 115 F.3d at 666.
[168] *Id.* at 664.

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test . . . . As 'a separate people,' Indians have a right to expect some special protection for their land, political institutions (whether tribes or native villages), and culture. We therefore have upheld statutes that provide Indians with special fishing rights that were promised to them by treaty . . . and subsidies for 'low-income housing in remote Alaskan villages'. . . .[169]

However, the outcome of the rational basis test in *Williams* differed from *Mancari* because "*Mancari* did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns, [whereas] the IBIA's interpretation of the Reindeer Act would force [the court] to confront the very issue."[170] As the court observed, "reindeer are neither native to Alaska nor part of the Alaskan native way of life."[171] As a consequence, "[t]he Act in no way relates to native land, tribal or communal status, or culture."[172] No rational link existed between the preferential policy and the special trust obligation of the federal government to support native culture and self-governance. Thus, although its outcome differed from *Mancari*, *Williams* still affirmed the use of the rational basis test in American Indian legislation.

Finally, *Rice v. Cayetano*[173] denied an equal protection challenge to the voting procedures for the Office of Hawaiian Affairs ("OHA"), which limited the franchise to Native Hawaiians alone. Ultimately, the court argued that the special treatment of Native Hawaiians "reflected in establishment of trusts for their benefit, and the creation of OHA to administer them, is similar to the special treatment of Indians that the Supreme Court approved"[174] in *Mancari*. Though the ruling was reversed recently by the Supreme Court on Fifteenth Amendment grounds, the Ninth Circuit acknowledged *Mancari*'s standing as good law.[175] Furthermore, the Ninth Circuit declined to overrule its own decision in *Alaska Chapter, Associated General Contractors v. Pierce*,[176] which declared that the preferential treatment of Indians rooted in the government's unique trust obligation represented a political, not racial, classification,[177] to which rational-basis review applied.[178] As I will

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[169] *Id.* (citations omitted).
[170] *Id.* at 663.
[171] *Id.* at 657.
[172] *Id.* at 664.
[173] 146 F.3d 1075 (9th Cir. 1998).
[174] *Id.* at 1081.
[175] *Id.*
[176] 694 F.2d 1162 (9th Cir. 1982).
[177] *Id.* at 1168 n.10.
[178] *See Rice*, 146 F.3d at 1081.

demonstrate, the Supreme Court's decision in *Rice* did nothing to disturb these positions.[179]

### *C. The Impact of Rice on Hawaiian-Only Education Programs and Policies*

All told, existing case law suggests that Native Hawaiian programs and preferences based on political classifications should be analyzed under a rational basis test. However, this principle is a precarious one to many observers, especially in light of the Supreme Court's reversal of the Ninth Circuit's decision in *Rice*. The Supreme Court recently held that OHA's Hawaiian-only voting procedure is unconstitutional because it violates the Fifteenth Amendment's strict prohibition of race-based voting requirements.[180] Despite this ruling, however, there is still plenty of constitutional breathing room for a Hawaiian-only education policy or program. Thus, the Supreme Court's decision in *Rice* is not dispositive of the constitutionality of Hawaiian-only education programs and policies.

First of all, there are powerful constitutional issues at work in *Rice* which are not present in Hawaiian-only education policies. As the Supreme Court plainly announced in *Rice*, "[t]he question before us is not the . . . Fourteenth Amendment, but the . . . Fifteenth Amendment . . . . In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry."[181] Thus, *Rice* was determined not on the basis of a violation of the Fourteenth Amendment, but because of a direct collision with the principles of the Fifteenth Amendment,[182] which as the petitioners even admitted was "the simplest, narrowest, easiest basis upon which [the] case could be decided."[183] This is a crucial distinction. The Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race[.]"[184] Based on the Fifteenth Amendment, the Supreme Court has held that "[r]acial classifications with respect to voting carry particular dangers."[185] As a result, the Fifteenth Amendment applies with unusually absolute force. As the *Rice* Court noted:

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[179] *See infra* section IV.C.

[180] Rice v. Cayetano, 528 U.S. 509-17 (2000).

[181] *Id.* at 520-23; *see also* Oral Arguments, 1999 WL 955376, at *42 (admitting, according to the petitioner, that "only the Fifteenth Amendment is involved here").

[182] *See Rice*, 528 U.S. 520-21.

[183] Transcript of Oral Argument, Rice v. Cayetano, 528 U.S. 495 (2000)(NO.98-818), 1999 WL 955376, at *41.

[184] U.S. CONST. amend. XV.

[185] Shaw v. Reno, 509 U.S. 630, 657 (1993); *see also* Brief of Amicus Curiae CEO et al., *supra* note 78, at *14.

> We held four decades ago that state authority over the boundaries of political subdivisions, 'extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution.'... A State may not deny or abridge the right to vote on account of race, and this law does so.[186]

By contrast, the Fourteenth Amendment's Equal Protection Clause is much more nebulous,[187] providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws."[188] Thus, the courts have repeatedly held that the appearance of race-based restrictions is much more grave in the area of voting procedures than in other government regulations and policies.[189] As Judge Wisdom once wrote, "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth."[190] The Supreme Court's reversal of the Ninth Circuit's decision in *Rice* rested exclusively on Fifteenth Amendment grounds[191] and the Constitution's explicit mandate for careful scrutiny of voting restrictions that carry any hint of racial discrimination. By contrast, Hawaiian-only education policies and programs invoke no such Fifteenth Amendment problems.

Secondly, the OHA elections and their voting procedures are administered by the State of Hawai'i, which is subject to the direct regulation of the Fourteenth and Fifteenth Amendments. Admittedly, equal protection requirements have been incorporated into the Fifth Amendment's Due Process clause which applies to the federal government. However, with respect to federal action, equal protection concerns must be balanced with the explicit plenary powers delegated to Congress.[192] In fact, *Adarand* implicitly acknowledged the continuing importance of special deference to the political branches of the federal government.[193] These areas include the plenary power to set immigration policy[194] and to deal with indigenous peoples via the Indian Commerce Clause.[195] By contrast, states do not have such a vitiating plenary

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[186] *Rice*, 528 U.S. at 495 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960)).

[187] Even the amicus briefs for the petitioners in the case concede this point. *See* Brief of Amicus Curiae CEO et al., *supra* note 78, at *11.

[188] U.S. CONST. amend. XIV.

[189] *See* Brief of Amicus Curiae CEO et al., *supra* note 78, at *13 (arguing that "Strict scrutiny... applies with particular force to racial classifications affecting the voting process").

[190] Anderson v. Martin, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting), *rev'd*, 375 U.S. 399 (1964); *see also* Center for Equal Opportunity, 1999 WL 345639, at *14.

[191] *See Rice*, 528 U.S. at 522, (noting that "[t]he question before [the Court] is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment").

[192] *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 n.21 (1976).

[193] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995).

[194] *See Hampton*, 426 U.S. at 101-02 n.21.

[195] *See* Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

power that can exclude their programs from equal-protection scrutiny. Thus, the constitutional case for federal support of indigenous policies with blood-quantum requirements is much stronger than the case for state support of such policies. The Supreme Court explicitly acknowledged this point as fundamental to its ruling in *Rice*: "Even were we to . . . find[] authority for Congress . . . to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort."[196]

Thirdly, *Rice* reaffirms *Mancari*'s standing as good law, acknowledging the exemption of preferential policies for American Indians from standard equal-protection analysis.[197] Thus, it appears that the Ninth Circuit's 1997 conjecture, that *Mancari*'s days may be numbered,[198] was premature. At the same time, *Rice* left wide open the possibility that Native Hawaiians qualify as Indian tribes entitled to political rather than racial classification for equal-protection purposes. As the Court noted, "It is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes. . . . We can stay far off that difficult terrain, however."[199] The concurring opinion of Justices Breyer and Souter is even more favorable to this proposition, arguing that "Native Hawaiians, considered as a group, may well be analogous to tribes of other Native Americans."[200] The only limitation that *Rice* placed on the *Mancari* doctrine and its applicability to Native Hawaiians was that "[i]t does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."[201]

All told, a careful examination of available case law and the principles involved in balancing Congress' plenary power over policies relating to indigenous people with the requirements of the equal-protection doctrine dictate that Hawaiian-only education programs must be subject to a rational basis review, rather than strict scrutiny. Despite the fears of KSBE and NHEA proponents, the Supreme Court's ruling in *Rice* does not affect this analysis, as *Rice* involves particularly sensitive voting requirements and, more importantly, involves state policy, rather than federal policy–a crucial distinction in equal-protection analysis.

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[196] *Rice*, 528 U.S. 520.

[197] *Id.* at 518.

[198] *See* Williams v. Babbit, 115 F.3d 657, 665 (9th Cir. 1997)(citing Stuart Minor Benjamin, *Equal Opportunity and the Special Relationship: The case of Native Hawaiians*, 106 YALE L.J. 537, 567 (1996)).

[199] *Rice*, 528 U.S. 518-19.

[200] *Id.* at 526 (Breyer, J., concurring).

[201] *Id.* at 520 (emphasis added).

## IV. MEANS-ENDS ANALYSIS: LINKING HAWAIIAN-ONLY EDUCATION TO THE LEGITIMATE ADVANCEMENT OF SELF-GOVERNMENT, SELF-SUFFICIENCY, AND LINGUISTIC AND CULTURAL PRESERVATION

In order to retain constitutionality, both the KSBE admission policy and the NHEA's Hawaiian-only limits must be rationally tied to government goals with respect to indigenous peoples. As I will argue, these policies pass constitutional muster for there is a clear link between the KSBE and NHEA's ancestral limitations and the advancement of legitimate non-racial interests related to Native Hawaiians–namely the preservation of Native Hawaiian culture and language, the advancement of self-governance, and the promotion of self-sufficiency, all of which constitute an essential part of the federal government's policy with respect to the indigenous peoples of the United States. Thus, besides a respect for precedent and the historical trust relationship, there are strong public policy reasons for the courts to respect the applicability of *Mancari* to the Native Hawaiian people and the continued constitutionality of support for Hawaiian-only education programs. As a consequence, Hawaiian-only education programs do not constitute discriminatory policies in violation of the equal protection requirements of the Constitution.

Despite this analysis, there is always the chance that the courts will elect to apply strict scrutiny to Hawaiian-only education policies and programs. After all, there are certainly portions of the *Rice* decision and prior doctrine expressed through *Croson* and *Adarand* that could provide a jurisprudential basis for the application of strict scrutiny. Even if the courts apply strict scrutiny, however, the programs and policies should pass constitutional muster, particularly in the case of the KSBE. There is a compelling state interest in ensuring that Native Hawaiians remain the exclusive beneficiaries of the KSBE. In particular, there is a vital property issue present in the disposition of the KSBE's income and assets which deserves careful consideration.

### *A. Applying the Mancari Doctrine to Education*

Admittedly, there is some ambiguity over the applicability of *Mancari* to education policy. First of all, one problem with the *Mancari* decision is its potentially limited scope. The statutory issue in the *Mancari* decision involved a Bureau of Indian Affairs employment preference for those of Indian blood,[202] not exclusive educational funding or indirect federal support for a Hawaiian-only educational admissions policy. However, as both *Delaware Tribal*

[202] *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

*Business Committee v. Weeks*[203] and *United States v. John*[204] illustrate, programs need not be mere preferences or limited to employment issues to qualify for *Mancari*-like rational-basis review. Thus, the *Mancari* analysis has the potential to apply to all government policies dealing with indigenous peoples.

Secondly, and more importantly, given the history of segregation and the power of the *Brown* decision, there is a great deal of suspicion of explicit admissions requirements which appear to implicate race. Strict scrutiny typically results. As the Supreme Court has noted, "An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."[205]

Moreover, even in areas where racial classifications are remedial and educational programs consider race as one of several qualifying elements, the judiciary has increasingly grown suspicious. Witness the demise, at the hands of the Fourteenth Amendment, of an admissions policy using separate procedures for whites and minorities at the University of Texas School of Law[206] and the invalidation of a University of Maryland scholarship program aimed at black students.[207] Indeed, the government has sought to revoke the tax-exempt status of any educational institution that engages in any racially discriminatory policies. In *Bob Jones University v. United States*,[208] the Supreme Court held that nonprofit private schools that enforce racially discriminatory policies, even if they are based on religious doctrine, do not qualify for tax-exempt status on the basis of the Fourteenth Amendment.[209] In this combined case, Bob Jones University lost its tax-exempt status as a result of its policy of denying admissions to any student who entered into an interracial relationship and Goldsboro Christian Schools lost its status as a result of its outright prohibition against the admission of black students.[210] As the Court concluded:

> Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*, . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination . . . should be encouraged by having all taxpayers share in their

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[203] 430 U.S. 73 (1977).

[204] 437 U.S. 634 (1978).

[205] Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

[206] *See* Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996).

[207] *See* Podberesky v. Kirwan, 38 F.3d 147, 161-62 (4th Cir. 1994). *Cf.* United States v. Virginia, 518 U.S. 515 (1996).

[208] 461 U.S. 574 (1983).

[209] *See id.* at 593-94.

[210] *Id.*

> support by way of special tax status. . . . [R]acial discrimination in education is contrary to public policy. Racially discriminatory education institutions cannot be viewed as conferring a public benefit within the 'charitable' concept . . . [that underlies tax exemption].[211]

However, the KSBE's admissions policy and the NHEA funding policy involve classifications of a political, rather than racial, nature. In constitutional terms, this stands in stark contrast to the classifications in *Brown* and *Bob Jones*, which involved race alone, and thereby invoked the equal-protection doctrine without any countervailing authority under the Indian Commerce Clause.

First of all, the KSBE and NHEA policies apply exclusively to individuals descended from citizens of the ancient Hawaiian political system, rather than to members of the Polynesian racial group as a whole. Though some might argue that this fact suggests the race-neutrality of the policies, the *Rice* decision has cast some doubt upon the validity of this argument. As the Court reasoned, "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral."[212] Thus, it would appear that the KSBE's exclusion of non-Hawaiian Polynesians does not suffice to escape an equal protection analysis. The above-quoted observation by the Court is largely truistic, however, and it ignores the crux of the classification issue–whether an ancestry requirement, be it one of American Indian or Native Hawaiian ancestry, is political at the core. Indeed, "[a]ncestry can be a proxy for race,"[213] but as the Court implicitly acknowledges, it need not always be. For example, specific government programs aimed at specific Indian tribes use ancestral requirements that do not include all members of the American Indian racial group. Nevertheless, they are excluded from traditional equal protection analysis based on *Mancari*, for they are viewed as political at the core.

Indeed, the Kamehameha Schools currently limit admissions to only those students who can trace their ancestry back to the pre-1778 sovereign inhabitants of the Hawaiian Islands. Similarly, NHEA limits its programs to descendants of "the aboriginal people, who prior to 1778, occupied and *exercised sovereignty* in the area that now comprises the State of Hawaii."[214] The policies' emphasis on the prior exercise of sovereignty highlights their political, rather than racial, nature. Moreover, the policies are stated broadly, encompassing any individual[215] who can demonstrate that their ancestors

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[211] *Id.* (citation omitted).

[212] Rice v. Cayetano, 528 U.S. 495, 516-17 (2000).

[213] *Id.* at 514.

[214] Native Hawaiian Education Act of 1994, 20 U.S.C. § 7912 (1998) (emphasis added).

[215] On a technical aside, it is generally acknowledged that, in the years prior to 1778, Hawai'i was not racially pure. According to the Hawai'i legislature's conference committee

resided in a particular place at a particular time under a particular system of government–the ancient Hawaiian political system.[216]

Secondly, the KSBE policy does not extend admissions to ethnic Hawaiians who no longer reside in the State of Hawai'i. Thus, it excludes those who would not possess a concrete and distinct interest in the preservation and advancement of Native Hawaiian culture, self-governance, and self-sufficiency *on the ancient lands* of the Native Hawaiians. Consequently, the policy does not merely extend blindly to those of Native Hawaiian ancestry, and is narrowly tuned to achieve its specific policy goals.

Thirdly, unlike the racial segregation condemned in *Brown*, the NHEA and KSBE policies still allow students of all races into the classrooms. Indeed, with its mélange of students representing more than sixty different ethnic groups, the Kamehameha Schools is hardly a bastion of racial purity. One might even make the case that it is as racially diverse as any educational institution in the United States.[217]

Furthermore, even if the NHEA and KSBE policies seem to possess a but-for blood quantum requirement, this can be constitutionally permissible under current jurisprudence.[218] It is critical to note that the *Mancari* court upheld the BIA's criteria for preferential treatment of American Indians,[219] which included a but-for requirement of a one-fourth quantum of American Indian blood.[220] As the Ninth Circuit has held, blood-quantum requirements are acceptable when "there is no race-neutral way to accord only those who have

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on the 1979 OHA laws, "[T]here were cross-migrations of people between Hawai'i and the South Pacific island groups previous to 1778 ... [I]t is also conceivable that persons descended from any race which may have been shipwrecked on Hawai'i before 1778 could similarly claim [the distinction of being 'Native Hawaiian']." S. STAND. COMM. REP. NO. 784, 1979 HAW. LEG. SESS., Sen. J. 1353. Therefore, cross-migrators and potential shipwreckers all come under the NHEA and KSBE's definitions of Native Hawaiian. Though a technicality, this observation suggests that political grouping, rather than racial status, is the criteron in question in NHEA and KSBE policies. NHEA and KSBE policies do not care about racial stock so much as they care about benefiting the descendants of those who lived under the ancient Hawaiian political system prior to the arrival of Captain Cook, which ultimately led to the collapse of Hawaiian independence and sovereignty.

[216] To this end, some might argue that the admissions policy is akin to water-and-irrigation-district requirements for voting constitutionally upheld by *Ball v. James*, 451 U.S. 355 (1981), and *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). However, the *Rice* case casts significant doubt on this proposition. *See* Rice v. Cayetano, 528 U.S. 521 (2000).

[217] *See* Brief of Amicus Curiae Kamehameha Schools Bishop Estate, *supra* note 41, at *29, app. A.

[218] Whether but-for blood quantum requirements *should ever* be constitutionally permissible in a society which aspires to become race-blind (but has yet to achieve that ideal) is a separate and distinct question.

[219] 417 U.S. at 555.

[220] *See id.* at 553 n.24. *See generally* Frickey, *supra* note 79, at 1762.

a legal interest in management of trust assets."[221] The intended beneficiaries of the Bernice Pauahi Bishop's trust are schools for the Native Hawaiian people.[222] Clearly, those with a quantum of Hawaiian blood represent the one true group with a proper stake in the preservation and advancement of Native Hawaiian culture, self-governance, and self-sufficiency through educational development.

### *B. Means-Ends Congruence in Hawaiian-Only Education Programs and Policies*

#### *1. Means-ends congruence in KSBE's policies: precedent*

It is critical to note that the KSBE has faced a discrimination challenge to its educational policies before. In *Equal Employment Opportunity Commission v. Kamehameha Schools Bishop Estate*,[223] the Ninth Circuit ruled that the KSBE had to give up its policy of hiring only Protestant teachers, despite the existence of an explicit condition in Bernice Pauahi Bishop's will calling for such a policy.[224] As the court maintained, such a hiring policy did not meet the religious-institution exemption to the Civil Rights Act of 1964[225] because there was not a sufficiently tight fit between the religious-affiliation requirement for teachers and the educational goals of the school.[226]

In comparing *EEOC v. KSBE* to a potential challenge against Hawaiian-only admissions policies, there is a key factor which makes the case against the KSBE's admissions policy even more compelling than the case against the religious-affiliation requirement for teachers. Bernice Pauahi Bishop's will mandated the Protestant-only hiring requirement of the KSBE.[227] By contrast, her will contains no explicit instruction requiring an exclusionary policy limiting admissions to only those of Native Hawaiian ancestry.[228]

Interestingly enough, the content of Pauahi Bishop's will might present the most successful challenge to the KSBE and its admissions policy. Although the schools' admissions policy may be constitutional, it may well violate the law of wills and its emphasis on testator intent. In fact, a plain-meaning

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[221] Rice v. Cayetano, 146 F.3d 1075, 1082 (9th Cir. 1998).

[222] It should be noted, however, that Bernice Pauahi Bishop's will does not contain any explicit clause that specifically limits admission to the KSBE to Native Hawaiians alone. *See infra* notes 229-32 and accompanying text.

[223] EEOC v. KSBE, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 510 U.S. 963 (1993).

[224] *See id.* at 466-67.

[225] 42 U.S.C. § 2000e-2(a)(1) (1998).

[226] *KSBE*, 990 F.2d at 466-67.

[227] *In re* Estate of Bishop, 53 Haw. 604, 608, 499 P.2d 670, 673 (1972) (Abe, J., concurring).

[228] *See* Roth, *supra* note 1, at 823.

interpretation of the will's language–the primary factor in carrying testator intent in the law of wills–suggests that Pauahi Bishop may have never intended such an exclusionary policy. According to the will, Pauahi Bishop wanted a portion of the income from her estate to go towards providing for the needs of orphans and indigents.[229] In this clause, she asks the trustees to grant individuals of full or part Hawaiian blood a preference in receiving this funding.[230] However, in no other part of her will does she create a Native Hawaiian *preference*, let alone an *exclusionary policy*.

Although this issue has never been directly litigated, it did receive mention in Justice Abe's concurring opinion in *In re Estate of Bishop*.[231] In the concurring opinion, Justice Abe suggests that the trustees carrying out the exclusionary admissions policy of the KSBE were actually violating the terms of Pauahi Bishop's will.[232] However, noting that neither of the litigating parties had raised the issue, the court's majority refused to rule on whether such a violation of trustee duty had actually occurred.[233]

While Justice Abe's argument presents a powerful challenge against the legitimacy of the KSBE's admissions policy, it fails to give due regard to several important facts. There is a wealth of evidence that suggests that Pauahi Bishop viewed herself as a trustee of the Hawaiian lands for the exclusive benefit of the Native Hawaiian people and likely intended the Kamehameha Schools to admit only those of Native Hawaiian descent.[234] However, if actually litigated, Pauahi Bishop's intentions outside of the four corners of her will might never obtain legal recognition. Under the strict formality of the late-nineteenth century law of wills, the no-extrinsic-evidence rule would likely apply, leading a court of law contemplating how to carry out the will's terms to ignore such statements made by Pauahi Bishop during her lifetime.[235] Still, the trustees could exercise discretionary power in concluding that Pauahi Bishop's orphans-and-indigents clause applied to her educational plans and that the preference was meant to be an exclusionary policy. The Hawai'i Supreme Court is deeply hesitant to subject the discretionary decisions of trustees to judicial interference in the absence of clear abuse.[236] However, one might ask if the KSBE trustees have ever properly investigated or researched whether Hawaiian-only education is in the best interest of the Native Hawaiian

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[229] *See* Brief of Amicus Curiae Kamehameha Schools Bishop Estate, *supra* note 41, at *3 (quoting from Pauhi Bishop's will).

[230] *Bishop*, 53 Haw. at 610, 499 P.2d at 674.

[231] 53 Haw. 604, 499 P.2d 670 (1972)(Abe, J., concurring).

[232] *See id.* at 610, 499 P.2d at 674.

[233] *Id.* at 608, 499 P.2d at 673.

[234] *See* Seto & Kohm, *supra* note 25, at 397-400, 403-08.

[235] *See* DUKEMINIER & JOHANSON, *supra* note 26, at 409-14.

[236] *See* Takabuki v. Ching, 67 Haw. 515, 530, 695 P.2d 319, 328 (1985).

people. These are matters for the courts to consider; but from the perspective of the law of wills, there is a strong case against the Hawaiian-only admissions policy and this might represent the most successful avenue to force a change at the KSBE.

*2. Rational basis review of the KSBE's Hawaiian-only admissions policy*

However, under constitutional law, there is a firmer basis for a Hawaiian-only admissions policy than for a Protestant-only hiring requirement. Thus, although *EEOC v. KSBE* was properly decided,[237] this does not mark the death knell for KSBE's admissions policy. At a minimum, there is a rational link between a Hawaiian-only admissions program and legitimate policy goals while there was no similar exigency with respect to a Protestant-only teacher policy. Also, there is a lower standard of scrutiny applied to policies invoking political classifications–such as some Hawaiian-only policies that relate to the federal government's special trust relationship with the Native Hawaiian people–versus policies that utilize religious classifications–which must face strong First Amendment scrutiny.

All told, the political nature of Hawaiian-only classifications subjects such policies, under *Mancari*, to a lenient, rational-basis standard. In order to pass the *Mancari* test, a federal policy aimed at indigenous people must contain a rational link to the advancement of self-governance, self-sufficiency, and cultural preservation. In *Mancari*, the Supreme Court allowed a hiring preference for American Indians at the Bureau of Indian Affairs because it contained a rational link to the advancement of American Indian self-governance of their own lands.[238] The Supreme Court has held that "As long as . . . special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, . . . legislative judgments will not be disturbed."[239] Like the legislative policy in *Mancari*, there is a clear link between Hawaiian-only education policies and the advancement of Native Hawaiian culture, self-governance, and self-sufficiency.

The Kamehameha Schools' admissions policy passes the rational-basis test by advancing Native Hawaiian culture, self-governance, and self-sufficiency. By limiting admissions to those who can trace one ancestor back to pre-1778

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[237] Interview with Jon Van Dyke (Sept. 6, 2000). Of course, there are some problems reconciling the KSBE decision with other Supreme Court decisions that have given much more zealous religious organizations the right to discriminate on the basis of religion under a much more tenuous mean-ends nexus. *See, e.g.*, Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (enabling the Mormon Church to maintain a requirement that all janitors be members of the Church). I am indebted to Jon Van Dyke for pointing out this comparison.

[238] *Mancari*, 417 U.S. at 555.

[239] *Id.*

Hawai'i, the Schools' policy helps to provide a unique educational environment for the study and practice of Native Hawaiian culture and helps to train the future leaders of the Native Hawaiian community. Indeed, a closer examination of the KSBE's admissions policy reveals how it is a political, not racial, classification. The Schools do not allow admission to all Native Hawaiians; Native Hawaiians who do not live in the State or those whose parent or guardian does not live in the State are barred from admission to the School. Thus, the Kamehameha Schools' admissions policy seeks to advance a specific political goal–the preservation of culture and the promotion of self-governance and self-sufficiency for Native Hawaiians still tied to the land of Hawaii.

*3. Strict scrutiny of the KSBE's Hawaiian-only admissions policy*

As noted earlier, the judiciary has grown increasingly hostile to any policies with a hint of racial preference or exclusion.[240] Although judicial precedent and the preceding analysis suggest that rational review should apply to the Hawaiian-only education policies, the Supreme Court may find that Native Hawaiians constitute a racial group unable to claim the shield of the *Mancari* doctrine or the Supreme Court might conceivably overrule the *Mancari* doctrine altogether. Thus, it is entirely possible that Hawaiian-only education will have to weather strict scrutiny in order to survive. Though difficult, this is not an altogether impossible challenge.

To begin with, in the *Adarand Constructors, Inc. v. Pena*,[241] majority opinion, Justice O'Connor went out of her way to assert that courts should no longer view strict scrutiny as necessarily fatal.[242] As she argued, there are certain legitimate uses of race-based classifications. However, our nation's history of racism makes any race-based classification immediately suspect. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."[243] As Justice O'Connor argued, government programs can meet strict scrutiny. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[244]

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[240] *See supra* notes 206-07 and accompaning text.
[241] 515 U.S. 2000 (1995).
[242] *Id.* at 237.
[243] *Id.* at 228.
[244] *Id.* at 237.

Admittedly, programs that have withstood strict scrutiny are few and far between. To pass strict scrutiny, a policy advocated by the government must be both necessary to further a compelling state interest and narrowly tailored to achieve that purpose.[245] Typically, strict-scrutiny survival has resulted from two compelling interests–national security or highly specific remedies to detailed instances of past wrongful conduct in a well-defined and targeted area. In the area of domestic security, for example, *Lee v. Washington*[246] enabled prison officials to separate inmates on the basis of race if such efforts were made in good faith and particularized circumstances. At the time, race riots threatened to produce anarchy at the penitentiary and the Supreme Court accepted that at times a race-based segregation policy might be the only way to quell tensions.[247] Moreover, in *United States v. Korematsu*[248]–a case which one is loathe to cite as precedent–the Court utilized strict scrutiny but still upheld the World War II internment of Japanese-Americans on the grounds of national security. Clearly, the case of Hawaiian-only education does not fall under this national-security exception to strict-scrutiny fatalism.

However, the Supreme Court has also upheld government policies under strict scrutiny when they involve highly specific remedies to detailed instances of past wrongful conduct in a well-defined and targeted area. In *United States v. Paradise*,[249] for example, all nine Justices on the Court agreed that the Alabama Department of Public Safety's "'pervasive, systematic, and obstinate discriminatory conduct'[250] justified a narrowly tailored race-based remedy."[251] Thus, *Paradise* opened the door for explicit race-based hiring policies where necessary to make up for specific instances of well-documented past discrimination–in that case, prior racial disparities in the hiring of troopers in Alabama.

Despite its ability to pass rational review, Hawaiian-only education would have a hard time standing up to the exacting standards of strict scrutiny. Though Native Hawaiians have suffered an attempted cultural genocide and substantial discrimination, the mean-ends nexus between these wrongs and Hawaiian-only education is difficult to establish. Indeed, it is far from certain whether segregated education is even in the interest of Native Hawaiians, let

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[245] *See id.*

[246] 390 U.S. 333 (1968).

[247] *See id.* at 334 (Black, J., Harlan, J., Stewart, J., concurring).

[248] Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.").

[249] 480 U.S. 149 (1987).

[250] *Id.* at 167 (1987) (Brennan, J., plurality opinion); *id.* at 190 (Stevens, J., concurring); *id.* at 196 (O'Connor, J., dissenting).

[251] *Adarand*, 515 U.S. at 237 (quoting *Paradise*, 480 U.S. at 167).

alone dictated as necessary to fulfill a compelling government interest. Nevertheless, there are some compelling reasons to favor the constitutionality of Hawaiian-only education.

First of all, as established earlier, the United States government has a trust obligation towards the Native Hawaiian people and is morally and legally obligated to support the continued survival of the Native Hawaiian culture. A poignant example will illustrate the importance of the KSBE and NHEA support for Hawaiian-only education to the continued survival of the Native Hawaiian people. Without delving too deeply into the theories of Noam Chomsky and Ludwig Wittgenstein,[252] it is well known that linguistic survival is inexorably entwined with cultural and ethnic survival. As a traditional Hawaiian saying goes, "I ka 'olelo no ke ola; I ka 'olelo no ka make. In the language rests life; In the language rests death."[253] To this effect, the dramatic and precipitous decline in the Hawaiian language through the twentieth century posed a critical threat to the durability of the Native Hawaiian way of life. Although many Hawaiian residents spoke the Hawaiian language in the late nineteenth century when Hawai'i was still a sovereign nation, fewer than a handful of individuals could speak fluent Hawaiian a century later.[254] In fact, after the overthrow of the Kingdom of Hawai'i in 1893, Hawaiian medium schools were eliminated and the use of the Hawaiian language in classroom instruction was banned until 1986.[255]

With the help of the KSBE (and other educational institutions), however, the situation has changed dramatically. By providing a strong lobbying interest for the revival of Hawaiian language studies–due in large part to its all-Hawaiian student body–the KSBE has played an important role in the revival of the near-extinct Hawaiian language over the past fifteen years.[256] Much in

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[252] *See generally*, NOAM CHOMSKY, LANGUAGE AND POLITICS 106-25 (C. P. Otero ed., 1988) (elucidating the powerful epistemological quality of language); LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 211 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper Torchbooks 1969) (arguing that language, through education and socialization, forms the basis of thought, identity, and the ways in which we see the world); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 8E (G.E.M. Anscombe trans., Basil, Blackwell & Mott 2d ed. 1958)(1953) (noting that "to imagine a language means to imagine a form of life").

[253] NHEA, 20 U.S.C. § 7902(19) (2000).

[254] *See* Susan Essoyan, *A Language Once Thought Dying Is Having a Rebirth; Outlook Brightens as an Immersion Program to Revive Hawaiian Takes Root but Some Fear Separatism*, L.A. TIMES, Aug. 8, 1991, at A5.

[255] 20 U.S.C. § 7902(19).

[256] It should be noted that the KSBE has been criticized for not doing enough in this area, and some observers have even charged that other educational institutions which do not have exclusionary admissions policies have done a superior job in regenerating interest in the Hawaiian language. Nevertheless, it is hard to dispute that KSBE's contribution in this area has been positive.

the way revival of the Hebrew language accompanied the creation of the state of Israel and a revitalization of the Jewish faith in the wake of World War II, the rebirth of the Hawaiian language has accompanied a reawakening in Native Hawaiian political activism and culture. Similarly, by recognizing "the unique right of the Native Hawaiian people to practice and perpetuate their culture and religious customs, beliefs, practices, and language,"[257] the NHEA has supplemented this mission by providing funding for the use of the traditional Hawaiian language in education through the Islands.

Beyond the revitalization of the Hawaiian language, the KSBE and NHEA provide critical support for education in other aspects of Hawaiian life and culture. Study of the Hawaiian arts, such as the hula, ancient Hawaiian narrative song, and ancient Hawaiian instrumentation form an integral part of the curriculum. Since ancient Hawaiian was never a written language until the arrival of the missionaries, Hawaiian culture was transmitted through an oral tradition captured through its songs, dances, and music.[258] Thus, study of the Hawaiian arts is vital to a reemergence of Hawaiian cultural sovereignty. Moreover, the KSBE and NHEA provide critical resources for the intensive study of Hawaiian history, including the ancient *ahupua'a* feudal system, the unification of the Islands under Kamehameha the Great, and the constitutional monarchy. Long replaced by pure American history courses in the State-operated schools, such a study of Native Hawaiian history is vital to the restoration of the Hawaiian way of life.[259]

Furthermore, by extending educational opportunities to a community who, like their American Indian counterparts on the mainland, have suffered from disproportionately high rates of poverty, alcoholism, and incarceration,[260] the KSBE and NHEA have provided valuable opportunities for the training of future Native Hawaiian political leaders. To this effect, the NHEA has focused on assisting Native Hawaiians to reach National Education Goals[261] in order to increase the overall level of educational attainment in the Native Hawaiian community, and it has created gifted and talented programs for Native Hawaiians in order to increase Native Hawaiian representation in institutions of higher learning.[262] Meanwhile, by providing a free, Hawaiian-intensive

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[257] NHEA, 20 U.S.C. § 7902(21)(A).

[258] *See* A. GROVE DAY, HAWAII AND ITS PEOPLE app. B. (1955).

[259] Of course, in the long run, the most effective way to revitalize the Hawaiian language might well be to have Hawai'i's non-Native-Hawaiian population learn the language as well. By limiting admissions to Native Hawaiians, the KSBE may be foregoing a key opportunity to spread the understanding of Native Hawaiian culture and traditions beyond just Native Hawaiians. However, this is a matter for policy analysts to decide, not constitutional scholars.

[260] *See* Ellen Nakashima, *Native Hawaiians Consider Asking for Their Islands Back; 100-Year-Old Cause Spurs Sovereignty Vote*, WASH. POST, June 27, 1996, at A1.

[261] *See* 20 U.S.C. § 7903(1).

[262] *See* 20 U.S.C. § 7902(17)(F).

education to all students of Native Hawaiian descent, the KSBE has provided the State of Hawai'i with a number of community leaders with a comprehensive knowledge of their peoples' past and a clear vision for their peoples' future.[263]

The above analysis provides compelling reasons for the continued survival of the KSBE and Hawaiian-only education. However, when viewed from another perspective–that of property rights–the case for enabling the KSBE to retain its Hawaiian-only policy becomes even stronger.

To pass strict scrutiny, a race-based policy must be necessary and narrowly tailored to rectify specific bad acts. With the overthrow of the Hawaiian monarchy in 1893[264] and the subsequent annexation of Hawai'i by the United States in 1898,[265] the Hawaiian people lost their public lands and nation involuntarily, through a process of coercion and conquest. Indeed, the United States government has formally recognized the illegitimate "overthrow of the Kingdom of Hawaii," a term that admits the absence of consent in the annexation process, and declared that the "inherent sovereignty"[266] of the Native Hawaiian people was never properly relinquished to the United States. The most direct means for the federal government to address this prior bad act is to ensure that as much of the original Hawaiian lands as possible remain in the hands of the Native Hawaiian people.

The Bernice Pauahi Bishop estate represents the last remnant of the ancient Hawaiian kingdom. As the last ali'i descendant of King Kamehameha I, Pauahi Bishop acquired her vast land holdings through inheritance, and throughout her life, she viewed herself as a trustee of the lands for the Native Hawaiian people.[267] The maintenance of the Bishop Estate for the benefit of solely the Native Hawaiian people fulfills the federal government's compelling interest in rectifying its illegitimate overthrow of the Hawaiian Kingdom. Keeping what remains of the ancient Hawaiian lands in the hands of the Native Hawaiian people is a specific remedial measure to the illegitimate overthrow.

Thus, by ensuring that the KSBE remains exclusively for the benefit of the Native Hawaiian people, the federal government will be engaging in a specific, land-based remedial measure to make up for the prior illegal seizure of the

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[263] Admittedly, this was not always the case. In its early years, the Schools did not provide a liberal-arts curriculum that would encourage students to achieve higher education and enter professional life. In its first four decades, for example, the Schools largely emphasized vocational and military training for boys and homemaker training for girls. *See* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 77 (1961).

[264] *See* Brief of Amicus Curiae Kamehameha Schools Bishop Estate, *supra* note 41, at *13-14.

[265] *Id.* at *16.

[266] Apology Bill, § 1.

[267] *See* Seto & Kohm, *supra* note 25, at 397-400, 403-08.

Hawaiian land. The government will thereby ensure that the last remaining private portion of the original Hawaiian lands continues to act exclusively for the benefit of its original owners. Such a result is not only dictated by law, but by justice as well.

Finally, even non-Hawaiians stand to benefit from the assurance that Bernice Pauahi Bishop's lands end up in the hands of their intended beneficiaries. If the KSBE's admissions policy is attacked on constitutional grounds, the Native Hawaiian people will not be the only victims. Indeed, the KSBE and NHEA make a contribution not only to Native Hawaiians but to all the people of Hawai'i. As Professor Jon Van Dyke concludes:

> Preferences for native people are upheld not for racial reasons, but because of the unique legal and political status that native groups have under statute and the United States Constitution. Unlike other ethnic groups in our multicultural community, native peoples have no 'mother culture' in another land where their culture is maintained and developed. Unless they are given the opportunity to protect their culture, language, religion, and traditions in their place of origin, their unique heritage will be lost forever. We all benefit by having diverse and strong cultures thriving in our community.[268]

Without continued support for the KSBE and NHEA, the Native Hawaiian people and the entire community-at-large stand to lose.

## V. CONCLUSION: A NEW SEGREGATION?

Admittedly, there are some serious policy issues that government programs such as the NHEA and admissions policies such as those of the KSBE must address. In a society that has traditionally espoused an assimilationist model of ethnic integration, educational programs that separate an entire group such as Native Hawaiians from other members of society seem to defeat the melting-pot ideal to which we have grown accustomed. If anything, such self-segregation might lead to increased fractionalization in society and greater pronouncement, rather than erosion, of ethnic and racial differences.

However, assimilation is not the only valid modus operandi for a multi-ethnic nation. For all too long, assimilation has involved a quid pro quo demanding white performance for white privilege.[269] At the educational level, this has involved denial of native culture, language, and institutions. Certainly, assimilation has its advantages, particularly from a macropolitical point of view; assimilation-based educational systems can help inculcate a

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[268] Jon M. Van Dyke, *The Kamehameha Schools/Bishop Estate and the Constitution*, 17 U. HAW. L. REV. 413, 415 (1995); *see* Jon M. Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 90-92 (1985).

[269] *See* Tehranian, *supra* note 43, at 821.

common body of values in the future citizenry of the state, thereby advancing political stability and national unity. However, such inculcation frequently comes at the expense of ethnic diversity and has typically accelerated the disappearance of indigenous cultures and ways of life.

The danger, inherent in KSBE and NHEA policies, is of a new segregation. However, such policies can also help to revitalize a culture and polity driven to the brink of extinction in the colonization process. Either way, this is a policy choice to be weighed by the United States government and the Native Hawaiian people. Contrary to a recent rash of claims by some constitutional scholars, it is not a matter presumptively decided by the Fifth and Fourteenth Amendments to the United States Constitution.

Like other indigenous peoples of the United States, Native Hawaiians enjoy a political classification that results from their unique history and special trust relationship with the federal government. Unlike racial classifications, political classifications need only fulfill the rational basis test in order to withstand an equal protection challenge. *Croson*, *Adarand*, and their progeny do not alter the rational basis test announced in *Mancari* for preferential legislation dealing with indigenous peoples. Moreover, the recent Supreme Court decision in *Rice v. Cayetano* does not alter this proposition with respect to Hawaiian-only education programs. Both the Kamehameha Schools admissions policy and the Native Hawaiian Education Act's Hawaiian-only limitation do not violate the equal protection component of the Fifth Amendment's Due Process Clause, since the policies and programs contain a rational link to the preservation of Native Hawaiian culture, the advancement of self-governance, and the promotion of self-sufficiency. Indeed, there is a sufficiently compelling state interest for federal support of Hawaiian-only education to survive even strict scrutiny. Thus, KSBE should not lose its tax-exempt status on the grounds that it is a racially-discriminatory educational institution, and the NHEA should not be struck down on constitutional grounds. Instead, the continued survival of Hawaiian-only education should be a matter of debate for educational-policy experts and not for constitutional scholars.

# Expert and Opinion Testimony of Law Enforcement Officers Regarding Identification of Drug Impaired Drivers

by David Sandler*

## I. INTRODUCTION

Prosecutors have attempted to utilize police officers as expert witnesses in a variety of areas over the decades. Each time prosecutors offer police officers as experts to give their opinions on scientific or technical matters, their qualifications as experts face severe challenges. In recent years, in Hawai'i and numerous other jurisdictions, prosecutors have attempted to utilize police officers as expert witnesses for their opinions as to whether or not the defendant was under the influence of drugs. This occurs on a daily basis in cases where the police charge the defendant with driving under the influence of drugs. In addition, police officers have testified as experts regarding drug impairment in cases involving murder, manslaughter, and vehicular homicide.

Mainly due to the growing number of drugged driving arrests nationwide, there is no greater use of police officers as expert witnesses in criminal trials than in this relatively new area of drug recognition. As of August 2000, there were over 5200 police officers specially trained in the area of drug recognition in the United States.[1] They have the title of "Drug Recognition Experts" ("DREs"), but whether or not the courts should recognize them as "experts" has been the subject of intense litigation.

In the typical drugged driving case, a police officer observes unusual driving behavior or a traffic violation that leads him to believe the driver may be impaired. The officer pulls the driver over, and asks him for his driver's license and registration. At this time, the officer observes additional signs of impairment such as bloodshot eyes, dilated pupils, incoherent speech, and fumbling with documents. He then asks the suspect to participate in a field sobriety test. [2]

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[1] Telephone interview with Carolyn Cockroft, Grant Technical Management Specialist, International Association of Chiefs of Police (Aug. 2000). Over 1000 of these individuals have received additional training and hold the title of instructor. *Id.*

[2] *See* NAT'L DIST. ATTORNEYS ASS'N, *The Drug Recognition Expert Program*, *in* PROSECUTING THE DRUGGED DRIVER 7 (1999) (on file with author) [hereinafter *Drug Recognition Expert Program*]. The National Highway Transportation Safety Administration

There is no strict pass/fail score for the field sobriety test. Consequently, many believe these "tests" should be referred to as "tasks." Based upon the officer's observations on how well the suspect performed these tasks, observations of the suspect's driving, the odor or presence of alcohol or drugs, statements made by the suspect, or any additional observations made by the officer, the officer determines whether or not to arrest the suspect for driving while impaired.

Where there is any indication that the impairment is due to alcohol, the officer arrests the suspect for Driving Under the Influence of Alcohol (DUI-Alcohol). This may be the result of alcohol being on the person's breath or a container of an alcoholic beverage found in the car. The officer then brings the suspect to the police station where the police administer a chemical test to determine the amount of alcohol in the person's system.[3] If the result of the chemical test shows the suspect was above the legal limit, which is .10 in most states and .08 in Hawai'i and a few other states, then the police formally arrest the individual for DUI-Alcohol.[4] In the past, if the individual's alcohol reading was below the legal limit, the police released him. This was done even though all the evidence demonstrated that he was impaired and presented a danger on the highway. Now, in thirty-four states and the District of Columbia, the police do not automatically release these suspects and put them back on the roads.[5] Instead, the arresting officer will call for a police officer specially trained in the area of drug recognition in order to further the investigation.

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sponsored two studies that directly led to the development of the Standardized Field Sobriety Test battery. *Id.* at 7 n. 8. The Southern California Research Institute conducted both studies: "Psychological Tests for DWI Arrest" and "Development and Field Test of Psychophysical Tests for DWI Arrest." *Id.*

The standardized field sobriety test consists of three parts. First, the suspect's eyes are examined for nystagmus, which is the jerking of the pupils. The presence of nystagmus is a sign of the use of alcohol and certain other types of drugs. The second test is the walk and turn test. The final test is the one-leg stand test. *Id.* at 7-8.

[3] U.S. DEP'T OF TRANSP., THE DRUG RECOGNITION SCHOOL, STUDENT MANUAL IV-3 (1993) (on file with author) [hereinafter STUDENT MANUAL].

[4] HAW. REV. STAT. § 291-4 (2000).

[5] International Association of Chiefs of Police ("IACP"), "IACP DECP State Coordinators," (Sept. 11, 2000) (on file with author). The states include: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.* In addition, the program has expanded to Canada, Australia, Norway, and Sweden, and a program is anticipated to begin in South Africa in the near future. *Drug Recognition Expert Program, supra* note 2, at 15.

The issue as to whether or not this specially trained officer should be recognized by the courts as an expert and be able to render an opinion as to whether or not the suspect was impaired by drugs is the subject of this article. The article details the development of the Drug Recognition Expert program in Part II, explains the training received by DREs in Part III, and outlines how drug influence evaluations are conducted in Section IV. Part V of the article discusses all the major cases that have been decided regarding the issue of allowing DREs to testify as expert witnesses, and Part VI gives an overview of DRE expert testimony in Hawai'i.

## II. THE DRUG RECOGNITION EXPERT

Driving under the influence of drugs ("DUI-Drugs") has surfaced as a growing problem in America and throughout the world.[6] "Drugged drivers" endanger the lives of everyone on the road, and increase the economic and non-economic societal costs related to driving.[7] There is little doubt that the increase in collisions caused by drugged drivers, including those caused by

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[6] *See* NAT'L DIST. ATTORNEYS ASS'N, *Drugs in American Society*, *in* PROSECUTING THE DRUGGED DRIVER 4-7 (1999) (on file with author) [hereinafter *Drugs in American Society*]. Comparatively, alcohol-impaired driving has a long and well-established history. While they share similar characteristics, there are important distinctions between DUI-Alcohol and DUI-Drug cases. *See id.*

[7] DUI-Alcohol and DUI-Drugs combine for over 16,000 deaths, one million injuries, and $45 billion in costs to society each year. *See* Jim Michie, *First Time Study Highlights Need for Increased Awareness of Substance Use and Driving Behaviors*, *at* http://samhsa-ext1.samhsa.gov/PRESS/981226s.htm (last visited Nov. 6, 2000).

Accurate data on DUI-Drugs alone is difficult to obtain. STUDENT MANUAL, *supra* note 3, at II-5. First, many impaired drivers are not detected. *Id.* Second, since many drug users also drink alcohol, they are frequently arrested and tabulated in statistics only as alcohol-impaired drivers. *Id.* Third, those involved in crashes are often chemically tested only for alcohol. *Id.*

Despite these difficulties, various studies have reported on the degree of drug-impaired driving. A California study showed that 51% of 440 young male drivers killed in crashes had used drugs other than alcohol. *Drugs in American Society*, *supra* note 6, at 6-7. Similarly, a Tennessee study of injured victims of motor vehicle crashes showed that 40% of the drivers tested positive for at least one drug other than alcohol. *Id.* A national study, "Driving After Alcohol or Drug Use," estimates that within a single year, 46.5 million (28% of drivers) have used drugs and/or alcohol within two hours before driving. Of the 46.5 million, approximately nine million Americans (5% of drivers) used drugs within two hours before driving. This survey included face-to-face interviews with 11,847 drivers sixteen years and older who reported having driven a motor vehicle on at least one occasion in the twelve months prior to the interview. "Driving After Drug or Alcohol Use Report: Highlights," *at* http://samhsa-ext1.samhsa.gov/OAS /driverrprt/fnldrf11.htm (last visited Nov. 6, 2000).

drivers under the influence of prescription medication, is a major factor causing higher insurance premiums for everyone.[8]

In the early 1970's, Los Angeles Police Department ("LAPD") officers noticed many of the individuals they arrested for DUI-Alcohol registered very low or zero alcohol concentration readings.[9] The officers suspected the individuals were impaired by drugs, but they lacked the necessary skills and training to support their suspicions. In the mid-1970's, two LAPD sergeants, a traffic officer and a narcotics officer, collaborated with various medical professionals to develop a simple, standardized procedure for recognizing drug influence and impairment.[10]

In the early 1980's, the LAPD's drug recognition program attracted the attention of the National Highway Traffic Safety Administration ("NHTSA").[11] NHTSA worked with the LAPD to standardize the protocol, and their combined efforts led to the development of the Drug Evaluation and Classification ("DEC") Program.[12] The DEC Program was validated by a 1984 controlled laboratory study[13] and a 1985 field validation study.[14] These studies demonstrated that a properly trained DRE could successfully identify drug impairment and accurately determine the category of drugs causing the impairment.[15]

In 1984, NHTSA and the National Institute on Drug Abuse (NIDA) sponsored a controlled laboratory study. The study, conducted by researchers at the Johns Hopkins University, involved subjects who were drug dosed and then individually evaluated by four experienced DREs.[16] Subjects received

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[8] *See* Jim Michie, *First Time Study Highlights Need for Increased Awareness of Substance Use and Driving Behaviors*, *at* http://samhsa-ext1.samhsa.gov/PRESS/981226s.htm, *supra* note 7.

[9] NAT'L DIST. ATTORNEYS ASS'N, *The Drug Recognition Expert Process*, *in* PROSECUTING THE DRUGGED DRIVER 5 (1999) (on file with author) [hereinafter *Drug Recognition Expert Process*].

[10] *Id.* Los Angeles Police Department Officers Sergeant Richard Studdard (retired) and Detective Len Leeds (deceased) were largely responsible for the early development of DRE procedures. *Id.*

[11] *See generally* STUDENT MANUAL, *supra* note 3 (acknowledging the efforts of the LAPD). The NHTSA is a part of the Department of Transportation. Its leadership role in development and implementation of the DEC program produced scientific validation of the program, effective training and certification standards, and rapid expansion and institutionalization of the program. *Id.* at III-3-5.

[12] *Id.*

[13] George E. Bigelow, Ph.D., et. al., Identifying Types of Drug Intoxication: Laboratory Evaluation of a Subject Procedure 16 (May 1985) (on file with author).

[14] Richard P. Compton, Field Evaluation of the Los Angeles Police Department Drug Detection Procedure 24 (Feb. 1986) (on file with author).

[15] Bigelow, *supra* note 13, at 12; Compton, *supra* note 14, at 22.

[16] Bigelow, *supra* note 13, at 2.

either a placebo or a single drug.[17] Neither the subjects nor the officers were told what drug, if any, had been administered.[18] This study concluded that DREs correctly identified 95% of drug-free subjects as "unimpaired," DREs correctly classified 98.7% of high-dose subjects as "impaired," and DREs correctly identified the category of drugs for 97% of the high dose subjects.[19]

In 1985, NHTSA and the LAPD collaborated on a field evaluation study.[20] An independent laboratory analyzed blood samples drawn from persons actually arrested for DUI-Drugs.[21] The results of this 173-subject case study were very similar to earlier findings and demonstrated that trained DREs were able to "predict" the presence of certain types of drugs in the majority of cases.[22] This study indicated that when DREs said that drugs other than alcohol were present, drugs were detected 94% of the time; DREs correctly identified at least one drug other than alcohol in 97% of the suspects evaluated; when DREs identified a suspect as impaired by a specific drug category, the category was detected in the suspect's blood 79% of the time; and in almost 50% of the suspects, the DREs were entirely correct in identifying all of the categories detected in the blood (most of these suspects had used multiple drugs, other than alcohol.)[23]

The most comprehensive study of the DEC program completed to date is the *Drug Recognition Expert Validation Study*.[24] This study examined the Drug Influence Evaluation records for 500 suspects who were evaluated in Arizona over a fifty-three month period, and the corresponding toxicological analyses of the suspects' specimens.[25] Among the major conclusions were: the DRE program is a valid method for identifying and classifying drug-impaired drivers; DREs are able to recognize drug impairment and identify the drug(s), by category which cause the impairment; and various drug categories produce specific observable signs and symptoms that DREs are able to detect.[26]

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[17] *Id.* at 4.

[18] *Id.* at 1.

[19] *Id.* at 13-16.

[20] Compton, *supra* note 14, at 3.

[21] *Id.* at 1-2.

[22] *Id.* at 22-24. The use of alcohol with other drugs was common, with 50% of the suspects who had used drugs having also used alcohol (thus making the detection of other drugs more difficult). *Id.* at 11. Furthermore, only six of the suspects (3.7%) who had used drugs had Blood Alcohol Contents equal to or greater than 0.10% w/v. *Id.* at 14. It is likely that most, if not all, of the remainder of the suspects would have been released if the drug symptoms had not been recognized by the DREs. *Id.*

[23] *Id.* at 22.

[24] Eugene V. Adler & Marcelline Burns, Drug Recognition Expert Validation Study: Final Report to Governor's Office of Highway Safety, State of Ariz. (June 1994) (on file with author).

[25] *Id.* at Abstract.

[26] *Id.* at 55.

Overall, the Arizona study found that at least one of the categories of drugs that the DRE predicted appeared in subsequent drug testing in 83.5% of all cases.[27] Other field studies have produced confirmation rates of 88.2% in California, 81.3% in Texas, 84.5% in Minnesota, and 88% in Oregon.[28] In 1999, during the second year of drug testing in the DRE Program in Hawai'i, toxicological confirmations for at least one category of drugs was 88.2%.[29]

It is important to keep in mind that merely because a lab report turns out to be "negative" does not necessarily mean the subject was drug free. Just because the lab was not able to confirm the DRE's findings does not mean that the DRE's analysis and conclusions were incorrect. For some very valid reasons, there are times when the toxicology lab simply is unable to confirm the DRE's findings.[30] There are indeed instances when an individual has drugs in his system although the lab test turns out "negative."[31]

On the other hand, just because a drug test comes up positive, does not necessarily mean the individual is under the influence of a particular drug. Metabolites of certain drugs may appear in low levels in a person's system weeks after the drug was ingested. Unless the drug levels are extremely high, toxicology results standing alone cannot prove impairment. This is why the role of the DRE is crucial. The DRE is trained to identify specific signs of impairment. Some of these signs may be visible, and others are obtained through taking some basic tests such as blood pressure, pulse rate, and body temperature.

The DEC Program, has received endorsements from the NHTSA,[32] the International Association of Chiefs of Police ("IACP"),[33] the U.S. Department

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[27] *Id.* at 33.

[28] Brief of Appellant at 19-20, State v. Baity, (Wash. 2000) (Nos. 98115104 and 970186124).

[29] Telephone interview with Dr. Clifford Wong, Director of Toxicology Services, Clinical Laboratories of Hawai'i (Oct. 2000).

[30] The most common reasons given by toxicologists for this are:

Limited Testing–Because of the substantial costs involved, a specimen is not tested for all possible drugs.

Cut-Off Levels–If there are only low-levels of the drug present falling below the laboratory's cut-off levels, then that drug will be reported out as a "negative."

Type of Test Given–Evidence of drug use may appear in the urine, but not the blood, or vice-versa.

Time the Test Was Given–Drugs metabolize at different rates.

Inability of Laboratory Equipment to Locate Evidence of Drug Use–Evidence of drug use is measured in one-one-millionth of a gram. Sometimes laboratory equipment is not sophisticated enough or is otherwise unable to detect such minute particles.

STUDENT MANUAL, *supra* note 3, at IV-20-22.

[31] *Id.* at IV-21.

[32] Bigelow, *supra* note 13; Compton *supra* note 14.

[33] STUDENT MANUAL, *supra* note 3, at I-1.

of Justice ("DOJ"),[34] the American Bar Association ("ABA"),[35] and the National Commission Against Drunk Driving.[36] Additionally, hundreds of law enforcement agencies at the local, state, and federal levels, as well as private industry, employ the DEC.[37]

In 1987, NHTSA started DEC pilot programs in Arizona, Colorado, New York, and Virginia.[38] In 1988, NHTSA added Utah, California, and Indiana.[39] In 1989, NHTSA greatly expanded the DEC program, and currently 34 states and the District of Columbia are participating.[40] The program began in Hawai'i in the late 1990's with the Maui County Police Department producing the first certified DREs in the state.

The DRE training program encompasses over one hundred hours of intensive classroom instruction and formal training.[41] This includes a basic overview of field sobriety tests, in-depth sessions on each drug category, and education in human physiology and drug pharmacology.[42] Officers are required to pass a written examination in order to complete the classroom portion of their training and before starting the field certification phase of their training.[43] As part of the field certification phase, an officer conducts actual drug evaluations under the supervision of a certified DRE instructor.[44] In order for a trainee to achieve certification as a DRE, his opinions must be confirmed by laboratory analysis of biological specimens collected during the training examinations.[45] After completing the twelve drug influence

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *See* discussion *infra* note 67.

[38] *Drug Recognition Expert Program*, *supra* note 2, at 14.

[39] International Association of Chiefs of Police ("IACP"), "IACP DECP State Coordinators," (Sept. 11, 2000) (on file with author).

[40] *Id.*

[41] *See* NAT'L DIST. ATTORNEYS ASS'N, *Drug Recognition Expert Training Course*, *in* PROSECUTING THE DRUGGED DRIVER, 7 (1999) (on file with author) [hereinafter *Drug Recognition Expert Training Course*]. This figure includes original training in alcohol, drugs, and field sobriety testing at the police academy, specialized field sobriety testing training, horizontal gaze nystagmus training, and DRE "pre-school" and "school." *See id.; see also infra* note 43 (discussing "pre-school" training).

[42] STUDENT MANUAL, *supra* note 3, at I-3.

[43] U.S. DEP'T OF TRANSP., Preliminary Training for Drug Evaluation and Classification: "The Pre-School" app. 4 (1993) (on file with author) [hereinafter *Preschool*]. Candidates must receive a score of at least 80%. *Id.*

[44] *Id.* at app. 4-5. The trainee must complete at least twelve drug influence evaluations. *Id.*

[45] *Id.* at app. 5. Student DREs must submit a minimum of nine physical specimens to a lab for analysis. The lab analysis is compared to the student DRE's opinion as to the type of drug influencing the individual. The student must achieve a 75% lab confirmation rate. *Id.*

evaluations, DRE candidates must pass another comprehensive examination followed by a detailed interview with a DRE instructor.[46]

A DRE makes three determinations: (1) whether or not the suspect's impairment is consistent with his Breath Alcohol Level ("BrAC"); (2) whether or not the suspect is under the influence of drugs, as opposed to suffering from some type of medical condition; and (3) if the suspect is under the influence of drugs, what specific category (or categories) of drugs are involved.[47] Since many medical conditions produce effects that mimic drug impairment, the DRE needs to be able to quickly and accurately assess the arrestee for the presence of these conditions.[48] Only after ruling out these medical conditions does a DRE proceed with an evaluation to determine under which category of drugs the person is under the influence.[49] The DRE is not required to identify a specific drug, only the general category of drugs.[50] The DRE's conclusions guide laboratories by narrowing the universe of drugs that need to be tested, thereby decreasing the cost of the analyses and increasing the likelihood of useful results.[51]

## III. THE DRUG EVALUATION AND CLASSIFICATION PROCESS

The drug evaluation process uses a variety of readily observable signs and symptoms that are medically accepted as reliable indicators of drug influence.[52] It is a systematic, standardized method of examining a suspect to

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[46] *Id.* at app. 6. For a complete description of all the requirements a DRE candidate must complete in order to obtain DRE certification, see *id.* at app.: "Standards for the Drug Evaluation and Classification Program."

[47] *Drug Recognition Expert Process*, *supra* note 9, at 2; *see infra* APPENDIX IV, entitled Indicators Consistent with Drug Categories.

[48] *Drug Recognition Expert Process*, *supra* note 9, at 2.

[49] *Id.*

[50] *Id.* at 3. Just as the officer does not need to determine the type or brand of alcohol a suspect has consumed in order to offer an opinion that the individual is driving under the influence of alcohol, the DRE is not expected to ascertain the precise drug the suspect is using in order to reach a conclusion regarding drug impairment. *Drug Recognition Expert Program*, *supra* note 2, at 16-17.

[51] *Drug Recognition Expert Program*, *supra* note 2, at 16.

[52] *See* United States v. Everett, 972 F. Supp. 1313, 1320 (D. Nev. 1997).

> The pertinent components of the DRE protocol have long been established and used in the medical community as part of physical examinations (e.g., blood pressure and heart rate, observations of the eyes, nose and mouth). Other components are identical to those used by police officers in evaluations for alcohol impairment (e.g., Horizontal Gaze Nystagmus ("HGN") and [Field Sobriety Tests]). Whether and how the various components of the protocol are impacted by various classes of drugs are sufficiently established to permit the DRE to draw conclusions and reach opinions based upon observations. The validity of those conclusions or accuracy of the observations is

determine whether the suspect is impaired by one or more categories of drugs.[53] The process is systematic because it is based on a variety of observable signs and symptoms that are known to be reliable indicators of drug impairment.[54] A DRE does not reach a conclusion based on a single element of the examination, but on the totality of the facts.[55] These facts are obtained from observations of the suspect's appearance, behavior, eyes, oral and nasal cavities, vital signs, the performance of psychomotor tests, and the suspect's statements.[56]

The process is standardized because it is conducted in exactly the same way, by every DRE, for every suspect.[57] A DRE does not omit any steps of the examination, even if a step is not expected to provide a positive indicator of the type of drug(s) that the DRE may suspect.[58] Additionally, the DRE never modifies the examination by including some additional test that he or she thinks may be helpful.[59] Standardization is important because it helps to avoid errors and promotes professionalism.[60] To ensure the drug evaluation is systematic and standardized, each DRE completes a "Drug Influence Evaluation" form on every suspect evaluated.[61]

The law does not require suspects to participate in a drug influence evaluation.[62] If a suspect refuses to participate in an evaluation, however, the

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certainly subject to cross-examination and other methods of impeachment but any errors in that regard do not make the underlying steps of the DRE protocol junk science, or scientific at all.

*Id.* (citations omitted); *see infra* APPENDIX IV, Indicators Consistent with Drug Categories.

[53] STUDENT MANUAL, *supra* note 3, at IV-1.

[54] *Id.*

[55] *Id.*; *see also infra*, APPENDIX III, Twelve-Step DRE Evaluation Matrix.

[56] STUDENT MANUAL, *supra* note 3, at IV-1.

[57] *Id.* One accepted exception deals with differing state requirements regarding *Miranda* warnings. The manner in which officers administer *Miranda* rights may vary from state to state.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See* NAT'L DIST. ATTORNEYS ASS'N, PROSECUTING THE DRUGGED DRIVER app. C (1999) (on file with author).

[62] *Drug Recognition Expert Process*, *supra* note 9, at 4-9. The Twelve Step Drug Influence Evaluation consists of the followings steps:

(1) Breath Alcohol Test to determine the suspect's Breath Alcohol Content (BrAC); (2) Interview of the Arresting Officer, in which the DRE discusses the circumstances of the arrest with the arresting officer; (3) Preliminary Examination and First Pulse, in which the DRE asks the suspect questions about his health and observes the suspect's physical condition and behavior. The examination includes a check of pupil size and pulse; (4) Eye Examination in which the DRE checks for nystagmus and lack of convergence; (5) Divided Attention Psychophysical Tests in which the DRE observes whether the suspect can follow various tests of coordination. The tests include the Romberg Balance Test, Walk and Turn Test, One Leg Stand, and Finger to Nose Test; (6) Vital Signs and Second Pulse, in which the DRE takes the

police officer involved will base his decision to arrest on his observations that usually consist of evidence of impaired driving, evidence of physical impairment, and the lack of indicators of alcohol use.[63] In Hawai'i, as in most states, however, the failure to submit to a drug test if there is probable cause to believe the suspect was driving under the influence of drugs will result in a license suspension.[64]

## IV. THE DRE AS AN EXPERT WITNESS

DREs identify drug impairment and categorize the drug involved based upon general observations and the shared signs and symptoms caused by the different drugs in each of seven drug categories.[65] DREs form their opinions by collecting and recording data in a standardized and systematic way, and render opinions based on the totality of the circumstances.[66] DREs know that not everyone who appears impaired is actually under the influence of alcohol or drugs. They also are well aware that not everyone reacts the same way when taking drugs.

Consequently, prosecutors argue DREs are qualified to testify as experts on drug impairment by virtue of their training, experience, skill, and education. By virtue of this special training and experience, DREs will be able to assist the trier of fact to understand the evidence and reach a conclusion. Meanwhile, defense attorneys contend the DRE protocol is nothing more than "voodoo science," and police officers lack the necessary medical training to accurately reach conclusions regarding drug impairment.

As previously discussed, hundreds of governmental agencies and many private organizations endorse the DRE program.[67] Two states, Maine and

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suspect's blood pressure, temperature, and pulse; (7) Dark Room Examination, in which the DRE measures the suspect's pupil sizes under four different lighting condition and examines the suspect's nasal and oral cavities for signs of ingestion; (8) Examination for Muscle Tone; (9) Check for Injection Sites and Third Pulse; (10) Suspect's Statements and Other Observations; (11) Opinion of the Evaluator; and (12) Toxicological Examination, in which the DRE requests a urine and/or blood sample from the suspect, which is then sent to the toxicology lab for analysis. *Id.*

On January 1, 1998, a law went into effect in Hawai'i requiring those whom the police had probable cause to believe were driving under the influence of drugs to submit to a urine or blood test or lose their licenses for one full year. *See* HAW. REV. STAT. § 286-157.3 (2000).

[63] STUDENT MANUAL, *supra* note 3, at IV-1.

[64] HAW. REV. STAT. § 286-157.3 (2000).

[65] STUDENT MANUAL, *supra* note 3, at II-2-3. The seven categories of drugs are: central nervous system ("CNS") depressants, CNS stimulants, hallucinogens, phencyclidine ("PCP") and its analogs, narcotic analgesics, inhalants, and cannabis. *Id.*; *see also infra* APPENDIX IV.

[66] *See* STUDENT MANUAL, *supra* note 3, at IV-1.

[67] *See, e.g.*, Letter from T. Edward Corley, M.D., President & Barry R. Weiss, M.D., Emergency Medical Services Committee, Broward County Medical Association, to Stephen K.

Maryland, have enacted statutes recognizing Drug Recognition Experts.[68] Maryland law states that individuals trained as DREs may request drug tests from drivers whom they have reasonable grounds to believe are driving under the influence of drugs.[69] The officers must be trained through a program in conjunction with the National Highway Traffic Safety Administration or through a program with requirements that are the substantial equivalent of the NHTSA program.[70] Maine has a similar law, but refers to these specially trained police officers as "Drug Recognition Technicians" rather than "Drug Recognition Experts."[71]

## V. CASE LAW UPHOLDING DRE TESTIMONY

An overwhelming majority of courts throughout the country have held DREs are qualified to testify as expert witnesses, and every appellate court in the United States that has ruled on this issue has concluded DREs are qualified to testify as expert witnesses.[72] Each appellate decision found that the DRE is an expert based upon training and experience.[73] In addition, in 1997, a federal

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Talpins, Esq., Assistant State Attorney 1-2 (March 1, 1994) (on file with author); Letter from N. Ralph Frankel, M.D., President, Dade County Medical Association, to Whom It May Concern 1 (Jan. 25, 1994) (on file with author); Letter from Richard P. Maulion, M.D., President, Broward County Psychiatric Society, to Whom It May Concern 1 (Jan. 14, 1994) (on file with author); Letter from Pat Chinn, M.D. President, Phil Hellreich, M.D., Legislative Chair, & Gerald McKenna, M.D., Physicians' Health Chair, Hawai'i Medical Association to Whom It May Concern 1 (Feb. 12, 1999) (on file with author).

In addition, the United States Department of Transportation stated in its 1996 Report To Congress:

> The Drug Evaluation and Classification Program has been remarkably successful in producing meaningful results in the critical areas of developing and implementing the program, saving lives on our nation's roads, strengthening partnerships, gaining court acceptance, as well as achieving self-sufficiency and showing a steady return on investment. NHTSA's leadership role in development and implementation of the DEC program produced scientific validation of the program, effective training and certification standards, and rapid expansion and institutionalization of the program.

U.S. DEP'T OF TRANSP., A Report to Congress on the Drug Evaluation and Classification Program 19 (Apr. 1, 1996) (on file with author) [hereinafter Report to Congress].

[68] *See* ME. REV. STAT. ANN. tit. 29-A, §§ 2525, 2526 (West 1999); MD. CODE ANN., Transp. § 16-205.1 (2000).

[69] MD. CODE ANN., Transp. § 16-205.1 (2000).

[70] *Id.*

[71] ME. REV. STAT. ANN. tit. 29-A, § 2526 (West 1999).

[72] *See* Mace v. State, 944 S.W.2d 830 (Ark. 1997); State v. Klawitter, 518 N.W.2d 577 (Minn. 1994); State v. Baity, 991 P.2d 1151 (Wash. 2000); Williams v. State, 710 So. 2d 24 (Fla. Ct. App. 1998); State v. Layman, 953 P.2d 782 (Utah Ct. App. 1998); State v. Sampson, 6 P.3d 543 (Or. Ct. App. 2000).

[73] *Id.*

district court issued a written decision in support of the right of DREs to testify as experts.[74]

The first case to address the admissibility of DRE testimony was *State v. Johnson*.[75] In *Johnson*, the Honorable Rita Jett determined that the procedures used by DREs met the standard established in *Frye v. United States*.[76] On appeal, the Arizona Supreme Court "recognized that the basic methodology used by DREs is the deduction of drug influence through the observation of generally accepted signs and symptoms and, is neither new [n]or novel."[77] Chief Justice Stanley G. Feldman further observed that "the component examination procedures had been established for fifty years."[78] Accordingly, the justices of the Arizona Supreme Court unanimously rejected the application of *Frye* to the DRE protocol and declined jurisdiction to reconsider Judge Jett's decision.[79]

In 1991, the Suffolk County District Court of New York considered the admissibility of DRE testimony in *People v. Quinn*.[80] The court found that "[t]he protocol is relatively simple" and held that the "HGN test and the DRE protocol meet the standards enunciated by *Frye* . . . ."[81]

In *State v. Klawitter*,[82] the Minnesota Supreme Court held that DREs may testify concerning the observations made while following the twelve-step drug evaluation protocol and based on those observations, may give an opinion on the impairment.[83] The *Klawitter* court reasoned that:

> [T]he protocol followed by the [DRE] is not itself a scientific technique but rather a list of the things a prudent, trained and experienced officer should consider before formulating or expressing an opinion whether the subject is under the influence of some controlled substance . . . . [O]f the twelve steps of the protocol, few of them seem to call for any particular medical or scientific training or skill on the part of the officer.[84]

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[74] United States v. Everett, 972 F. Supp. 1313 (D. Nev. 1997).

[75] Report to Congress, *supra* note 67, at 14.

[76] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (holding that a party offering new or novel scientific evidence must demonstrate that the evidence is generally accepted to be accurate and reliable in the relevant scientific community)

[77] Report to Congress, *supra* note 67, at 14.

[78] *Id.*

[79] *Id.*

[80] 580 N.Y.S.2d 818 (N.Y.D.C. 1991).

[81] *Quinn*, 580 N.Y.S.2d at 826 (referring to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

[82] 518 N.W.2d 577 (Minn. 1994).

[83] *Id.* at 586.

[84] *Id.* at 584.

Although the defense challenged the officer's capability to draw conclusions on the defendant's impairment based on the twelve-step protocol, the court disagreed.[85] Writing for the majority, Justice Coyne explained that:

> [T]he protocol does not involve any scientific skill or training on the part of the officer. Drug recognition training is not designed to qualify police officers as scientists but to train officers as observers. The training is intended to refine and enhance the skill of acute observation which is the hallmark of any good police officer and to focus that power of observation in a particular situation.[86]

The court justified the use of the twelve-step protocol for recognizing drug impairment with the explanation that a standard procedure used by all officers leads to greater accuracy and consistency.[87] The only problem the court found with the testimony of the officers trained in drug evaluation is their title of "Drug Recognition Expert."[88] Justice Coyne explained that such a title may be misleading and stated that "[p]erhaps the officer can be called a 'Drug Recognition Officer' or some other designation which recognizes that the officer has received special training and is possessed of some experience in recognizing the presence of drugs without suggesting unwarranted scientific expertise."[89]

Justice Wahl dissented. He argued that "a police officer's application of medical or scientific tests and the rendering of an opinion on drug impairment based on those tests is an 'emerging technique' that warrants a *Frye* inquiry."[90] Justice Wahl argued that the DRE protocol does not meet the *Frye* standard and therefore an opinion on impairment based on that protocol should be inadmissible.[91] He concluded by stating that "[p]ersons driving motor vehicles under the influence of a controlled substance should be apprehended and convicted, but they should not be convicted by the force of an opinion of impairment based on and enhanced by a DRE protocol which has not been proved to be valid and reliable."[92]

In *United States v. Everett*,[93] a United States Magistrate allowed DRE testimony to be admitted. The magistrate found that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[94] did not apply to the DRE protocol because the

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[85] *Id.*
[86] *Id.* at 585.
[87] *Id.* at 586.
[88] *Id.*
[89] *Id.* at 585.
[90] *Id.* at 586.
[91] *Id.* at 587.
[92] *Id.*
[93] 972 F. Supp. 1313 (D. Nev. 1997).
[94] 509 U.S. 579 (1993).

protocol was made up of nothing more than physical observations.[95] The *Everett* court explained, "the testimony of the DRE is based upon observations and tabulations of the results of those observations. He or she is not propounding a scientific principle or theory in testifying about the performance of the various steps of the evaluation and what the findings or observations were."[96] The court stated that multiple physical observations "used in concert, to reach a conclusion, does not necessarily elevate the result from the technical to the scientific. The pertinent components of the DRE protocol have long been established and used in the medical community as part of physical examinations . . . ."[97]

The court held that "upon the appropriate foundation being laid, the Drug Recognition Evaluation protocol conducted by [the DRE], together with his conclusions drawn therefrom, shall be admitted into evidence to the extent that the DRE can testify to the probabilities, based upon his or her observations and clinical findings . . . ."[98] More importantly, the court held that a DRE is a technical expert and not a scientific expert.[99] The DRE is deemed to have specialized knowledge, and to base his opinion on observation, training, skill, and experience.[100] A DRE can testify as to this specialized knowledge since it will assist the trier of fact to understand the evidence.[101] However, the court mentioned a preference for using the title of "Drug Recognition Examiner," rather than "Drug Recognition Expert," explaining that the term "expert" is presumptuous and possibly infringes on the court's discretion to determine who are experts.[102]

In *Mace v. State*,[103] the Arkansas Supreme Court unanimously held that a police officer trained as a DRE qualifies as an expert under Rule 702 of the Arkansas Rules of Evidence.[104] Chief Justice Arnold explained that the lower court qualified the officer "as an expert for a narrow purpose–whether [the defendant] was impaired because of some kind of intoxicant," and agreed with the lower court that the officer's "specialized training and knowledge aided the circuit court in determining this fact in issue."[105]

Although the defendant asserted that the officer should not have been qualified as an expert in drug recognition, the court found the officer possessed

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[95] *Everett*, 972 F. Supp. at 1320.
[96] *Id.* at 1319.
[97] *Id.* at 1320.
[98] *Id.* at 1326.
[99] *Id.* at 1321.
[100] *Id.*
[101] *Id.* at 1326.
[102] *Id.* at 1316 n. 2.
[103] 944 S.W.2d 830 (Ark. 1997).
[104] *Id.* at 834.
[105] *Id.*

specialized knowledge that would assist the jury to decide the fact in issue.[106] Chief Justice Arnold explained, "[I]f some reasonable basis exists from which it can be said that the witness has knowledge of the subject beyond that of ordinary knowledge, the evidence is admissible as expert testimony."[107]

In 1998, the Utah Court of Appeals addressed the issue of officers testifying as drug recognition experts in *State v. Layman*.[108] In *Layman*, the defendant argued that the trial court should not have admitted DRE testimony concerning his intoxication because it was not analyzed under *State v. Rimmasch*,[109] a Supreme Court of Utah decision that outlined the admissibility of scientific evidence.[110] In determining the admissibility of scientific evidence, the *Layman* court concluded that DRE testimony is opinion and not scientific testimony, and therefore does not have to meet the test for scientific evidence.[111] The court explained, "*Rimmasch* analysis applies only to expert testimony based on scientifically derived facts or determinations, and not to an expert's personal observations and opinions based on his or her education, training, and experience."[112]

In 1998, a Florida Appeals Court held in *Williams v. State*[113] that DRE testimony and evidence is admissible because it is reasonably accurate, reliable, and relevant.[114] They also held that although the tests DREs use to determine drug use are "quasi-scientific," they are not new or novel and therefore *Frye* does not apply.[115] The defendant argued that the DRE testimony should not be admitted because the State did not establish the reliability of the DRE protocol.[116]

The *Williams* court distinguished between the general portion of the DRE protocol and its subsets HGN, VGN, and LOC.[117] Regarding the general portion of the DRE protocol, the court stated:

> [b]ecause the tests, signs and symptoms of the protocol are within the common understanding of the average layman, the general portion of the protocol is not

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[106] *Id.*

[107] *Id.* (citing Dillon v. State, 877 S.W.2d 915 (Ark. 1994)).

[108] 953 P.2d 782 (Utah Ct. App. 1998).

[109] 775 P.2d 388 (Utah 1989).

[110] *Layman*, 953 P.2d at 785.

[111] *Id.* at 786.

[112] *Id.*

[113] 710 So. 2d 24 (Fla. Dist. Ct. App. 1998).

[114] *Id.* at 32-33.

[115] *Id.* at 28-29. For example, DREs use the Horizontal Gaze Nystagmus ("HGN") test, the Vertical Gaze Nystagmus ("VGN") test, and the Lack of Convergence ("LOC") test, each scientifically based, in helping to determine whether a suspect is under the influence of drugs. *Id.* at 27.

[116] *Id.* at 28.

[117] *Id.*

> "scientific" within the meaning of *Frye*. The fact that some of the examinations in the protocol are borrowed from the medical profession, does not elevate the protocol to scientific status.[118]

The DRE's opinion is not a medical diagnosis, but rather the result of tests "within the common experience and understanding of the average person."[119] The court stated:

> [p]olice officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct, and appearance, and also to give an opinion on the defendant's state of impairment based on those observations. Objective observations based on observable signs and conditions are not classified as "scientific" and thus constitute admissible testimony.[120]

The court explained that any conflicting studies or scientific articles may be introduced by the defense to challenge the DRE testimony, yet held that "common sense mandates DRE testimony is relevant in a prosecution for driving under the influence of a controlled substance, because it shows a probability that a person was impaired by alcohol and/or drugs."[121]

The Washington Supreme Court is the most recent state supreme court to consider the admissibility of DRE testimony. In *State v. Baity*,[122] the court ruled DRE evidence admissible under *Frye* because it is generally accepted in the relevant scientific communities.[123] In its unanimous decision, the court held the DRE may testify if the conclusions regarding impairment are based on his or her observations and clinical findings, and not by way of scientific standards.[124] Judge Talmadge explained that "'(f)or the same reason that the [c]ourt would admit the testimony of an officer testifying about his observations . . . of an alcohol intoxicated driver, even though the officer could be wrong, this [c]ourt finds the same justification for admitting the testimony of the DRE here for the same purposes.'"[125] The court confined its holding to apply only when all twelve steps of the drug evaluation protocol have been undertaken.[126] The court further explained that "[t]he officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and

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[118] *Id.* at 28 (italics added).
[119] *Id.*
[120] *Id.* at 28-29.
[121] *Id.* at 33 (citation omitted).
[122] 991 P.2d 1151 (Wash. 2000).
[123] *Id.* at 1160-61.
[124] *Id.*
[125] *Id.* at 1159 (citing United States v. Everett, 972 F. Supp. 1313, 1324 (D. Nev. 1997)).
[126] *Id.* at 1160; *see* discussion *supra* note 62.

physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs."[127]

In May 2000, the Oregon Court of Appeals issued a decision regarding the admissibility of DRE testimony.[128] The trial court ruled DRE testimony was scientific evidence and that it met the admissibility requirements for scientific testimony.[129] The court of appeals agreed, and stated that "the DRE protocol has achieved a significant degree of acceptance within the relevant scientific community that weighs in favor of its admissibility for the purpose of establishing the influence of controlled substances."[130]

In other cases around the country, courts faced with the issue of the admissibility of DRE testimony have reached similar results. In *Harris v. Schmitt*,[131] the Arizona Court of Appeals upheld an administrative order suspending the defendant's license for driving under the influence of drugs and failing to provide a urine sample.[132] The court relied upon a DRE officer's opinion that the defendant was under the influence of a stimulant.[133] The defendant claimed the DRE officer was still in training and not certified to administer the drug influence evaluation.[134] The court, however, held that "under these circumstances, in which Officer Jex [DRE] testified about his prior experience and his supervisor was present and concurred in his assessment, any issue about Jex's testimony could only relate to its weight, not its admissibility."[135] Here, even though the DRE had not yet received his certification, the court determined that it was proper for his opinions to be admitted at the administrative hearing.[136]

The Court of Appeals of Texas addressed the admissibility of drug recognition testimony in *Hooker v. Texas*.[137] The *Hooker* court held that there was sufficient evidence to sustain a prosecution for driving while intoxicated by prescription drugs where the defendant initially refused to submit to a DRE evaluation.[138] The defendant argued that although the arresting officer was a DRE, his expertise in recognizing drug intoxication depended upon the administration of a variety of tests, "only two of which were actually

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[127] *Baity*, 991 P.2d at 1160-61.
[128] State v. Sampson, 6 P.3d 543 (Or. Ct. App. 2000).
[129] *Id.* at 547.
[130] *Id.* at 553.
[131] 885 P.2d 1125 (Ariz. Ct. App. 1994).
[132] *Id.* at 1126.
[133] *Id.*
[134] *Id.*
[135] *Id.* at 1126-27.
[136] *Id.* at 1126.
[137] 932 S.W.2d 712 (Tex. Ct. App. 1996).
[138] *Id.* at 714-15.

performed."[139] The officer explained that he could only perform two of the tests because the defendant was unable to perform any others.[140] The court recognized the officer's experience and training and held that "[b]ased upon the testimony and exhibits before the jury . . . we find that any rational trier of fact could have found, beyond a reasonable doubt, that appellant had lost the normal use of his mental or physical faculties from ingesting the controlled substance Vicodin on the night in question."[141]

In 1996, a New York appellate court affirmed the admissibility of expert testimony given by a DRE on the subject of drug metabolization and the defendant's metabolization of and impairment by cocaine.[142] The court rejected the defendant's challenge regarding the admissibility of the DRE's testimony.[143] The court stated that "[t]he attack on [the DRE's] expertise was not supported by any evidence. Defendant's conclusary allegations as to [the DRE's] limitations as an expert fail to make out a ground for exclusion of his testimony."[144]

In *Duffy v. Director of Revenue*,[145] the Missouri Court of Appeals upheld the administrative suspension of the defendant's license for driving under the influence of drugs based in part upon testimony of the DRE officer.[146] The defendant argued the Director failed to give a proper *Frye* foundation for the testimony of the DRE.[147] The court rejected the defendant's argument and explained, "where scientific proof of sobriety is offered to establish reasonable grounds that an individual was driving while intoxicated sufficient to revoke an individual's driving privileges . . . it is not necessary to lay a *Frye* foundation."[148]

In *Arizona v. Hammonds*,[149] an officer noticed that a suspect he pulled over displayed signs of intoxication.[150] When the BrAC revealed low concentrations, the officer suspected that the defendant's intoxication resulted from drug use.[151] The DRE administered a series of tests and eventually

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[139] *Id.* at 713.
[140] *Id.* at 714.
[141] *Id.* at 715.
[142] *See* State v. Villeneuve, 232 A.D.2d 892, 895 (N.Y. App. Div. 1996).
[143] *Id.*
[144] *Id.*
[145] 966 S.W.2d 372 (Mo. Ct. App. 1998).
[146] *Id.* at 377.
[147] *Id.* at 374.
[148] *Id.* at 377 (citing Nuyt v. Dir. of Revenue, 814 S.W.2d 690 (Mo. Ct. App. 1991)).
[149] 968 P.2d 601 (Ariz. Ct. App. 1998).
[150] *Id.* at 603.
[151] *Id.*

concluded that the defendant was under the influence of drugs.[152] The trial court admitted this opinion testimony.[153]

## VI. DRE EXPERT TESTIMONY HELD ADMISSIBLE IN HAWAI'I

In Hawai'i scientific and technical evidence is admissible if it comports with the mandates of Hawai'i Rules of Evidence, Rule 702. Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.[154]

The leading Hawai'i case in interpreting this rule is *State v. Montalbo*.[155] Here, the Hawai'i Supreme Court explained that courts should weigh general acceptance of a theory, along with whether:

(1) the evidence will assist the trier of fact to understand the evidence or to determine a fact in issue;
(2) the evidence will add to the common understanding of the jury;
(3) the underlying theory is generally accepted as valid;
(4) the procedures used are generally accepted as reliable if performed properly;
(5) the procedures were applied and conducted properly in the present instance.[156]

A court should then consider whether the evidence is more probative than prejudicial.[157]

In a hearing on a Motion in Limine to Preclude DRE Testimony, a Honolulu district court evaluated the issue of DREs testifying as experts.[158] The defendants presented two witnesses in support of their Motion to Preclude DRE Testimony: (1) Dr. John P. Morgan, M.D., Professor of Pharmacology,

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[152] *Id.*

[153] *Id.* at 603.

[154] HAW. R. EVID. 702 (1999).

[155] 73 Haw. 130, 828 P.2d 1274 (1992).

[156] *Id.* at 140, 828 P.2d at 1280-81.

[157] *Id.*, 828 P.2d at 1281.

[158] State v. Cheung, Nos. 098304309, 098304512 (Haw. Dist. Ct. Apr. 21, 1999) (on file with author). Seven additional defendants, also represented by the Office of the Public Defender, were joined for purposes of this motion. *Id.*

City University of New York Medical School, and (2) Dr. John Medford Corboy, M.D., Board Certified in Ophthalmology.[159] In opposition to the motion, the State presented the following witnesses: (1) Sergeant Thomas Page, Head of the DRE Program, Los Angeles Police Department; (2) Dr. Zenon Zuk, M.D., California; (3) Dr. Clifford Wong, Ph.D., Head of the Clinical Laboratory of Hawai'i, Director of Toxicology Services; (4) Mr. Robert Adler, Toxicologist, Arizona; (5) Dr. Karl Citek, Doctor of Optometry, Oregon; (6) Dr. Marcelline Burns, Doctor of Psychology, Co-Founder and Director of the Southern California Research Institute; and (7) Officer Shermon Dowkin, Drug Recognition Expert, Honolulu, Hawai'i.[160]

The court made seventeen findings of fact in its decision regarding the DRE protocol.[161] Included were the following:

> The twelve-step DRE evaluation process is a systematic assessment of a suspect's vital signs and physical appearance and is not a new or novel scientific procedure.
>
> The DRE Protocol is a technical, not scientific, application of long-established and accepted scientific principles and procedures drawn from medicine and police practices and procedures.
>
> The DRE Protocol produces an accurate and reliable determination as to whether or not a suspect is impaired by drugs, as well as the category of drugs that the suspect has used.
>
> The extensive, rigorous, in-depth training of police officers as reflected in their training manuals enable DREs to accurately observe the signs and symptoms of drug impairment and to reach trustworthy and valid conclusions.
>
> DRE testimony represents an area of specialized knowledge based upon observation, education, training, skill, and experience.[162]

The court concluded that *Frye* and *Daubert* do not apply to the DRE protocol because the procedures underlying the twelve steps are not new or novel.[163] The DRE protocol is held to be "a compilation of tried and true procedures utilized by medical science and the law enforcement community in similar contexts for many years."[164] The court also held that *Frye* and *Daubert* were inapplicable because the DRE protocol involves technical knowledge, not scientific knowledge.[165] The court went on to say, however,

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[159] *Id.* at 7.
[160] *Id.*
[161] *Id.* at 8-10.
[162] *Id.*
[163] *Id.* at 12 (citations omitted).
[164] *Id.* (citing People v. Quinn, 580 N.Y.S.2d 818, 827 (1991)).
[165] *Id.*

that even if it applied *Frye* and *Daubert* in this case, DRE testimony, including opinion testimony would still be admissible.[166]

Although some courts have concluded the DRE protocol is "scientific," DREs are generally considered "technical" rather than "scientific" experts.[167] DREs' opinions are based on observation, education, training, skill, and expertise.[168] The DRE is not a doctor, pharmacologist, or toxicologist. Nonetheless, the DRE has specialized knowledge that will assist the trier of fact to understand the evidence. Thus, while there is a scientific explanation for pupil dilation, "the DRE is not testifying about the underlying physiological mechanism that controls pupil dilation, only whether the pupils were dilated."[169] Furthermore, while the DRE may make observations that are scientifically explainable, those observations are not themselves scientific.[170] Testimony from a DRE involves "technical knowledge" and not "scientific knowledge." The difference between these two terms is spelled out in *State v. Fukusaku*,[171] in which the Hawai'i Supreme Court stated:

> 'Scientific knowledge' must be distinguished from 'technical knowledge.' Expert testimony deals with 'scientific knowledge' when it involves the validity of the scientific principles and the reliability of the scientific procedure themselves. In contrast, expert testimony deals with 'technical knowledge' when it involves the mere application of well-established scientific principles and procedures. In such a situation, because the underlying scientific principles and procedures are of proven validity/reliability, it is unnecessary to subject technical knowledge to the same type of full-scale reliability determination required for scientific knowledge. Thus, although technical knowledge, like all expert testimony, must be both relevant and reliable, its reliability may be presumed.[172]

In *Fukusaku*, the Hawai'i Supreme Court stated that "[b]ecause scientific principles and procedures underlying hair and fiber evidence are well established and of proven reliability, the evidence could be treated as

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[166] *Id.* at 13.

[167] NAT'L DIST. ATTORNEYS ASS'N, *The DRE as Expert Witness*, *in* PROSECUTING THE DRUGGED DRIVER 7 (1999) (on file with author).

[168] *Id.*

[169] *Id.* Just as an individual does not need to understand how a television operates in order to determine if the set is working properly, the DRE does not need to know the scientific explanation of how drugs cause impairment in order to see impairment. *Id.*

[170] *See* State v. Layman, 953 P.2d 782 (Utah Ct. App. 1998) (affirming a lower court decision admitting DRE testimony because it is opinion and not scientific testimony); State v. Klawitter, 518 N.W.2d 577, 584 (Minn. 1994) (holding that the DRE protocol is not itself a scientific technique).

[171] 85 Hawai'i 462, 946 P.2d 32 (1997).

[172] *Id.* at 473, 946 P.2d at 43.

'technical knowledge' . . . [and] an independent reliability determination was not necessary."[173]

Prosecutors contend the scientific principles and procedures underlying the DRE protocol have been proven to be valid and reliable, and the DRE protocol is not an attempt to advance a new scientific theory or technique. They argue that DREs simply report what they are trained to observe and make conclusions based on widely accepted medical principles. DREs are merely technicians applying their observations to principles utilized by the medical community for decades. Consequently, according to the distinction between "scientific" knowledge and "technical" knowledge set forth in *Fukusaku*, DREs testify as "technical" experts.[174]

This distinction between "scientific evidence" and "technical evidence" may not play such a crucial role in the future as it has in the past. The initial standard for the admission of expert testimony was developed in *Frye v. United States*.[175] The *Frye* standard requires a party offering new or novel scientific evidence to demonstrate the evidence is generally accepted to be accurate and reliable in the relevant scientific community.[176]

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*[177] modified the *Frye* standard. The *Daubert* test does not require the scientific theory to have been accepted in the scientific community.[178] According to *Daubert*, other factors such as testing, publication, error rate, and reliability should be taken into account when determining the admissibility of expert testimony.[179]

The *Daubert* decision left some confusion as to whether or not non-scientific expert testimony was subject to its standards. Many courts, including those in Hawai'i, continued to make the distinction between "scientific experts" and "technical experts" as previously discussed.[180] In 1999, the U.S. Supreme Court attempted to clarify this issue in *Kumho Tire*

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[173] *Id.* at 474, 946 P.2d at 44.

[174] *Id.* at 473, 946 P.2d at 43. In *United States v. Everett*, the court held DRE protocol was made up of nothing more than physical observations. The court stated these physical observations did not elevate the DRE protocol from a mere technical procedure to a scientific procedure and recognized the components of the DRE examination have long been practiced and accepted in the medical field. *See* United States v. Everett, 972 F. Supp. 1313, 1320 (D. Nev. 1997).

[175] 293 F. 1013 (D.C. Cir. 1923).

[176] *See id.* at 1014.

[177] 509 U.S. 579 (1993).

[178] *Id.* at 588.

[179] *Id.* at 593-94.

[180] Walter G. Amstutz & Bobby Marzine Harges, *Evolution of Controversy: The Daubert Dilemma, The Application of* Daubert v. Merrell Pharmaceuticals Inc. *to Expert Testimony of Law Enforcement Officers in Narcotics Related Cases*, 23 U. HAW. L. REV. 67.

*Co., Ltd. v. Carmichael.*[181] Here, the Court held that both "scientific experts" and "technical experts" were subject to the gate-keeping role of the courts.[182] At the same time, however, the Supreme Court stated that the judge acting as the gatekeeper does not have to base his decision on the criteria established in *Daubert.*[183] *Daubert* criteria could be used as well as any other relevant criteria that would help the court determine the reliability of the proposed expert testimony.[184]

What does the *Kumho* decision mean for the Drug Recognition Expert Program? Since most state appellate courts have yet to rule on the issue of DRE testimony, it is anticipated they will look to *Kumho* for guidance. Because of the timing, it may not come as a surprise if some states, Hawai'i included, use a case involving DREs as a mechanism to address the issue of qualifications of expert witnesses.

Overall, the *Kumho* decision can be viewed in a positive light by both prosecutors and defense attorneys who work on the DRE expert witness issue. No longer will there be any need to spend time arguing if the DRE should be considered a "scientific expert" or a "technical expert." Moreover, courts will be given the flexibility to develop standards that are relevant to the DRE protocol in order to determine reliability. Courts will not be straightjacketed into any type of set formula. This will allow more creativity for the parties, and give both sides better opportunities to present their arguments.

The only time the Hawai'i Supreme Court has looked into the area of drug recognition was back in 1989 before there were any officers trained as DREs in Hawai'i.[185] At that time, the Hawai'i Supreme Court held that expert testimony regarding the behavioral effects of drugs is relevant and admissible in determining whether or not a suspect was driving under the influence of drugs and in determining the precise drug the defendant was using.[186] In *State v. Engcabo,*[187] the police stopped the defendant because he was driving in an erratic manner.[188] When the police officer observed the defendant, he noticed the defendant's eyes were bloodshot, his pupils were constricted, and that he had three puncture marks on his left arm.[189] The police officer also noticed a syringe with residue on the floor of the vehicle.[190]

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[181] 526 U.S. 137 (1999).
[182] *Id.* at 147.
[183] *Id.* at 152.
[184] *Id.*
[185] *See* State v. Engcabo, 71 Haw. 96, 99, 784 P.2d 865, 866-67 (1989).
[186] *See id.*
[187] 71 Haw. 96, 784 P.2d 865 (1989).
[188] *Id.* at 97, 784 P.2d at 865.
[189] *Id.*, 784 P.2d at 866.
[190] *Id.*

The Supreme Court of Hawai'i reversed the defendant's conviction because the State failed to provide evidence of the specific drug the defendant was alleged to have been using.[191] In doing so, however, the court held that the State could have proven the specific drug the defendant had been using even without him submitting to a drug test by engaging "an expert to testify as to the *behavioral effects* of a specific drug."[192] In a few years, the Hawai'i Supreme Court will likely answer the question as to whether or not police officers trained in the Drug Recognition Expert Program qualify as experts in this context.

Hawai'i courts traditionally hold that police officers are qualified to testify regarding their opinions that a person was under the influence of alcohol. Hawai'i case law concerning the admissibility of opinion evidence in DUI-Alcohol cases certainly suggests that police officers should be able to testify regarding their opinions that a person was driving under the influence of drugs other than alcohol. In *State v. Nishi*,[193] the Intermediate Court of Appeals of Hawai'i, citing *State v. Murphy*,[194] stated that a lay witness may express an opinion regarding another person's sobriety, provided the witness has had an opportunity to observe the other person.[195]

## VII. CONCLUSION

The decision in *Kumho* and the extensive litigation around the country regarding police officers specially trained in drug recognition will give many states, including Hawai'i, the opportunity to re-write its standards on the admissibility of expert testimony. Regardless of the precise formula each jurisdiction develops to deal with the admissibility of expert witness testimony, the proponent of an expert witness will always need to prove reliability. Through both laboratory studies and field experience, it has been demonstrated that the DRE protocol is a reliable means for detecting drug impairment. It would seem a police officer, or any individual who is properly trained and follows the protocol, can formulate accurate conclusions. If this foundation is properly established, the drug recognition testimony should be admissible. DRE testimony provides courts with a mechanism to address those who operate vehicles on our roads and highways while intoxicated by drugs rather than alcohol.

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[191] *Id.* at 99, 784 P.2d at 867.

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

[193] 9 Haw. Ct. App. 516, 852 P.2d 476 (1993).

[194] 451 N.W.2d 154, 155 (Iowa 1990).

[195] *Nishi*, 9 Haw. Ct. App. at 522, 852 P.2d at 479.

## APPENDIX I

In order to qualify a police officer trained in drug recognition as an expert consistent with the decisions reached in *Daubert* and *Kumbo Tire*, the prosecutor may utilize the questions set forth below. These questions should be asked after general questions have been asked about the officer's background, education, and law enforcement experience. For each question on the list, prosecutors should ask a series of follow-up questions depending upon the witness's responses. It is important to ask follow-up questions in order to help the witness educate the judge and jury about the DRE program and the method used to evaluate drug-impaired drivers. In some instances, areas for follow-up have been listed. Meanwhile, defense attorneys should note that these are the areas the government is going to emphasize in its attempt to qualify its witness as an expert.

### DRUG RECOGNITION TRAINING AND EXPERIENCE

1. Did there come a time during your service as a police officer that you became interested in the Drug Recognition Expert Program?
2. What is the Drug Recognition Expert Program?
3. When and where did this program get started?
4. When did the program begin in this state?
5. How many states currently utilize the Drug Recognition Expert Program as a means to identify drug impaired drivers?
6. Has the program been adopted in any foreign countries?
7. What is the role of the Drug Recognition Expert or DRE?
8. What specialized training have you received in regards to drug recognition?
   A. Address - Standard Field Sobriety Test Training
   B. Address - DRE Pre-School and School
   C. Address – Any Additional Training
9. How were you selected to receive this training?
10. What is the National Highway Traffic Safety Administration or NHTSA?
11. What is its role in regards to the training you received and the DRE Program?
12. As part of your training, did you have to take any examinations?
13. Did you pass those examinations?
14. After passing those examinations were you automatically certified as a DRE?
15. What else did you need to do?
    A. Address - Certification Process

B. Address – Awarding of DRE certificate and enter it into evidence.

16. What is a Drug Influence Evaluation?
    A. Have a blow-up of a chart listing the 12 steps marked for Identification. (State's Exhibit #1) (Appendix III)
    B. Address – 12 Step Systematic Approach
    C. Address – Uniformity Across the Country
17. What is the Symptomology Matrix or as it is sometimes called the Signs and Symptoms Matrix?
    A. Have a blow-up of the matrix marked for identification. (State's Exhibit #2) (Appendix IV).
    B. Address – 7 Categories of Drugs
    C. Address – 8 Signs and Symptoms
    D. Address – Poly Drug Use
18. On (date) did you perform a Drug Influence Evaluation on the Defendant?
19. Did you follow all of the steps listed in State's Exhibit #1?
20. Did you utilize the Signs and Symptoms Matrix, State Exhibit #2, in reaching your conclusions?
21. Have any studies been conducted in order to determine whether or not the 12-Step DRE protocol used in conjunction with the Signs and Symptoms Matrix result in accurate findings regarding drug impairment?
    A – Address Johns Hopkins University Laboratory Study
    B – Address Los Angeles Field Study
    C – Address NHTSA's Role in These Two Studies
22. *Admit the two charts into evidence and display them throughout the trial. If the court requires additional foundation information, ask the court to take judicial notice of the seven published appellate decisions listed in the Appendix II. All seven decisions found the DRE methodology as a reliable means to detect drug impairment.*
23. Is alcohol a drug?
24. What category of drugs does alcohol fall within?
25. How many arrests have you made for DUI-Alcohol?
26. How many arrests have you made for driving under the influence of drugs other than alcohol?
27. How many drug influence evaluations have you conducted?
28. How are the results of those evaluations recorded?
29. Of all the drug influence evaluations you have conducted, how many times did you conclude the suspect was under the influence of drugs?
30. Of those evaluations where you concluded the suspect was under the influence of drugs, how many times were your conclusions confirmed by subsequent laboratory testing?

31. In those situations where you concluded the suspect was under the influence of drugs, yet the lab report came out negative, did that mean you were incorrect? Explain.
32. *Go through the first ten steps of the drug influence evaluation step by step.*
33. *Ask the court to qualify the witness as an expert in drug recognition on the basis of his specialized training and experience.*
34. *Ask the witness to give his opinion regarding the defendant's impairment, and to describe in detail what that opinion is based upon.*
35. *Have the witness describe what, if anything, he did in regards to Step 12 – the toxicological sample.*

## APPENDIX II

STATE SUPREME COURT PUBLISHED DECISIONS

Arkansas – *Mace v. State*, 944 S.W.2d 830 (Ark. 1997).
Minnesota – *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994).
Washington – *State v. Baity*, 991 P.2d 1151 (Wash. 2000).

STATE APPELLATE COURT PUBLISHED DECISIONS

Florida – *Williams v. State*, 710 So. 2d 24 (Fla. Ct. App. 1998).
Utah – *State v. Layman*, 953 P.2d 782 (Utah Ct. App. 1998).
Oregon – *State v. Sampson*, 6 P.3d 543 (Or. Ct. App. 2000).

FEDERAL COURT PUBLISHED DECISIONS

Nevada – *United States v. Everett*, 732 F. Supp. 1313 (D. Nev. 1997).

## APPENDIX III

### TWELVE-STEP DRE EVALUATION MATRIX

1. BREATH ALCOHOL TEST

2. INTERVIEW OF ARRESTING OFFICER

3. PRELIMINARY EXAMINATION
   First Pulse — Initial Angle of Onset
   Initial Estimate of Pupil Size

4. EYE EXAMINATION
   HGN — Lack of Smooth Pursuit
   Nystagmus at Maximum Deviation
   Angle of Onset
   VERTICAL NYSTAGMUS
   LACK OF CONVERGENCE

5. DIVIDED ATTENTION TESTS
   1. Romberg Balance — 2. Walk & Turn
   3. One Leg Stand — 4. Finger to Nose

6. VITAL SIGNS
   PULSE — 60-90 B.P.M. (Normal Range)
   30 SECONDS X 2 = b.p.m.
   BLOOD PRESSURE

   | | | | |
   |---|---|---|---|
   | 120 | - 140 - | Systolic | (Normal Range) |
   | 70 | - 90 - | Diastolic | |

   BODY TEMPERATURE
   98.6°F ± 1.0°F (Normal Range)

7. DARK ROOM CHECKS
   PUPIL SIZE – 3.0mm – 6.5mm (Normal Range)
   1. Room Light — 2. Near Total Darkness
   3. Indirect Light — 4. Direct Light
   INGESTION EXAMINATION
   1. Nasal Area — 2. Oral Cavity

8. CHECK FOR MUSCLE TONE

9. CHECK FOR INJECTION SITES – THIRD PULSE

10. QUESTIONING OF SUBJECT – OBSERVATIONS

11. OPINION OF EVALUATOR

12. TOXOLOGICAL SAMPLE

## APPENDIX IV

## INDICATORS CONSISTENT WITH DRUG CATEGORIES

| | DEPRESSANTS | STIMULANTS | HALLUCINOGENS | PCP | NARCOTIC ANALGESICS | INHALANTS | CANNABIS |
|---|---|---|---|---|---|---|---|
| HGN | PRESENT | NONE | PRESENT | NONE | NONE | PRESENT | NONE |
| VERTICAL NYSTAGMUS | PRESENT (HIGH DOSE)* | NONE | NONE | PRESENT | NONE | PRESENT (HIGH DOSE)* | NONE |
| LACK OF CONVERGENCE | PRESENT | NONE | NONE | PRESENT | NONE | PRESENT | PRESENT |
| PUPIL SIZE | NORMAL (1) | DILATED | DILATED | NORMAL | CONSTRICTED | NORMAL (4) | DILATED (6) |
| REACTION TO LIGHT | SLOW | SLOW | NORMAL (3) | NORMAL | LITTLE OR NONE VISIBLE | SLOW | NORMAL |
| PULSE RATE | DOWN (2) | UP | UP | UP | DOWN | UP | UP |
| BLOOD PRESSURE | DOWN | UP | UP | UP | DOWN | UP/DOWN(5) | UP |
| BODY TEMPERATURE | NORMAL | UP | UP | UP | DOWN | UP/DOWN/ NORMAL | NORMAL |

***High dose for that particular individual**

**FOOTNOTE:**
**These indicators are those most consistent with the category, keep in mind that there may be variations due to individual reaction, dose taken and drug interactions.**

1. **SOMA, Quaaludes usually dilate pupils.**
2. **Quaaludes and ETOH may elevate.**
3. **Certain psychedelic amphetamines cause slowing.**
4. **Normal but may be dilated.**
5. **Down with anesthetic gases, up with volatile solvents and aerosols.**
6. **Pupil size possibly normal.**

# Music on the Internet: An International Copyright Dilemma

## I. INTRODUCTION

The advent of digital music on the internet is arguably the single greatest threat to copyright standards in the history of recorded music.[1] There is strong discourse on the issue of whether sharing music files over the internet constitutes copyright infringement. Many feel that music should be freely shared,[2] while others believe that the process violates copyright laws and will

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[1] *See infra*, note 15 and accompanying text. Steven Devick, Chief Executive Officer of Platinum Music, believes the internet will change the way music is promoted. In the future, most music will be available for free over the internet, and advertisers will pay the music companies and musicians. Press Release, Associated Press, AP-Free Music (1999) (on file with the author).

[2] Individuals have posted comments to bulletin boards at many web sites, including MP3.com and Napster. *See infra*, section IV.A. Many commentators are in favor of file sharing without restrictions, while others are opposed. *See, e.g.*, *Message Boards*, MP3.com, *at* http://msg.mp3.com/msg/ (last visited Dec. 19, 2000), *Napster Forum*, Napster, *at* http://forum.napster.com (last visited Dec. 19, 2000). The following is just one of many:

> I think that if the artists really cared about the fans, then they wouldn't be doing this just for the money. Music is meant to be for the pure joy of music, like the old bards (wandering minstrels) back in the Old Ages. Did they get paid? No. They went around singing for the sake of singing. Most of the artists today have lost the fact that Music is for the Joy of Music, and Pleasing the Fans.

Judd632, to *Music Isn't About Record Sales*, *at* http://www.forum.napster.com (July 30, 2000, 10:40 PM) (last visited Dec. 20, 2000) (copy on file with author).

British band Chumbawamba is a proponent of music sharing. The band has made its song called "Pass It Along" available for free on their web site "www.chumba.com." The song samples artists, without permission, such as Eminem, Madonna, The Beatles, Dr. Dre and Metallica, who are opposed to free file sharing. *Chumbawamba Enter File Sharing War*, BUSINESS WIRE, Nov. 13, 2000.

Interestingly, the web site does not offer the band's entire collection, but does offer "hard to get, limited edition stuff that's not available anywhere/any more." *Chumbawamba*, *at* http://www.chumba.com. Chumabawamba vocalist Dunstan Bruce states:

> What? Killing music the way that home taping killed music in the seventies? It's not passing music around for free which is killing music, but the industry which is stifling creativity by only ever thinking in terms of dollars and pounds. . . . If Ulrich, Madonna and Eminem had never sold any records and were worried about entering a poverty stricken old age, then their determination to stop their music being passed around would be understandable–but what we're seeing is some of the richest popstars in the world making the biggest stink about not being able to screw every last penny from their adoring fans. . . . And it's hilarious listening to the big record companies bleating on about how file sharing is damaging art," added Bruce. "They wouldn't recognise art or artistic integrity if it bounded over and bit them on the arse. Time Warners [sic] President, Richard Parsons recently said that young people no longer buy albums and a generation are growing up with the notion that music should be for free. The real truth is that record companies have been screwing the public for years and they're now terrified that they

ultimately chill creativity.[3] While there are legal and advantageous uses of the new technology,[4] courts have so far sided with the status quo.[5] This comment argues that the sharing of digital music on the internet constitutes piracy,[6] violates United States' copyright laws,[7] and that international means of protection should be developed to accommodate the global nature of the internet. United States' copyright statutes[8] are not effective against global piracy because protection under the law of a single nation is of limited value when online music can be accessed in other countries.

Digital music attracts music pirates. Digital copying creates high quality sound, unlike analog tape recordings, which degrade rapidly from the first

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might lose the odd dollar here and there."

Dunstan Bruce, *Pass It Along–Press Release for the MP3 Mix, available at* http://www.chumba.com/_passitalong.htm (last visited Dec. 19, 2000).

[3] The Recording Industry Association of America, the trade group that represents the U.S. recording industry, provides the following information on its web site:

> Eighty-five percent of recordings released don't even generate enough revenue to cover their costs. Record companies depend heavily on the profitable fifteen percent of recordings to subsidize the less profitable types of music, to cover the costs of developing new artists, and to keep their businesses operational. The thieves often don't focus on the eighty-five percent; they go straight to the top and steal the gold. . . . [With piracy, m]usicians, singers, songwriters and producers don't get the royalties and fees they've earned. Virtually all artists (95%) depend on these fees to make a living. The artists also depend on their reputations, and inferior pirated copies hurt their reputations.

RIAA, *RIAA/Anti-Piracy Effects, at* http://www.riaa.org/Protect-Campaign-3.cfm (last visited Dec. 19, 2000).

[4] The technology exposes music and musicians to internet users all over the world, thus creating a new marketing method for new artists. The internet can also be an educational tool. A group of third- to fifth-grade students created, recorded, and then posted their music on MP3.com, generating over $400 through MP3.com's Payback for Playback program. The students learned how to create sound files and upload the files to the internet. The group also received an Internet Innovator Award from National Semiconductor Corp., which awarded $10,000 to their teacher and $20,000 to their school. John Townley, *School Kids Become Music Entrepreneurs on the Internet*, INTERNET NEWS, Oct. 27, 2000, *at* http://www.internetnews.com/streaming-news/article/0,,8161_497201,00.html (last visited Nov. 27, 2000).

[5] *See infra* section IV.A. Courts have held that companies facilitating file sharing are liable for willful copyright infringement. *See id.*

[6] Piracy is the unauthorized copying of copyrighted material for commercial gain. GILLIAN DAVIES & MICHÈLE E. HUNG, MUSIC AND VIDEO PRIVATE COPYING 4 (1993). It is the unauthorized duplication of an original recording distributed to the public with labels, artwork, trademarks and packaging different from, although often similar to, those of the original legitimate recording. *Id.* In the music industry, piracy represents a massive $4.5 billion illicit enterprise. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, *What Is Copyright?, at* http://www.ifpi.org/copyrightcreativity/what_is_copyright.html (last visited Dec. 19, 2000).

[7] Copyright Act of 1976, 17 U.S.C. §§ 101-1205 (2000).

[8] *Id.*

generation.[9] Music pirates can transfer huge music files easily and quickly over the internet with newly developed file compression techniques. The most popular technique is MPEG-1 Audio Layer 3 (commonly known as MP3).[10] Music pirates allegedly maintain web sites full of thousands of MP3s converted from commercial compact disks (CDs).[11] Internet users around the world can access this music. New products such as portable MP3 players[12] and rewritable CDs[13] simplify the production of multiple high-quality copies with a very low investment. There are probably more than 100 million computers worldwide connected to the internet, most of which can download and store pirated copies of recorded music.[14] When large numbers of high-quality copies can be made privately, piracy and any copying for personal use is devastating to the copyright system.[15]

Customs agents at the United States Customs' CyberSmuggling Center police the internet for sites illegally hosting copyrighted music.[16] Once an illegal site is discovered, it takes weeks or months to gather evidence, identify

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[9] John Burgess, *Bill Imparts the Sound of Music*, WASHINGTON POST, Oct. 9, 1992, at F1, *available at* 1992 WL 2162688.

[10] Stephen M. Kamarsky, *Managing Copyright in Digital Marketplace System May Be Redefined by Music Distribution War*, NEW YORK L.J., Oct. 18, 1999, at S4.

[11] *Id.* The International Federation of the Phonographic Industry (IFPI) estimates that there are at least twenty-five million illegal music files posted on the internet. International Federation of the Phonographic Industry, *Soaring Internet Piracy Could Threaten the Future of the European Music Industry*, *at* http://www.ifpi.org/press/20000713.htm (July 13, 2000). The IFPI is an international organization representing over 1400 record producers and distributors. *Id.*

[12] Portable devices can receive, store, and re-play digital audio files, such as MP3s, stored on a personal computer's hard drive and are now available for sale through the internet or at electronics retailers for less than $200. For example, the "Audiovox MP-1000" player costs $169. *Etronics*, *at* http://www.etronics.com/printspecs.asp?stk_code=andmp1000 (last visited Nov. 27, 2000).

[13] Internet users can also record their MP3 files onto blank CDs using a CD ReWriteable (CD-RW) drive. *See, e.g.*, Yamaha Product Catalog, *CRW2260TIPC*, *available at* http://www.yamaha.com/cgi-win/webcgi.exe/DsplyModel/?gHDR00007CRW2260TIPC (last visited Dec. 19, 2000). With CD-RW, it is possible to record and rerecord an unlimited number of song compilations or entire CDs, and play them back on a stereo or car CD player. Thus, individuals can copy music easier and more efficiently, making factory production unnecessary for piracy of commercial-quality music.

[14] Patrick Allossary, *Clickety-Click and the Music Is Illegal*, NAT'L POST, Feb. 11, 2000, at C3.

[15] Private copying is the non-commercial copying of sound recording for personal use. DAVIES & HUNG, *supra* note 6, at 1. Private, non-commercial copying is legal in the United States, as codified in the Audio Home Recording Act, 17 U.S.C. § 1008 (2000). *See* discussion *infra* at section III.B. See DAVIES & HUNG, *supra* note 6, for an argument against reproduction for private use in the digital age.

[16] Tom Spring, *Surfing With U.S. Customs*, NETWORK WORLD FUSION, Oct. 19, 1999, *available at* 1999 WL 16424187.

the owner, and shut down a site.[17] Few civil suits have been filed against music pirates, but thousands of cease and desist orders have been sent by the Recording Industry Association of America (RIAA).[18] The music industry was defrauded by $300 million in 1998 in revenue lost to digital downloads of MP3s.[19]

Some sites give free music away legally, making it hard for the potential consumer to understand the difference between legal and illegal downloads. Platinum Entertainment has placed its entire catalog online hoping that advertisers will pay a premium to place their logo on the site.[20] "MP3.com" allows users to listen instantly to unrepresented artists for free and add their personal favorites to a play list.[21] These artists sign up with MP3.com in order to promote their music.[22] Yet, until very recently, many of the songs available for download at MP3.com were unauthorized by the artists.[23] A copyright infringement lawsuit against MP3.com filed by the RIAA in January 2000 states that MP3.com's use of the music is unauthorized because the company does not own the music and is offering it without permission.[24]

Music piracy takes on a much larger international dimension with the advent of MP3 technology. The response must be global and immediate. Part II of this comment reviews the major multilateral treaties that have addressed copyright in sound recordings and concludes that there is still a lack of means for international enforcement. Part III outlines the United States copyright law as a model for international law. Part III also discusses the use of economic leverage in the encouragement of international compliance with multilateral treaties, which is ineffective against countries that are in a trade deficit with the United States. Part IV discusses recent litigation and addresses the problem of public perception, both in the United States and in the developing

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[17] *Id.*

[18] RIAA, *RIAA/Anti-Piracy Statistics*, *at* http://www.riaa.org/Protect-Campaign-6.cfm (Aug. 17, 1999).

[19] Spring, *supra* note 16.

[20] *AP-Free Music*, *supra* note 1. Platinum Entertainment's web site is at http://www.heardon.com.

[21] *MP3.com*, *at* http://www.mp3.com (last visited Dec. 19, 2000).

[22] MP3.com, *MP3.com New Artist Sign Up*, *at* http://www.mp3.com/newartist/ (last visited Dec. 19, 2000).

The site also lists success stories of artists who have received record deals because of their exposure on the internet. MP3.com, *Artist Success Stories*, *at* http://www.mp3.com/newartist/artistsuccess.html#1 (last visited Dec. 19, 2000).

[23] MP3.com signed licensing agreements with the top five record labels as a result of several lawsuits. These lawsuits are discussed *infra* in section IV.A.

[24] *Suit Filed Against Music Web Site*, HONOLULU ADVERTISER, Jan. 22, 2000, at A3. The lawsuit is discussed *infra* in section IV.A.

world and concludes that educating the public of the need for copyright controls is the first step in creating a global solution.

## II. INTERNATIONAL CONVENTIONS

### *A. Background*

Although there is a wide spectrum of public opinion as to whether music should be freely shared via the internet, the rights of both consumers and copyright holders must ultimately be determined by what the law states. Thus, a discussion of the evolution of modern copyright law and international agreements follows.

Copyright originated in the privilege system, which granted monopoly rights or licenses to publishers.[25] The first copyright act, the Statute of Queen Anne of 1709, granted exclusive rights to publishers for limited terms, which were gradually lengthened to fifty years after the death of the author.[26] The United States adopted this English concept of copyright, and it gradually spread to the English-speaking world.[27] From the time of the French Revolution, France recognized the *droit d'auteur*, which granted to the author the essential rights of performance and publication.[28] The concept of '*droit d'auteur*' spread to continental Europe, the French colonies and Latin America.[29] The Berne Convention of 1886, discussed *infra*, was the first attempt to create an international copyright system and was essentially a compromise between the two main systems.[30]

In general, copyright grants the right to prevent copying, to make adaptations for other media, to make derivative works such as translations and other versions of the original material, and in some countries, the *droit moral*, or "moral right" which serves to prevent distortion of the work.[31] These rights are economic rights, often granted in return for the payment of a copyright

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[25] STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS § 2.12 (2d ed. 1989). Henry VIII set up the privilege system in order to control the dissemination of religious and political books. Only publishers registered with the Stationers' Company were authorized to print copies of books, and had the right to publish these copies in perpetuity. This right was later referred to as "copyright." *Id.*

[26] *Id.* § 2.14.

[27] *Id.* § 2.17. The source of law for copyright in the United States is the Constitution. U.S. CONST. art. I, § 8, cl. 8. The first copyright statute was enacted in 1790. STEWART, *supra* note 25, § 21.01.

[28] *Id.* § 2.10.

[29] *Id.* § 2.19.

[30] *Id.* § 2.20.

[31] RICHARD WINCOR, COPYRIGHTS IN THE WORLD MARKETPLACE 10 (1990).

registration or licensing fee.[32] Thus, copyright is a collection of rights to protect the author's interests as well as the publisher's interests. As applied to music, those interests are held by the composer or songwriter[33] and sometimes the performer, as well as the record producer[34] or distributor.

Rights in sound recordings[35] are granted to the producer in both copyright countries and in *droit d'auteur* countries.[36] The local laws of nations may provide civil remedies to the copyright holder, such as a right of action for damages, as well as criminal punishment for violators of these rights.[37]

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[32] J. A. L. STERLING, INTELLECTUAL PROPERTY RIGHTS IN SOUND RECORDINGS, FILM & VIDEO § 1.08 (1992). In the United States, registration is no longer necessary. Protection ensues from the moment of fixation in a tangible medium of expression. *See* 17 U.S.C. § 102 (2000).

[33] In the United States, the composer holds the exclusive rights enumerated in section 106 of the Copyright Act of 1976, including the rights of reproduction, distribution, performance, display and the right to prepare a derivative work. 17 U.S.C. § 106 (2000). Early copyright law protected only the composer and not the performer. An amendment to the Copyright Act added protection for sound recordings in 1971. Steve Jones, *Music and Copyright in the USA*, *in* MUSIC AND COPYRIGHT 67 (Simon Frith ed., 1993). "In the days before recording, 'fixing' music could only mean scoring it. The author of a song was the author of its sheet music . . . ." *Id.* at 80 (quoting Simon Frith).

[34] The person or company responsible for making the arrangements for recording, manufacturing and distributing the song is referred to as the "producer." STERLING, *supra* note 32, § 1.02 (1992). In the United States, the producer has fewer rights than the composer, namely the exclusive rights to reproduce the work in phonorecords, to prepare derivative works, to distribute copies in phonorecords, and to perform the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C. § 114 (2000).

[35] All sound recordings currently distributed to the public are audio recordings. An audio recording is a recording that is processed electronically. STERLING, *supra* note 32, § 2.04. Sound recordings are "works that result from the fixation of a series of musical, spoken or other sounds . . . regardless of the nature of the material objects, such as disks, tapes or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (2000). In this article, the terms "audio recording," "sound recording," and "recording" are used interchangeably.

[36] STEWART, *supra* note 25, § 1.14(e). The *droit d'auteur* (author's right) is an individual right. In most cases, audio recordings are made by companies, which cannot be authors in the *droit d'auteur* sense. *Id.* Individuals who contribute to the making of an audio recording, such as musicians, sound engineers and recording editors can be co-authors of the resulting work. Their rights "may belong to, be transferred to or be acquired by the producer, by virtue of legal provision, employment conditions or otherwise." STERLING, *supra* note 32, § 10.25. Under the French system, producers must acquire rights from all individuals classed as authors. STEWART, *supra* note 25, § 1.14(e). In continental European systems, producers are given neighboring rights, under which the rights are transferred from the songwriter and/or composer. *Id.*

[37] In the United States, remedies for copyright infringement are codified in the Copyright Act of 1976, 17 U.S.C. §§ 501-512 (2000).

### B. The World Intellectual Property Organization

The World Intellectual Property Association (WIPO) is an agency of the United Nations and works for the promotion of protection of intellectual property generally.[38] The WIPO, founded in 1967, has 175 nations as members.[39] The WIPO administers twenty-one multilateral treaties and conventions dealing with the legal aspects of intellectual property, and facilitates cooperation with developing countries.[40] The most important copyright treaty is the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").[41]

#### 1. The Berne Convention

Standard copyright protocol originates from the Berne Convention, signed in 1886.[42] The United States became a party to the Convention over 100 years

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[38] World Intellectual Property Organization, *About WIPO, at* http://www.wipo.org/about-wipo/en/overview.html (last visited Dec. 19, 2000). Intellectual property includes musical works, as well as literary works, choreographic works, artistic works, maps and technical drawings, photographic works, audiovisual works, and sometimes derivative works, collections and mere data. WIPO, *Copyright and Related Rights, at* http://www.wipo.org/en/copyright.htm (last visited Dec. 19, 2000).

[39] *About WIPO, supra* note 38.

[40] *Id.* The WIPO also hosts an Arbitration and Mediation Center, which assists in commercial disputes between private parties and offers alternatives to court litigation. WIPO, *The WIPO Arbitration and Mediation Center, at* http://www.arbiter.wipo.int/center/index.html (last visited Dec. 19, 2000). This alternative however, is more amenable to contract disputes, such as payment of royalties, rather than enforcement of rights against an infringer. If a dispute arises under the WIPO conventions, a member nation must bring the dispute before the International Court of Justice (individuals do not have standing in the ICJ). *See* Marshall A. Leaffer, *Protecting United States Intellectual Property Abroad: Toward a New Multilateralism*, 76 IOWA L. REV. 273, 301 (1991).

The WIPO's Permanent Committee on Development Cooperation Related to Copyright and Neighboring Rights coordinates training programs targeted toward developing countries to assist in the development of copyright legislation, public awareness, enforcement mechanisms and the establishment of collective management societies. *WIPO Permanent Committee on Development Cooperation Related to Copyright and Neighboring Rights (PC/CR): Memorandum by the Director General*, 14th Sess., Annex at 3, U.N. Doc. WO/CF/XIV/2 (1997), *available at* http://www.wipo.int/eng/document/govbody/wo_gb_cf/doc/cf14_2.doc.

[41] Leaffer, *supra* note 40, at 293. A Convention defines basic standards of protection as agreed by the international community. As of October 15, 2000, the Berne Convention has 147 member states. For updated statistics and a list of members, see WIPO, *Intellectual Property Protection Treaties, at* http://www.wipo.org/treaties/ip/index.html (last visited Dec. 19, 2000).

[42] The Berne Convention was established at a diplomatic conference by the Swiss Federal Council in 1886 as a union of states for the protection of literary and artistic works. Leaffer, *supra* note 40, at 293 n.95.The United States, as well as the U.S.S.R. and China, were not members of this important convention. *Id.*

later, in 1988.[43] The Berne Convention sets minimum standards of copyright protection and requires the parties to adopt measures to ensure application of the treaties and availability of enforcement procedures.[44] The Berne Convention also provides that protection should be automatic, without registration, notification or other formality requirements.[45] Every copyright treaty since has incorporated the standards developed in the Berne Convention.

The Berne Convention and its later revisions at Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967) and Paris (1971) establish minimum substantive standards of protection, although national law may afford greater protections.[46] Each party agrees to incorporate these standards into its national law, although a number of the provisions are optional.[47] The minimum rights are designed to avoid imbalances created by the principle of national treatment, discussed in the next paragraph. Each revision tends to incorporate additional minimum rights. For example, the Rome Act of the Convention of 1928 extended the author's control of the work to sound broadcasting.[48] Another important provision was added at the Brussels revision of 1948, which requires a minimum term for copyright of at least the life of the author plus fifty years.[49]

The guiding principle of the Berne Convention was that "all authors of works published in contracting states, irrespective of their nationality, should be treated without discrimination under the national law of a member country and without being subjected to any formalities" such as registration or notice.[50]

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[43] *Intellectual Property Protection Treaties*, *supra* note 41; *see also* Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

> Adherence to Berne required significant changes in U.S. policy. Before Berne, the United States relied on bilateral agreements and the Universal Copyright Convention (UCC). The UCC is administered by UNESCO, a U.N. organization from which the U.S. has withdrawn. Interest in joining the world copyright community and establishing copyright relationships with countries not covered by either bilateral agreements or the universal copyright conventions provided the impetus for U.S. entry.

Leaffer, *supra* note 40, at 293 n.95.

[44] *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, amended in Paris, July 24, 1971, 828 U.N.T.S. 221, *reprinted in* MARSHALL A. LEAFFER, INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 360 (Marshall A. Leaffer ed., 2d ed. 1997) [hereinafter Berne Convention].

[45] *Id.* art. 5. Examples of formalities are imprinting "C" in a circle and depositing copies with the registrar. WINCOR, *supra* note 31, at 9-10.

[46] Dave Laing, *Copyright and the International Music Industry*, *in* MUSIC AND COPYRIGHT 22, 24-25 (Simon Frith ed., 1993).

[47] *Id.* at 25.

[48] *Id.*

[49] Berne Convention, *supra* note 44, art. 7(1).

[50] MARSHALL A. LEAFFER, INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 5 (Marshall A. Leaffer ed., 2d ed. 1997).

Thus, the Berne Convention allows for national treatment, which means that foreign copyright holders must receive the same protection as domestic authors.[51] The Convention also establishes the place of publication as an alternative basis for national treatment.[52] Thus, protection must be given to a work if it is first published in a member country irrespective of the author's nationality.[53] Alternatively, a Berne Convention member may grant 'reciprocal treatment,' which provides to foreign authors only the level of treatment they would receive in their own country.[54]

The Berne Convention provides that "[a]uthors of literary and artistic works . . . have the exclusive right of authorizing the reproduction of these works, in any manner or form."[55] The Berne Convention also gives authors of musical works the exclusive right of authorizing "the public performance of their works, including such public performance by any means or process . . . ."[56] Musical compositions are protected, but producers of sound recordings are not protected because that particular medium is not included in the definition of "literary and artistic work."[57] Article 9(3) provides that "[a]ny sound or visual recording shall be considered as a reproduction for purposes of this Convention."[58] Thus, a composer is protected from having his or her song recorded by another artist, but the copyright owner of a sound recording is not protected from having that recording distributed by another.

The Berne Convention did not create transnational rights for copyright owners or a system of enforcement of copyright laws.[59] It contains no

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[51] Laing, *supra* note 46, at 25.

[52] Berne Convention, *supra* note 44, art. 3(1)(*b*).

[53] LEAFFER, *supra* note 50, at 7.

[54] Laing, *supra* note 46, at 25. The private copying levies in force in many European countries provide an example of reciprocal treatment. *Id.* Foreign composers may share in the distribution of the levies only if there is a similar levy in force in their home country. *Id.*

[55] Berne Convention, *supra* note 44, art. 9(1).

[56] *Id.* art. 11(1)(i).

[57] *See id.* art. 2(1). A musical work embodied in an MP3 file is comprised of two copyrights. The musical copyright is for the underlying song itself (i.e. the notes of music placed in sequence) and belongs to the composer of the song, or often the composer's publishing company. Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 69 (1999). The sound recording copyright is for the actual recording of the song, and belongs to the artist who recorded the song, or his or her record company. *Id.* Often, but not always, the composer and the artists who record the song will be the same person or persons. *Id.*

[58] Berne Convention, *supra* note 44, art. 9(3).

[59] Linda W. Tai, *Music Piracy in the Pacific Rim: Applying a Regional Approach Towards the Enforcement Problem of International Conventions*, 16 LOY. L.A. ENT. L. REV. 159, 170 (1995).

effective dispute settlement provisions, a fact that may demonstrate that its framers never intended the treaty to enforce the rights of copyright owners.[60]

The Berne Convention simply confers national protection with minimum rights to artists only. Thus, the Berne Convention is ineffective when pirating countries fail to honor their responsibilities under the convention or neglect to amend their own laws to comply.[61] Moreover, incorporation of provisions to address important new technologies, such as the internet, has lagged.[62]

*2. The Phonograms Convention*

The WIPO also administers the 1971 Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Phonograms (Phonograms Convention), which was the first international treaty designed to deal with piracy and resulted from the arrival of the compact tape cassette in 1963.[63] The Phonograms Convention grants rights to the person who "first fixes the sounds of a performance on a material support" as long as he or she is a national of a contracting state.[64] This excludes manufacturers, wholesalers and retailers.[65] Other provisions of the Phonograms Convention set the duration of the protection to a term of at least twenty years from the fixation of the first phonogram or from the first publication of it.[66] Also, the Convention disallows extensive formalities, indicating that the maximum requirement allowed is that of the printing of the Convention symbol (a circle around a "P"), followed by the year of publication.[67]

The Phonograms Convention protects "against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the

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[60] *Id.*

[61] *Id.*

[62] Leaffer, *supra* note 40, at 293. Professor Leaffer notes as an example that semiconductor chip protection is not subject to international agreement. *Id.*

[63] Laing, *supra* note 46, at 30-31. As of October 15, 2000, there are sixty-three contracting parties. *See* WIPO, *Intellectual Property Protection Treaties*, *at* http://www.wipo.org/treaties/ip/index.html (last visited Dec. 19, 2000). For updated statistics and a list of members, see *id.*

[64] STEWART, *supra* note 25, § 9.06.

[65] *Id.*

[66] Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, *opened for signature* Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 67, art. 4, *reprinted in* MARSHALL A. LEAFFER, INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 453 (Marshall A. Leaffer ed., 2d ed. 1997) [hereinafter Phonograms Convention].

[67] *Id.* art. 5.

public."[68] Distribution to the public is usually for a commercial purpose; thus, making a copy for a friend or for personal use is not distribution.[69]

The means of protection vary greatly among the parties to the Convention, yet it was important for the Convention to be drafted quickly due to the worsening international piracy situation.[70] Thus, in order for the major countries to ratify the Convention without changing their laws, members are given the option to choose from three alternate forms of protection: copyright, the law of unfair competition, or penal sanction.[71] The most effective form of protection is copyright, and is the choice of the United Kingdom, the United States, and countries formerly in the British Commonwealth.[72] France protects its producers under the law of unfair competition.[73] In France, "the very act of illicit duplication is regarded as unfair competition," so all the plaintiff has to prove is that the duplications were never authorized.[74] A State must make piracy a criminal act if it adopts penal sanctions as its sole means of protection.[75] The main drawback of this form of protection is that the burden of proof is heavier on the prosecution than it would be on a plaintiff in a civil case.[76]

The Phonograms Convention, however, requires implementing legislation in each contracting State. The Phonograms Convention has achieved success in combating piracy in markets in the record-producing countries, but has been less effective in the largely piratical countries, situated mainly in the

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[68] *Id.* art. 2.

[69] STEWART, *supra* note 25 § 9.06. In the United States, the doctrine of fair use legalizes the limited reproduction or distribution of copyrighted material for personal use, and is codified at 17 U.S.C. § 107 (2000). *See* 17 U.S.C. § 107 (2000). Fair use is discussed in further detail *infra*, section III.A.1.

[70] STEWART, *supra* note 25, § 9.07. For example, in the United States, the Copyright Act of 1909 did not protect phonograms. *Id.* Courts applied the law of unfair competition against the pirates, but some Supreme Court decisions made the law unclear in this area, and lawsuits were lengthy and difficult. *Id.* In 1971 it was reported that the pirates' annual sales were estimated at one hundred million dollars, or a quarter of the total sales. *Id.*

[71] Phonograms Convention, *supra* note 66, at art 3. Examples of copyright countries are the United States, the United Kingdom and countries of the British Commonwealth, such as Australia, Canada, Ghana, India, Kenya, New Zealand, and countries formerly in the British Commonwealth that have legislation similar to that of the United Kingdom, including Ireland, Israel and South Africa. *Id.* Other countries have neighboring rights, which have the same effect as copyright, including Austria, Germany, Italy, Japan and the Nordic countries. *Id.* Belgium and the Netherlands offer protection under the law of unfair competition. STEWART, *supra* note 25, § 9.07.

[72] STEWART, *supra* note 25, § 9.07.

[73] *Id.* § 9.10.

[74] *Id.*

[75] *Id.* § 9.11.

[76] *Id.* For example, it may be difficult to prove that the defendant knew that the phonograms were illicitly made. *Id.*

developing world.[77] Developing states have little incentive, other than the economic leverage asserted by the music-exporting countries, to spend their limited resources enforcing anti-piracy laws. Finally, the Phonograms Convention does not address digital technology, including the internet.

*3. The internet treaties*

The WIPO adopted the so-called "internet treaties," the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) on December 20, 1996.[78] The WCT and WPPT incorporate minimum standards established in the Berne Convention and extend these rights to works in the realm of digital technology.[79] Many of the provisions are the same in both treaties. For example, both treaties include the so-called "Black Box" provision, which prohibits the "circumvention" of technological methods that control access to, and prevent duplication of a copyrighted work.[80] Another provision prohibits removing, changing or altering "electronic rights management information" (ERM).[81] ERM information identifies the owner of any right and may include the title of the work, author, copyright owner, terms for use of the work and any identifying numbers or symbols of a work.[82] The United States Congress ratified both treaties in 1999.[83] At present, fifty-one countries have ratified the WCT[84] and fifty the WPPT.[85]

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[77] Laing, *supra* note 46, at 31 (quoting Stephen Stewart, Director General, International Federation of the Phonographic Industry).

[78] *See* WIPO Copyright Treaty, *opened for signature* Dec. 20, 1996, S. TREATY DOC. NO. 105-17 (1997), *available at* 1997 WL 447232 [hereinafter WIPO Copyright Treaty].

[79] *See id.*

[80] *See id.* art. 11; *see also* WIPO Performances and Phonograms Treaty, *opened for signature* Dec. 20, 1996, S. TREATY DOC. NO. 105-17, art. 18 (1997), *available at* 1997 WL 447232 [hereinafter WIPO Performances Treaty]. For further information, see Mark Radcliffe, *Digital Millenium Copyright Act Forging the Copyright Framework for the Internet: First Steps*, 557 P.L.I/PAT. 365, 385 (1999). This provision is meant to protect the technological methods that are used to protect digital works both on the internet and on other media, such as encryption and watermarks. *Id.* See PETER WAYNER, DIGITAL COPYRIGHT PROTECTION (1997) for a general discussion of these new technological methods.

[81] WIPO Copyright Treaty, *supra* note 78, art. 12; *see also* WIPO Performances Treaty, *supra* note 80, art. 19; Radcliffe, *supra* note 80, at 387.

[82] WIPO Copyright Treaty, *supra* note 78, at art. 12(2); *see also* WIPO Performances Treaty, *supra* note 80, art. 19(2). The identifying information becomes ERM when it is "attached" to a copy or "appears in connection with" the communication. *Id.*

[83] *See* Press Release, World Intellectual Property Organization, *WIPO Outlines "Digital Agenda,"* (Oct. 31, 1999), *at* http://www.wipo.org/eng/pressrel/1999/p185r.htm (last visited Dec. 20, 2000).

[84] As of October 15, 2000, the following nations are signatories:

Argentina, Austria, Belarus, Belgium, Bolivia, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark, Ecuador, Estonia, Finland, France, Germany, Ghana,

### *C. The World Trade Organization*

The World Trade Organization (WTO), successor to the General Agreement on Tariffs and Trade (GATT), works for the protection of copyright in its relation to international trade.[86] The World Trade Organization negotiates international treaties designed to promote and police free trade on a worldwide basis.

#### *1. Overview of the WTO*

The WTO administers the GATT, which is primarily concerned with the international trade of goods.[87] As of December 21, 2000, there are 140 members of the WTO.[88] The WTO's objective is to ensure that trade flows as smoothly and freely as possible by providing a framework of predictability about the conditions in which traders conduct their transactions in the world market.[89]

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Greece, Hungary, Indonesia, Ireland, Israel, Italy, Kazakhstan, Kenya, Kyrgyzstan, Luxembourg, Mexico, Monaco, Mongolia, Namibia, Netherlands, Nigeria, Panama, Portugal, Republic of Moldova, Romania, Senegal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, United Kingdom, United States of America, Uruguay, Venezuela, and the European Communities.

WIPO, *Treaties Administered by WIPO*, *at* http://www.wipo.org/treaties/index.html (last visited Nov. 29, 2000).

[85] As of October 15, 2000, the following nations are signatories:

Argentina, Austria, Belarus, Belgium, Bolivia, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark, Ecuador, Estonia, Finland, France, Germany, Ghana, Greece, Hungary, Indonesia, Ireland, Israel, Italy, Kazakhstan, Kenya, Luxembourg, Mexico, Monaco, Mongolia, Namibia, Netherlands, Nigeria, Panama, Portugal, Republic of Moldova, Romania, Senegal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, United Kingdom, United States of America, Uruguay, Venezuela, and the European Communities.

*Id.*

[86] Unlike the WIPO, the WTO focuses on all types of products and services, rather than intellectual property only. *See* WTO, *World Trade Organization*, *at* http://www.wto.org (last visited Dec. 20, 2000).

[87] General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, T.I.A.S. 1700, 61 Stat (5) A3. For the current version, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 December 1993, *reprinted at* INSTITUTE FOR INTERNATIONAL LEGAL INFORMATION, GATT MULTILATERAL TRADE NEGOTIATIONS THE URUGUAY ROUND (1994) [hereinafter GATT].

[88] WTO, *What Is the WTO*, *at* http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 21, 2000).

[89] WTO, *The WTO in Brief*, *at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm (last visited Nov. 29, 2000).

The WTO provides an enforcement mechanism that does not exist in traditional multilateral agreements. The WTO's Dispute Settlement Understanding (DSU) facilitates the settling of disputes by using a panel of individual experts, who investigate and attempt to resolve the dispute.[90] The entire body of contracting parties rules on the dispute, usually deferring to the panel's recommendations.[91]

*2. Trade related aspects of intellectual property*

With increasing levels of piracy and the greater importance of intellectual property, "Western countries–particularly the United States–became dissatisfied with the low level of intellectual property protection provided by the WIPO conventions and the WIPO's inability to enforce intellectual property rights."[92] Thus, the Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS) emerged from the 1986-94 GATT Uruguay Round negotiations.[93] TRIPS incorporated trade in intellectual property for the first time. During the Uruguay Round, the United States maintained that inadequate protection of intellectual property rights is a serious non-tariff barrier to trade.[94] At the same time, developing countries criticized intellectual property rights, saying that developed countries could use copyright laws to maintain a competitive edge relative to countries lacking sophisticated technology.[95]

The TRIPS Agreement instituted a higher level of protection than any of the previously existing treaties. However, "TRIPS is not intended to replace the current treaties [such as the Berne Convention and the Internet Treaties] but to enhance them, and to fill in their gaps where necessary."[96] The TRIPS Agreement incorporates by reference most of the substantive provisions of the

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[90] *Id.*

[91] Leaffer, *supra* note 40, at 301. Professor Leaffer also notes that the dispute settlement mechanism is occasionally ineffective and inefficient, with the possibility for interminable hearings and extreme politicization. *Id.*

[92] LEAFFER, *supra* note 50, at 12.

[93] The current version of the GATT was negotiated in Uruguay. *See* GATT, *supra* note 87, at v. The complete agreement consists of about sixty agreements and separate commitments, and is about 30,000 pages long. WTO, *The WTO in brief, at* http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr03_e.htm (last visited Dec. 21, 2000).

[94] GILBERT R. WINHAM, THE EVOLUTION OF INTERNATIONAL TRADE AGREEMENTS 81 (1992).

[95] *Id.*

[96] LEAFFER, *supra* note 50, at 12.

Berne Convention, thus extending the Berne minimums to WTO countries.[97] Developing countries' obligations will go into effect in the year 2000, with the least-developed countries to follow in 2006.[98]

Article 14 of TRIPS attempts to prevent piracy by protecting sound recordings and live performances. Specifically, TRIPS provides producers of phonograms with the right to "authorize or prohibit the direct or indirect reproduction of their phonograms" (i.e., duplicating a CD or cassette tape).[99] TRIPS requires member countries to establish enforcement procedures, including provisions for seizure of pirated goods at borders.[100] It also requires the establishment of effective judicial procedures, including injunctive relief, measures to preserve evidence, and civil damages.[101] Disputes arising under TRIPS are to be settled under the terms of the WTO DSU's arbitration mechanism.[102] Member states may bring claims alleging inadequate protection or enforcement procedures.

TRIPS, however, is not self-executing and does not mandate specific procedures. Rather, each member country must "determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."[103] Thus, it is up to each country to establish its

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[97] DAVID LANGE ET AL., INTELLECTUAL PROPERTY CASES AND MATERIALS 1074 (1998). Article 9(1) states that members must comply with Articles 1 through 21 of the Berne Convention. *Id.* The TRIPS agreement excludes Article 6*bis* of Berne, which grants moral rights (the spirit and personality of the work). *Id.*

[98] *Id.* There are no WTO definitions of "developed" or "developing" countries, rather, developing countries in the WTO are designated by self-selection. WTO, *Who Are the Developing Countries in the WTO*, at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (last visited Dec. 19, 2000).

> The WTO recognizes as least-developed countries those countries that have been designated as such by the United Nations. There are currently 48 least-developed countries on the United Nations list, 29 of which to date have become WTO Members. These are: Angola; Bangladesh; Benin, Burkina Faso, Burundi, Central African Republic, Chad, Democratic Republic of the Congo, Djibouti, Gambia, Guinea, Guinea Bissau, Haiti, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Myanmar, Niger, Rwanda, Sierra Leone, Solomon Islands, Tanzania, Togo, Uganda, Zambia. Seven additional least-developed countries are in the process of accession to the WTO. These are: Cambodia, Cape Verde, Laos, Nepal, Samoa, Sudan and Vanuatu. Bhutan, Ethiopia and Yemen are WTO Observers.

*Id.*

[99] General Agreement on Tariffs and Trade–Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, art. 14(2), 33 I.L.M. 81 (1994). [hereinafter TRIPS Agreement].

[100] *Id.* art. 50

[101] *Id.* arts. 42-49.

[102] *Id.* art. 64; *see supra* notes 90 and 91 and accompanying text.

[103] TRIPS Agreement, *supra* note 99, art.1(1).

own rules and procedures for enforcing the TRIPS guidelines. Individual copyright owners cannot assert their rights against foreign countries, but must instead rely on the protection of the government to assert these rights on their behalf in the DSU. Not surprisingly, the United States' recording industry has not opted to or has been unable to take that route.

## III. COPYRIGHT LAW IN THE UNITED STATES

Although the term "international copyright" is used frequently, the term is somewhat of a misnomer. Copyright is guaranteed by national law, extending protections to foreign nationals of those countries that are parties to the international conventions. National law determines whether and which rights will be protected for foreign copyright owners, although parties to the treaties discussed *supra* must abide by the minimum requirements set forth in those treaties. Laws in almost every country set forth the specific rights of authors, producers and performers of copyrighted works. Enforcement, however, is governed purely by the legislation of the enforcing nation. Copyright law varies considerably around the globe, as does the commitment to enforcement.

In the United States, copyright law has evolved considerably within the short time span since the United States' ratification of the Berne Convention in 1988. The current copyright act and some significant recent amendments are set forth below as an example of compliance with treaty norms, and can be used as a model for worldwide copyright reform. An important significance of U.S. law is that it was written to anticipate future technology,[104] yet continues to evolve in order to keep pace with unanticipated technology.

### *A. The Copyright Act*

The United States Constitution authorizes the federal government to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[105] Early copyright law protected the right to print, publish and sell for a term of years that could be extended.[106] The law also required

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[104] The statute grants protection to "original works of authorship fixed in any tangible medium of expression, *now known or later developed*." 17 U.S.C. § 102(a) (2000) (emphasis added).

[105] U.S. CONST. art. I, § 8, cl. 8. Note that there is an inherent conflict between the ideas of ownership and control associated with copyright and the American tendency to value public discourse and free exchange. The First Amendment states "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

[106] LANGE, *supra* note 97, at 647-48. Once the term of years expires, the work enters the public domain. *See* Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960)

registration of the work with the government and publication of this registration in the newspaper.[107] These restrictions run counter to provisions within the Berne Convention and precluded the United States from joining the Berne Convention until these restrictions were loosened.[108] Current copyright law is embodied in the Copyright Act of 1976, which relaxed the publication requirement and expanded the copyright duration,[109] thus allowing the United States to join the Berne Convention in 1988.[110]

Congress extended protection to sound recordings under the then current copyright statute in 1971.[111] Under U. S. law there are separate copyrights for the musical composition and the sound recording. "The sound recording is the aggregation of sounds captured in the recording while the song or tangible medium of expression embodied in the recording is the musical composition."[112] The statue treats these separate rights differently.[113] This article focuses on the rights in the sound recording only.

The exclusive rights granted are those of reproduction, distribution, performance by means of a digital audio transmission, and the right to prepare derivative works.[114] The right of reproduction includes the right to copy, or "duplicate the sound recording in the form of phonorecords or copies that

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(holding that when the author of a copyrighted musical composition dies testate, the executor is entitled to the renewal rights).

[107] LANGE, *supra* note 97, at 647.

[108] HELENA STALSON, INTELLECTUAL PROPERTY RIGHTS AND U.S. COMPETITIVENESS IN TRADE 27 (1987). Requirements included giving notice to the public, and registration and recording of a work with the Library of Congress. *Id.*

[109] 17 U.S.C. §§ 104-1332 (2000). The Sonny Bono Copyright Term Extension Act further extended copyright duration to life of the author plus seventy years. *Id.* § 302 (2000).

[110] Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988); *see also* Leaffer, *supra* note 40, at 293 n.95.

[111] Act of Oct. 15, 1971, Pub. L. 92-140, § 1(b), 85 Stat. 391 (previously codified at 17 U.S.C. § 5(n), repealed in 1976).

[112] Harms v. JEM Records, Inc., 655 F. Supp. 1575, 1577 (D.N.J. 1987) (quoting H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 56, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5659, 5669).

[113] Composers are granted the complete list of exclusive rights listed in § 106, including the rights to reproduce, to prepare derivative works, to distribute copies (i.e. sheet music), to perform the copyrighted work publicly, to display the work publicly, and to perform publicly by means of a digital audio transmission. *Id.* § 106 (2000). Composers are also granted the moral rights of § 106A. 17 U.S.C. § 106A (2000). The rights of the owner of a copyright in a sound recording are limited to the rights to reproduce, to prepare derivative works, to distribute copies, and to perform by means of a digital audio transmission. *Id.* § 114(a) (2000). The right of public performance is explicitly excluded. *Id.* Thus, the artist must obtain permission from the composer in order to make the sound recording.

[114] These exclusive rights are codified at § 106 of the 1976 Copyright Act. 17 U.S.C. § 106 (2000).

directly or indirectly recapture the actual sounds fixed in the recording."[115] Reproduction also includes the transfer of a song from one format to another,[116] as in copying from CD to MP3 format. The distribution right grants the right to control distribution of all duplicates, including those made without the consent of the owner.[117] Sale, lease, rental and lending are all forms of distribution.[118] Several internet sites sell music in the form of CDs or cassette tapes sent by mail.[119] The music sold by these vendors is typically legal, with permission granted by the copyright holders.

The Sound Recording Amendment contained no reference to personal copying, however the legislative history indicates, "it is not the intention of the Committee to restrain the home recording, from broadcast or from tapes and records, of recorded performances, where home recording is for the private use and with no purpose of reproducing or otherwise capitalizing commercially on it."[120] This intention is in harmony with the "fair use" doctrine.

*1. The fair use doctrine*

The most controversial section of the Copyright Act with regard to sound recordings is the fair use doctrine, codified at section 107 of the Copyright Act.[121] Fair use allows exceptions that would otherwise be infringment in order to create a proper balance between encouraging creative endeavors and providing broad, public access to these works.[122] The statute provides a nonexclusive list of fair uses: "reproduction in copies or phonorecords . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[123] Section 107 provides four factors that courts must consider in determining whether a particular use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of

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[115] 17 U.S.C. § 114(b) (2000).

[116] *Id.*; STERLING, *supra* note 32, § 4.12.

[117] STERLING, *supra* note 32, § 4.45.

[118] 17 U.S.C. § 106 (2000).

[119] *See, e.g.*, *CDNOW*, *at* http://www.cdnow.com (last visited Dec. 19, 2000). BMG Music offers twelve CDs for the price of one CD. *BMG Music*, *at* http://www.bmgmusicservice.com(last visited Dec. 19, 2000).

[120] H.R. REP. NO. 487, 92d Cong., 1st Sess. 7, *reprinted in* 1971 U.S.C.A.A.N. 1566, 1572.

[121] 17 U.S.C. § 107 (2000).

[122] Tyler G. Newby, Note, *What's Fair Here is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?*, 51 STAN. L. REV. 1633, 1637 (1999).

[123] 17 U.S.C. § 107 (2000).

the copyrighted work.[124] This legislation is consistent with the Berne Convention,[125] the TRIPS Agreement[126] and the WIPO Copyright Treaty,[127] all of which allow exceptions to the right of reproduction in cases that do "not conflict with a normal exploitation of the work and do not unreasonably prejudice the interests of the author."[128]

The statutory language of section 107 has been upheld by the United States Supreme Court. The most important decision under the statute is *Sony Corp. of America v. Universal City Studios, Inc.*,[129] in which the Supreme Court held that private, home videotaping of broadcast programs was a fair use.[130] In so holding, the Court stated that the owners of copyrights on television programs failed to demonstrate that the recording would cause a likelihood of nonminimal harm to the potential market for the copyrighted works.[131] Important to the Court's holding was its finding that the home videotape recorder was capable of substantial non-infringing uses.[132]

The *Sony* suit was followed by a dispute in 1989 between the recording industry and manufacturers of Digital Audio Tape (DAT) recorder.[133] Industry representatives threatened to sue the first manufacturer to import DAT recorders to the United States for contributory copyright infringement if Congress failed to enact royalty schemes and copy prevention technology.[134] The manufacturers and the recording industry agreed to implement a copy

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[124] *Id.*

[125] Berne Convention, *supra* note 44, art. 9(2).

[126] TRIPS Agreement, *supra* note 99, art. 13.

[127] WIPO Copyright Treaty, *supra* note 78, art. 10.

[128] Berne Convention, *supra* note 44, art. 9(2); *see also* TRIPS Agreement, *supra* note 99, at art. 13; WIPO Copyright Treaty, *supra* note 78, art. 10. The language in all three of the treaties is identical.

[129] 464 U.S. 417 (1984). Universal argued that selling of home video recorders (Betamax VTRs) made Sony a contributory copyright infringer because some of Sony's customers used the devices to record programs off the air. *Id.* at 419. The evidence showed that the customers' primary use of the VTRs was for "time-shifting" purposes, to view the program at a more convenient time. *Id.* at 419-21.

[130] *Id.* at 455.

[131] *Id.* at 456.

[132] *Id.*

[133] Michael Plumleigh, Comment, *Digital Audio Tape: New Fuel Stokes The Smoldering Home Taping Fire*, 37 UCLA L. REV. 733 (1990). DAT combines the recording ability of standard analog cassette tape machines with the superior digital sound quality of compact discs ("CDs"). Studio executives were concerned that DAT consumers would use the devices to create high-quality copies of their CDs, with the resulting increase in copyright infringement. *Id.* at 734-35.

[134] *Id.* at 736.

protection solution, thus forestalling the threat of litigation.[135] Congress ultimately responded with the Audio Home Recording Act of 1992.

### *B. The Audio Home Recording Act of 1992*

The Audio Home Recording Act (AHRA) was signed into law on October 28, 1992.[136] The AHRA requires the manufacturer of digital audio recording devices to file a notice with the Register of Copyrights.[137] The manufacturer must also incorporate circuitry that prevents serial copying and prohibits the importation of devices designed to circumvent this circuitry.[138] The AHRA also imposes a royalty fee of two percent on recording devices[139] and three percent on recording media.[140] Finally, the AHRA also bars copyright infringement suits based on: 1) the manufacture, importation or distribution of a digital recording device, or 2) the use of such devices to make private copies.[141] Thus, private home taping in a digital medium does not infringe copyright in sound recordings. This was challenged by the recording industry with the introduction of the first portable MP3 player in *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc. (RIAA v. Diamond Multimedia)*[142]

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[135] *Id.* Representatives of the international recording and consumer electronics industries agreed in June 1989 to recommend jointly to governments the Serial Copy Management System (SCMS), which allows unlimited copying of prerecorded CDs, DATs, and digital radio broadcasts, but does not allow copying of subsequent DAT copies. *Id.* at 736 n.10. In part because of the dispute, DAT technology has not become popular with American consumers.

[136] 17 U.S.C. §§ 1001-1010 (2000).

[137] *Id.* § 1003(b).

[138] *Id.* § 1002. Digital audio recording devices must conform to the Serial Copy Management System (SCMS) or similar system approved by the Secretary of Commerce. 17 U.S.C. § 1002(a) (2000). SCMS technology allows unlimited copying from an original recording but prevents further copies being made from the first generation copy. Joel L. McKuin, *Home Audio Taping of Copyrighted Works and the Audio Home Recording Act of 1992: A Critical Analysis*, 16 HASTINGS COMM. & ENT. L.J. 311, 325-26 (1994).

[139] 17 U.S.C. § 1004(a) (2000).

[140] *Id.* § 1004(b).

[141] *Id.* § 1008.

[142] Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624 (C.D. Cal. 1998).

### *1. RIAA v. Diamond Multimedia*

The Recording Industry Association of America (RIAA)[143] filed for an injunction against the release of Diamond Multimedia's Rio PMP 300 MP3 Player (Rio) alleging violation of the AHRA.[144] The Rio "is a lightweight, hand-held device, capable of receiving, storing, and re-playing digital audio file [sic] stored on the hard drive of a personal computer."[145] The district court denied the injunction, holding that although the device meets the AHRA's definition of a "digital audio recording device,"[146] compliance with the SCMS requirements is not necessary because the device is without digital output capability, and unable to make "downstream cop[ies]."[147] The court stated,

> Although the Rio will inevitably be used to record both legitimate music (e.g., commercially available CDs) and illegitimate music (e.g., copyrighted music illegally posted on the internet), the absence of the SCMS information does not cause the illegitimate uses. Even if the Rio did incorporate SCMS, a Rio user could still use the device to record unauthorized MP3 files posted to the internet.[148]

The court added, "[T]o the extent Plaintiffs are injured through an illicit use of the Rio, this is precisely the type of injury for which the royalty provisions were adopted."[149] Thus, the RIAA could not stop the sale of the Rio and had to settle for royalties.

The RIAA appealed this decision to the Ninth Circuit Court of Appeals,[150] which held that the Rio is not a digital audio recording device because it is "incapable of receiving audio files from anything other than a personal computer"[151] and "cannot make copies from transmissions, but instead, can

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[143] The RIAA represents the major record companies (and the artists on their labels) that control approximately ninety percent of the distribution of recorded music in the United States. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1074 (9th Cir. 1999).

[144] *Recording Indus. Ass'n of Am.*, 29 F. Supp. 2d at 625-26. Specifically, the RIAA alleged that the defendant violated the AHRA because it did not register the device with the Copyright Office, it does not pay royalties and does not incorporate a Serial Copyright Management System (SCMS) to prevent the unauthorized making of second generation copies. RIAA, *RIAA Takes Stand to Protect Legitimate Online Marketplace*, *at* http://www.riaa.com/PR_Story.cfm?id=164 (Oct. 9, 1998).

[145] *Recording Indus. Ass'n of Am.*, 29 F. Supp. 2d at 625.

[146] *Id.* at 628.

[147] *Id.* at 632.

[148] *Id.* at 633.

[149] *Id.*

[150] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999).

[151] *Id.* at 1075.

only make copies from a computer hard drive . . . ."[152] The court also noted that the AHRA does not "broadly prohibit digital serial copying of copyright protected recordings. Instead, the Act places restrictions only upon a specific type of recording device."[153]

The court first determined that computer hard drives are specifically excluded under the definition of digital music recordings within the language of the AHRA.[154] In so holding, the court looked to the plain language of the statute and found that the AHRA expressly provides that the term "digital musical recording" does not include "a material object . . . in which one or more computer programs are fixed . . . ."[155] The court also noted that computers are not digital audio recording devices because their "primary purpose" is not to make digital audio copied recordings.[156] Finally, the court reasoned that because computers are not digital audio recording devices, they are not required to comply with the SCMS requirement, and thus, "the Act seems designed to allow files to be 'laundered' by passage through a computer . . . ."[157] Since computers are not digital audio recording devices, the Rio can not be a digital recording device unless it makes copies from transmissions according to the AHRA.[158]

The court next determined that the Rio does not make copies from transmissions.[159] The court found that a transmission is simply a broadcast of a recording, as through a radio, and declined to extend the meaning to include the "indirect" transmission from one internet user to another.[160] Thus, the Ninth Circuit has removed protection against the reproduction of sound recordings in the form of MP3s from the AHRA because MP3s by definition must be transmitted through a computer and pass through a computer's hard drive. After *RIAA v. Diamond Multimedia*, the AHRA regulates only the relatively uncommon or expensive digital equipment used primarily by recording professionals, such as digital audio tape recorders.

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[152] *Id.* at 1081.

[153] *Id.* at 1075.

[154] *Id.* at 1076.

[155] *Id.* (quoting 17 U.S.C. § 1001(5)(B)).

[156] *Id.* at 1078.

[157] *Id.* at 1078-79.

[158] *Id.* at 1079. The AHRA defines a digital audio copied recording as "a reproduction in a digital recording format of a digital musical recording whether that reproduction is made directly from another digital musical recording or indirectly from a transmission." *Id.* at 1076 (quoting 17 U.S.C. § 1001(1)).

[159] *Id.* at 1081.

[160] *Id.* at 1080-81.

### C. The Digital Millennium Copyright Act of 1998

On May 14, 1998, the Senate voted ninety to zero in favor of the Digital Millenium Copyright Act of 1998 (DCMA).[161] Title I of the Act implements the WIPO Copyright Treaty and Performances and Phonograms Treaty.[162] The DMCA makes it unlawful to manufacture, import, distribute, or provide services or products that are designed with the primary purpose of circumventing copyright protection technologies.[163]

Title II of the DMCA establishes limited liability for online copyright infringement for Internet Service Providers (ISPs).[164] An ISP is not required to monitor materials run through its service, and will generally be protected where it is not the source of the infringing transmission, the carriage is automatic, and the ISP does not select or modify the material.[165] The ISP must establish a policy to disconnect repeat offenders and it must act quickly to remove or block off any material once it obtains knowledge that such material infringes on copyright.[166]

#### 1. *Realnetworks, Inc. v. Streambox, Inc.*[167]

In the only DMCA case to date, RealNetworks, Inc. obtained a preliminary injunction on the manufacture and distribution of products known as Streambox VCR and Streambox Ferret on January 18, 2000.[168] RealNetworks' products allow internet users to access audio and video files through a process known as "streaming."[169] Owners of the audio and video content decide whether the end user will be allowed to copy the content, and RealNetworks products have several safeguards to prevent the unauthorized copying of the streamed content.[170] Streambox's products circumvent RealNetwork's

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[161] *Senate Passes Digital Millenium Copyright Act of 1998*, COMPUTER LAWYER, July 23, 1998, at 30.

[162] Digital Millenium Copyright Act, 17 U.S.C. §§ 1201–05 (2000). The treaties are discussed *supra* section II.B.3.

[163] *Id.* § 1201(a)(2). Protection technologies include serial copyright management systems, encryption and digital watermarking. *See infra* note 261 and accompanying text.

[164] 17 U.S.C. § 1202(e).

[165] Don Beiderman, *Copyright Trends: With Friends Like These ...*, 17 ENT. & SPORTS LAW. 3, 6 (Fall 1999).

[166] *Id.*

[167] Realnetworks, Inc. v. Streambox, Inc., No. 2:99CV02070, 2000 WL 127311 (W.D. Wash. Jan. 18, 2000).

[168] *Id.* at *12–*13.

[169] *Id.* at *1. "Streaming" is the process that enables consumers to access audio and video content over the internet. *Id.*

[170] *Id.* at *3. The court noted, "Without the security measures afforded by RealNetworks, these methods of distribution could not succeed. End-users could make and redistribute digital

authentication procedures and allow the internet user to copy (i.e. download) the file as it is being streamed.[171] The court found that Streambox's products are likely to violate the DMCA because they "circumvent" protections afforded a technological measure by "avoiding, bypassing, removing, deactivating or otherwise impairing" the technological measure[172] and have no commercial purpose other than to enable users to access and record protected content.[173] Streambox claims its VCR allows consumers to make "fair use" copies of the streamed files.[174] The court distinguished *Sony Corp. v. Universal City Studios, Inc.*[175] in finding that the copyright owners here have specifically chosen to prevent the copying of their content.[176] Realnetworks' victory demonstrates that even in the digital era it is possible to protect the copyright system. In fact, it is not only possible, but because of consumers' easy access to media, it is of critical importance.

### *D. The No Electronic Theft Act*[177]

The No Electronic Theft Act (NET Act) of 1997 allows criminal prosecution of persons who either 1) willfully infringe copyrights for financial gain, or 2) reproduce or distribute copyrighted works which have a total retail value of more than $1,000.[178] A person convicted under the NET Act may be fined up to $2,500 and must forfeit for destruction all infringing copies.[179] The sentence may also include imprisonment in accordance with sentencing guidelines.[180]

The NET Act was proposed in response to a loophole created by *United States v. LaMacchia*.[181] LaMacchia, a computer hacker, set up an internet bulletin board where he encouraged people to upload copyrighted computer

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copies of any content available on the internet, undermining the market for the copyrighted original." *Id.*

[171] *Id.* at *4. The "downloading" process delivers and stores a complete copy of an audio or video clip on a consumer's computer. The consumer can then access the clip at will, and can redistribute copies of the clip to others. *Id.* at *1.

[172] *Id.* at *7 (quoting 17 U.S.C. §§ 1201(b)(2)(A), 1201(a)(2)(A) (2000)).

[173] *Id.* at *8.

[174] *Id.*

[175] 464 U.S. 417 (1984).

[176] *Realnetworks, Inc.*, 2000 WL 127311, at *3. The Sony decision turned on a finding that most of the copyright holders who broadcast their works would not object to having their works time-shifted by private viewers. *Id.* at *8.

[177] 17 U.S.C. § 506-512 (2000).

[178] *Id.* § 506(a).

[179] *Id.* § 506(b)-(e).

[180] The NET Act provides for punishment as set out under 18 U.S.C. § 2319(1) (1997). *See* 17 U.S.C. § 506(a) (2000).

[181] 871 F. Supp. 535 (D. Mass. 1994).

programs and allowed others to download the programs to their home computers free of charge.[182] The government was unable to charge LaMacchia with copyright infringement because there was no financial profit, and charged him with conspiring to violate the wire fraud statute.[183] The *LaMacchia* court concluded that Congress did not intend to protect copyrights under the wire fraud statute and the charges were dismissed.[184] Thus, under the NET Act, financial gain is no longer a requirement. The NET Act amended the copyright law to define "financial gain" to include "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."[185]

Jeffrey Gerard Levy, a twenty-two-year-old University of Oregon student, was the first person successfully prosecuted under the NET Act almost two years after the Act's passage.[186] Mr. Levy posted about $70,000 worth of material on his site, including 1,000 mostly pirated MP3 files, but the United States District Attorney in Oregon was unable to determine the value of the material that was actually downloaded.[187] Levy could have been sentenced to a maximum of three years in prison and fined $250,000, but he signed a plea agreement and was sentenced to two years probation.[188]

Many states have also enacted criminal copyright statutes. "Sound recording piracy is a felony in 43 states."[189] Music pirates will be unable to

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[182] *Id.* at 536. LaMacchia devised a scheme whereby individuals would send the entire version of popular software applications, such as Excel 5.0 or WordPerfect 6.0, to a web address created specifically for this purpose. *Id.* His scheme "had as its object the facilitation on 'an international scale' of the 'illegal copying and distribution of copyrighted software' without payment of licensing fees and royalties to software manufacturers and vendors." *Id.*

[183] *Id.* at 537.

[184] *Id.* at 545.

[185] 17 U.S.C. § 101 (2000).

[186] Jennifer Sullivan, *MP3 Pirate Gets Probation*, WIRED NEWS, Nov. 24, 1999, *at* http://www.wired.com/news/print/0,1294,32276,00.html (last visited Nov. 30, 2000).

[187] *Id.* Levy agreed that the amount exceeded $5,000. *Id.* In one attorney's opinion the sentence would have been much tougher and "included time in the joint" if the amount had been $5 million worth of software. *Id.* Levy's attorney said the prosecutor could have invested the resources to determine the actual amount. *Id.* The U.S. Attorney's Office stated that they "agreed to a minimal amount of loss to move forward to pursue other investigations." Andy Patrizio, *DOJ Cracks Down on MP3 Pirate*, WIRED NEWS (Aug. 23, 1999), *at* http://wired.com/news/print/0,1294,21391,00.html (last visited Nov. 30, 2000).

[188] Sullivan, *supra* note 186.

[189] Press Release, Recording Industry Ass'n of Am., Governor Signs Wisconsin's First Felony Anti-Piracy Bill Into Law (Apr. 13, 2000), *at* http://www.riaa.org/PR_Story.cfm?id=33 (last visited Dec. 20, 2000). Wisconsin Assembly Bill 614, also known as the Wisconsin True Name and Address Statute, makes all forms of music piracy a criminal offense and can result in a penalty of up to five years in prison and hundreds of thousands of dollars in fines. *Id.*

cross state borders to escape state laws in surrounding states once legislation is enacted in all states.

### *E. Section 301*[190]

The United States encourages other countries to comply with U. S. copyright standards by imposing trade sanctions against countries that violate copyright standards. Section 301 of the Trade Act of 1974 allows United States citizens to petition the Office of the United States Trade Representative (USTR) against foreign unfair trade practices that adversely affect United States commerce.[191] Section 301 directs the President to "take all appropriate and feasible action" to enforce United States rights under any trade agreement.[192] Thus, section 301 can be a fairly broad and powerful tool for U. S. commerce, allowing private parties to take a first step in the enforcement of both the substantive and procedural provisions of the various codes governing nontariff barriers to trade.[193] However, the actual decision to enforce trade rights rests exclusively with the President, with no opportunity for judicial review if no action is taken.[194] The decision may rest entirely on domestic publicity, congressional relations and foreign policy rather than the actual merits.[195]

The USTR identifies those countries with the greatest adverse impact on the United States as "priority foreign countries," unless they begin good faith negotiations or significantly improve their protection of intellectual property rights.[196] As a result of the year 2000's special 301 annual review, the USTR identified fifty-nine trading partners as failing to provide adequate and effective intellectual property protection and fair and equitable market access

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[190] Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2411 (1996).

[191] Bart S. Fisher & Ralph G. Steinhardt, *The Enforcement by Private Citizens of United States Rights Under International Trade*, *in* CURRENT LEGAL ASPECTS OF INTERNATIONAL TRADE LAW 189 (Patrick F. J. Macrory & Peter O. Suchman eds., 1982).

[192] 19 U.S.C. § 2411(a)(1)(B)(ii) (1996).

[193] Fisher & Steinhardt, *supra* note 191, at 189. Examples of nontariff barriers to trade include customs valuation, standards, subsidies and government valuation. *Id.*

[194] *See id.*

[195] *See id.*; *see also, infra* section III.E.1.

[196] Notice, 64 Fed. Reg. 24438 (May 6, 1999). Priority foreign countries are those that have the most onerous and egregious acts, policies and practices which have the greatest adverse impact (actual or potential) on U.S. products; and, (2) are not engaged in good faith negotiations or making significant progress in negotiations to address these problems. 19 U.S.C. § 2242(b)(1) (2000).

The USTR reviews foreign practices each year within thirty days after the issuance of the National Trade Estimate Report. USTR, *Fact Sheets–"Special 301" and "Title VII," available at* http://www.ustr.gov/html/factsheets.html (last visited Nov. 30, 2000).

to persons who rely on such protection.[197] The USTR placed sixteen trading partners on the administratively created "Priority Watch List," and placed thirty-nine countries on the special 301 "Watch List."[198]

The USTR initiates an investigation and consultation with any country placed on the Priority Watch List.[199] If the USTR determines that the offending country violates trade standards, the United States may retaliate by withdrawing trade agreement concessions, imposing import restrictions, or taking any other action within the power of the President.[200] When the investigation reveals a violation of TRIPS, the USTR initiates consultations in the Dispute Settlement Understanding (DSU) of the WTO.[201]

### *1. The China experience*

Perhaps the most extreme example of the use of section 301 leverage with respect to intellectual property law is in the China experience. In 1991, the United States government placed China on the priority list of countries having problematic intellectual property laws.[202] Although China saw the threat of trade sanctions as a violation of their sovereignty, China implemented intellectual property laws in 1991, agreeing to outlaw theft of computer software and protect patents of agricultural chemicals and pharmaceuticals.[203] China took a strong stance on piracy, and even executed a man in 1992, for selling fake *Maotai*, a brand name liquor.[204]

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[197] USTR, *2000 Special 301 Report, available at* http://www.ustr.gov/pdf/special.pdf (last visited Nov. 30, 2000).

[198] *Id.* at 2. Countries on the "Priority Watch List" include: Argentina, Dominican Republic, EU, Egypt, Greece, Guatemala, India, Israel, Italy, Korea, Malaysia, Peru, Poland, Russia, Turkey, and Ukraine. *Id.* at 11. Countries on the "Watch List" include: Armenia, Azerbaijan, Belarus, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Czech Republic, Denmark, Ecuador, Hungary, Indonesia, Ireland, Jamaica, Kazakhstan, Kuwait, Latvia, Lebanon, Lithuania, Macau, Moldova, Oman, Pakistan, The Philippines, Qatar, Romania, Saudi Arabia, Singapore, Spain, Taiwan, Tajikistan, Thailand, Turkmenistan, Uruguay, Uzbekistan, Venezuela, and Vietnam. *Id.* at 19-30. See *id.* for information on the specific reasons for the designations.

[199] Fact Sheets–"Special 301" and "Title VII," *supra* note 196.

[200] 19 U.S.C § 2411(a)(1)(B)(ii) and (c)(1)(A-B) (1996).

[201] Nicole Telecki, Note, *The Role of Special 301 in the Development of International Protection of Intellectual Property Rights After the Uruguay Round*, 14 B.U. INT'L L.J. 187, 197 (1996).

[202] DEBORA J. HALBERT, INTELLECTUAL PROPERTY IN THE INFORMATION AGE 82 (1999).

[203] *Id.* at 82-83. China implemented its copyright code partly in response to the threat of U.S. sanctions, which could have led to the imposition of hundreds of millions of dollars in punitive tariffs. *Id.*

[204] *Id.* at 83.

In 1995, the United States again used section 301 to investigate China's intellectual property record and threatened to impose sanctions because the United States felt that China had not enforced its anti-piracy laws.[205] China, faced with $1.1 billion of sanctions, capitulated to United States' demands, making "the China market safer for American computer programmers and pop stars."[206] The result of the use of section 301 is that United States imposed its concept of intellectual property on a country with a strong history of government censorship and control over ideas, and a different approach to property rights.[207] The United States was forced into this position because of its huge trade deficit with China, and its inability to compete with Japan in consumer products and with the easy-credit terms of European capital-manufacturers.[208] This combination of circumstances is not likely to be repeated very often.

While the United States has successfully utilized section 301 in encouraging foreign countries to comply with fair trade standards, it has also been proactive in passing legislation to deal with piracy and new technology.[209] With the NET Act, as well as many state statutes, criminal laws are stricter and more specific.[210] The recording industry is protected with the royalty scheme and copy protection incorporated into the AHRA. Congress and the courts have also been mindful of the delicate balance between the public's interest in uninhibited access to free information and the rights of those who toil in creating that information.[211] Unfortunately, pirates can simply move their operations offshore, with little effect on the consumer. The spectrum of laws developed in the United States should be incorporated into a new global standard. In addition, the laws must be clarified to define the rights and limitations of those facilitating widespread file sharing. Recent litigation is discussed in the following section.

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[205] *Id.*

[206] *Id.* (quoting L. Kaye, *Trading Rights: Beijing exacts a high price for copyright accord*, FAR EASTERN ECONOMIC REVIEW, Mar. 9, 1995, at 16). Although the United States was victorious, the price was high. China rejected an attempt to ban nuclear weapons testing and issued a report that China has no political or religious prisoners. *Id.* The report was issued near the time of the copyright accord. *Id.*

[207] HALBERT, *supra* note 202, at 84.

[208] *Id.* at 83. Technology exports and intellectual property was the United States only hope of narrowing the trade deficit with China. *Id.*

[209] *See, e.g.*, The Audio Home Recording Act, discussed *supra*, section III.B; The Digital Millenium Copyright Act, discussed *supra*, section III.C; and The No Electronic Theft Act, discussed *supra*, section III.D.

[210] *See supra*, section III.D; *see also supra*, note 189 and accompanying text.

[211] See *supra*, section III.A for a discussion of the Copyright Act, which grants rights to artists in order to encourage creativity, and fair use doctrine, which allows public access to copyrighted works for limited purposes.

## IV. THE FUTURE

Two things are certain: 1) technology will continue to evolve, producing smaller and smaller files with little quality degradation; and 2) digital music will grow in popularity, regardless of what happens in the courtroom and in Congress.

### *A. Recent Litigation: Napster and MP3.com*

In the United States, the recording industry is fighting back against the Web sites. In December 1999, the Recording Industry Association of America (RIAA) filed suit[212] on behalf of its member companies against Napster, which uses proprietary software[213] to enable "users to locate and share media files from one convenient, easy-to-use interface."[214] Napster users upload their CD collection onto the internet and download music from other Napster users. Napster downplays the fact that most people use its service to swap illegal MP3s and focuses on the community of music fans and marketing potential for music.[215] Napster has the following disclaimer on its site:

> Users are responsible for complying with all applicable federal and state laws applicable to such content, including copyright laws. . . . You should be aware that some MP3 files may have been created or distributed without copyright owner authorization. As a condition to your account with Napster, you agree that you will not use the Napster service to infringe the intellectual property rights of others in any way. Napster will terminate the accounts of users who are repeat infringers of the copyrights.[216]

Thus, Napster places the onus for honesty on the users, not the network. Napster argues that it is protected by fair usage provisions, the Audio Home

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[212] The plaintiffs include: A & M Records, Inc., Geffen Records, Inc., Interscope Records, Sony Music Entertainment, Inc., MCA Records, Inc., Atlantic Recording Corp., Island Records, Inc., Motown Records Company L.P., Capitol Records, La Face Records, BMG Music d/b/a The RCA Records Label, Universal Records Inc., Elektra Entertainment Group Inc., Arista Records, Inc., Sire Records Group, Inc., Polygram Records, Inc., Virgin Records America, Inc., and Warner Bros. Records Inc. A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).

[213] Napster's software was programmed by a nineteen-year-old college student. Eric Boehlert, *Artists to Napster: Drop Dead!*, SALON (Mar. 24, 2000) *at* http://www.salon.com/ent/feature/2000/03/24/napster.artists (last visited Apr. 15, 2000).

[214] *About Us, Napster*, *at* http://www.napster.com/company.html (last visited Dec. 19, 2000).

[215] Janelle Brown, *m p 3 Free-For-All*, SALON (Feb. 3, 2000), *at* http://www.salon.com/tech/feature/2000/02/03/napster/index.html (last visited Dec. 19, 2000).

[216] Napster, *Napster Copyright Policy*, *at* http://www.napster.com/terms/ (last visited Dec. 21, 2000).

Recording Act of 1992, as well as precedent set by the *Sony* and *Diamond Multimedia* cases.[217] Napster states, "It isn't the company's fault that people use its service to exchange illegal files, just as it wouldn't be AOL's legal responsibility if terrorists used one of its private chat rooms to plan a bombing."[218] The recording companies believe that the ability to share digital music will discourage CD sales. The RIAA states, "Napster provides its users with all the facilities and means to engage in massive copyright infringment [sic]."[219]

On August 10, 2000, the U.S. District Court of the Northern District of California granted an injunction against Napster.[220] The court found that "virtually all Napster users download or upload copyrighted files and that the vast majority of the music available on Napster is copyrighted."[221] The Ninth Circuit Court of Appeals stayed the district court injunction on appeal.[222]

The German media giant Bertelsmann A.G., owner of BMG Entertainment, settled with Napster in early November, and will provide funds to allow Napster "to become a paid music service that would provide royalties to artists, labels and songwriters."[223] Bertelsmann intends to withdraw as a plaintiff from the lawsuit if Napster agrees to protect the rights of copyright holders.[224] "The other major recording companies–EMI, Sony, Seagram's Universal and Time Warner's Warner Music–have said they will continue with their copyright infringement lawsuit against Napster."[225]

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[217] Marc Cuenco, *The Great Debate: Napster and MP3.com*, DAILY AZTEC, Nov. 14, 2000, *available at* 2000 WL 29108525.

[218] Brown, *supra* note 215. Napster asserts this argument as a defense under the DMCA, discussed *supra* section III.C.

[219] *Recording Industry Sues Napster for Copyright Infringement*, *at* http://www.riaa.com/piracy/press/120799.htm (Dec. 7, 1999).

[220] A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000). The court enjoined Napster from "engaging in, or facilitating others in copying, downloading, uploading, transmitting or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission rights of its owner." *Id.* at 927.

[221] *Id.* at 902-03.

[222] A & M Records, Inc. v. Napster, Inc., No. 00-16401, No. 00-16403, 2000 U.S. App. LEXIS 18688, at *1 (9th Cir. July 28, 2000).

[223] Patrick Donovan, *The Day the Free E-Music Died*, THE AGE, Nov. 2, 2000, at 4, *available at* 2000 WL 27336841.

[224] *No on-line music love-in yet*, FINANCIAL POST, Nov. 21, 2000, *available at* 2000 WL 29575055.

[225] *Id.* The two sides have been negotiating without much success. Napster has offered business models in which Napster users would pay a small monthly fee to access Napster's file sharing service. John Borland, *Court Adjourns Without Decision in Napster Case*, CNET NEWS.COM (Oct. 2, 2000), *at* http://news.cnet.com/news/0-1005-202-2895878.html. Napster estimates that it could pay record companies close to $500 million in 2001 by charging users just $4.95 per month. *Id.* Napster states that for the recording companies, the issue is one of

Software mimicking Napster's capabilities is now available. In March 2000, engineers at America Online, Inc.'s (AOL) music division released a program called Gnutella.[226] Publicity forced AOL to remove the software, but "Gnutella survives on independent Web sites."[227] Also, because Gnutella is not operated by a centralized directory, there's no business to invest in and no one to sue, except the individuals who use it.[228] Another "Napsteresque" product called Scour Exchange, or SX, was launched in April, 2000.[229] SX searches other users' hard drives for MP3 files as well as other multimedia and image files, such as videos and pictures, and allows users to download these files to their own computers.[230] Thus, whether or not Napster and MP3.com survive, the recording industry cannot go back in time to an era before file sharing was available. File sharing capabilities cannot be easily stopped.

The RIAA filed suit against MP3.com on January 21, 2000, shortly after MP3.com launched a new online service called "My.MP3.com."[231] My.MP3.com allows users to "time-shift" their CD music collection to a private, password-protected account on the internet, and access the music from any internet-connected PC.[232] To facilitate this application, and to speed up

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control rather than money. *Id.* The RIAA states that their goal "is an increased cooperation between innovation and industry so that legitimate business models can make more music available online." *Id.*

[226] Lee Gomes, *Napster Changes Tune to Appease Colleges*, *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2472439,00.html (Mar. 23, 2000).

[227] *Id.*

[228] Boehlert, *supra* note 213.

[229] Doug Reece, *Scour Too SeXy for Napster?*, *at* http://www.mp3.com/news/694.html (Apr. 2, 2000).

[230] *Id.* Allowing the exchange of a variety of file types could help Scour argue that there are substantial, non-infringing legal uses for SX. *Id.* As of the second week of November, 2000, SX is no longer operational and is in Chapter 11 bankruptcy. This is in the wake of lawsuits by the Motion Picture Association of America (MPAA), the RIAA and the National Music Publishers Association (NMPA). Steve Tilley, *Net Tool Hits a Scour Note*, EDMONTON SUN, Nov. 25, 2000, at Ent. 4. Within weeks, CenterSpan Communications announced it potentially plans to bid to acquire Scour, Inc. out of bankruptcy. The company also plans to launch C-star, a "new secure and legal digital distribution channel," in the first quarter of 2001. *CenterSpan Announces Conference Call to Discuss Its Potential Acquisition of Scour, Inc.*, BUSINESS WIRE (Nov. 27, 2000), *at* http://www.businesswire.com.

[231] UMG Recordings, Inc. v. MP3.com, No. 00-0472, 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000). The complaint and various court documents related to the case are available on the RIAA's web site at http://www.riaa.com/legal.cfm.

[232] Richard Menta, *RIAA Strikes Again! Sues MP3.com*, MP3NEWSWIRE.NET (Jan. 24, 2000), *at* http://www.mp3newswire.net/stories/2000/riaavmp3.html. The concept of "Time Shifting" comes from the copyright battles that arose years ago with the advent of cassette and video taping technology. Time Shifting "is a concept where the consumer transfers music from one medium to another for the convenience of playing it at a later time and place." *Id.*; *see also supra* section III.A.1.

delivery time, MP3.com has created a database of music from CDs the company has purchased.[233] The RIAA has responded, "[s]imply put, it is not legal to compile a vast database of our member's sound recordings with no permission and no license. And whatever the individual's right to use their own music, you cannot exploit that for your company's commercial gain."[234] MP3.com's chief executive officer is quoted as saying, "[w]e have every intention of fighting this to the court of last resort, if necessary."[235]

The District Court for the Southern District of New York found that MP3.com willfully infringed the plaintiffs' copyright and that MP3.com's defense "was and is without any merit and does not meet a single one of the tests for 'fair use.'"[236] MP3.com ultimately settled with the top five record labels, providing for royalty payments and licensing arrangements.[237] The "total of all settlements was within [the] $170 million that [the] company had said it had set aside to handle litigation costs, and significantly less than $167.5 million in damages that could have been assessed."[238] The company is still in litigation with other music companies, such as Zomba Recording, which "should be small enough not to affect [MP3.com] significantly."[239]

MPL Communications, Inc, a music rights firm owned by former Beatle Paul McCartney has also filed suit against MP3.com.[240] The suit alleges that MP3 is sending users illegal copies of six songs owned by MPL and seeks damages of $150,000 for each song infringed.[241] A spokesman for McCartney and MPL says, "[t]his is not Paul McCartney taking on MP3. This is not about Paul McCartney's music. It's about protecting the rights of writers who have deals with MPL . . . ."[242]

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[233] Brown, *supra* note 215.

[234] Hilary Rosen, *An Open Letter to MP3.com President Michael Robertson*, *at* http://www.riaa.com/piracy/press/012100.htm (Jan. 21. 2000).

[235] *Suit Filed Against Music Web Site*, HONOLULU ADVERTISER, Jan. 22, 2000, at A3.

[236] UMG Recordings, Inc. v. MP3.com, No. 00 CIV. 472, 2000 WL 1262568, at *3 (S.D.N.Y. Sept. 6, 2000). The court assessed statutory damages at $25,000 per CD, stating that the total award would be approximately $118,000,000 depending on the number of CDs for which plaintiffs qualify for statutory damages. *Id.* at *6.

[237] *Boucher Says Music Licensing Bill Probably Isn't Needed*, AUDIO WEEK, Nov. 20, 2000, *available at* 2000 WL 4552006.

[238] *Id.*

[239] *Id.*

[240] Margaret Kane, *McCartney's Firm Sues MP3.com*, ZDNET, Mar. 24, 2000 *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2473148,00.html?chkpt=zdnntop. The suit alleges that MP3.com "has copied sound recordings of plaintiff's copyrighted works from CDs onto its computer servers and is making digital phonorecord deliveries of those compositions to consumers over the internet . . . ." *Id.* Thus, the defendant has infringed on the plaintiff's exclusive rights of reproduction and distribution.

[241] *Id.*

[242] *Id.*

MP3.com settled with the National Music Publishers' Association (NMPA) and the NMPA's licensing subsidiary, The Harry Fox Agency, for $30 million in October of 2000.[243] McCartney's company is a member of NMPA.[244] The licensing arrangement will allow MP3.com to use over one million musical compositions and provides for royalties.[245]

Both Napster and MP3.com have agreed to pay millions of dollars to the recording companies for the rights to share the music, but the legal battles continue. The outcome of these lawsuits, as well as future legislation, will determine the future of internet music, at least in the United States. Should courts hold that posting music on the internet is a proper application of fair use, we will see profound changes as the recording industry attempts to deal with the new music distribution formats. Should the recording industry win this round we may see computer programmers and internet users find new and more creative ways to share copyrighted music. At this stage, it appears that copyrighted music will not be offered free to the public by either Napster or MP3.com.

### *B. Public Perception in the United States*

The public must be educated on the importance of copyright protection. In the United States, many people believe that copyright protects the rich few. When huge companies are portrayed as the "victim," it's hard to evoke sympathy. Yet recording companies spend millions financing recording sessions, promoting the artists and sponsoring live tours; without the record companies there may be no music.[246] One artist manager hopes to present the artists' perspective with an ad campaign entitled "Artists Against Piracy," which will be broadcast on TV, the radio and the internet.[247] But many artists are not yet aware of the problem or number of files swapped everyday.[248] Other artists have been afraid to speak out concerning the business side of their music, afraid the buying public will perceive the concern as greed.[249]

Also, people believe in free access to information. Many feel that music should be free, as it is on the radio. They do not realize that music on the radio is licensed through firms such as BMI, ASCAP and The Harry Fox Agency. Public service announcements would help educate the public on their

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[243] Steven Bonisteel, *MP3.com Negotiates Licensing Deal With Music Publishers*, NEWSBYTES NEWS NETWORK, Oct. 18, 2000, *available at* 2000 WL 27301609.

[244] *Id.*

[245] *Id.*

[246] Boehlert, *supra* note 213.

[247] *Id.*

[248] *Id.*

[249] *Id.*

misperceptions of music ownership. Publicity about criminal prosecutions will also help educate the public. In France, rock group Louise Attaque, its record label and music publisher have filed suit "against a student . . . who had created Web pages offering to download a pirated MP3" recording of the band's concert.[250] The label and publisher are not seeking damages but hope the to use "the case as an educational platform to inform youngsters about copyright law and its application to the internet."[251]

Furthermore, many erroneously believe that the Fair Use Act lets people do whatever they want with the CD they own.[252] The lawsuits against MP3 and Napster will settle the argument, but the recording industry points out that when a person buys a CD, he is merely paying for the CD format it is stored on, and not the music itself.[253] Therefore, because he doesn't own the music itself, he does not have the right to possess it or distribute it to others.[254]

### *C. The Developing World*

Public perception about copyright is also a problem in the developing world, and this leads to halfhearted enforcement. Many developing countries are unwilling to enforce anti-piracy laws because they believe that intellectual property protection is a device to keep them "eternally dependent on the technology and creativeness of the industrial world and to hamper the establishment of local capacities to invent and create."[255] They complain that intellectual property laws keep products and information necessary for development at prices they cannot afford and under conditions that violate their sovereignty.[256] Many pirates portray themselves in philanthropic terms, as idealists bringing education and entertainment to the poor and otherwise deprived.[257] The truth is that these pirates do not contribute to the country in any meaningful, long-term way. They pay no royalties or taxes to the government in which they are based, and have no long-term commitment to supply and no guarantees of quality.[258]

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[250] Emmanuel Legrand, *French Independent Label*, 111 BILLBOARD, May 1, 1999, *available at* 1999 WL 22655406.

[251] *Id.*

[252] Giancarlo Varanini, *MP3: You Can't Stop the Music–or the Controversy*, ZDNET (Apr. 7, 2000) *at* http://www.zdnet.com/zdnn/stories/news/0,4586,2523609-2,00.htm.

[253] *Id.*

[254] *Id.* The exclusive rights of reproduction and distribution belong to the copyright holder. The Fair Use Doctrine allows for duplication for personal use or other limited circumstances. *See supra* section III.A.

[255] STALSON, *supra* note 108, at 48.

[256] *Id.*

[257] JOHN GURNSEY, COPYRIGHT THEFT 30 (1995).

[258] *Id.*

Whether the developing countries are unable or unwilling to adequately fund law enforcement agencies, the inducement for enforcement should not be tied to international trade. Punitive measures tied to international trade, such as section 301, are extremely politicized and may encourage resistance to anti-piracy efforts.[259] The WIPO-sponsored training seminars promote awareness of law enforcement techniques, yet substantive funding is essential. A fund should be established to finance cyber-police efforts at finding and shutting down pirates in developing countries, and for educating the public on the purposes and benefits of copyright law. This fund may be established through standard royalties or surcharges on recording media and hardware.

### *D. The Treaties*

The older copyright treaties, including the Berne Convention and the Phonograms Convention, assume that for piracy to exist, an illegal copy must be manufactured in a factory then transported across physical international borders. Although traditional pirates still exist, cyberspace border controls are now necessary. The existing treaties set comprehensive guidelines for copyright legislation, but do not have adequate enforcement mechanisms. The International Federation of the Phonographic Industry (IFPI) has stated that there is an urgent need to introduce copyright legislation worldwide specifically to protect against online piracy.[260]

The current generation of treaties, the WIPO Internet Treaties and TRIPS, recognize the unique problems of the internet, yet these treaties are not fully binding as of yet. Even these treaties fall short in the areas of security standards, fair use, and standard civil remedies.

Copyright treaty provisions should include mandated standards for digital security controls, such as watermarking and encryption,[261] a larger scale

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[259] Keshia B. Haskins, Note, *Special 301 in China and Mexico*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1125, 1161 (1999). Haskins states that "threatened sanctions evoke issues of a government's power and control and may prompt a government to retaliate with more resistance to prosecuting piracy." *Id.*

[260] IFPI, *Recording Industry Aims Global Crackdown on Internet Pirates, at* http://www.ifpi.org/press/19991028.htm (Oct. 28, 1999). The IFPI's legal initiatives comprise moves to close illegal sites and delete unauthorized files in countries around the globe from Japan to the United States, Argentina, South Africa and Europe. *Id.* The IFPI hired a London company to provide "tracking, tracing, and technical services" to assist the IFPI in its efforts to remove illegal MP3 files from the internet. Dominic Pride, *Copyright Control Services (CCS)*, 111 BILLBOARD, Dec. 4, 1999, *available at* 1999 WL 31678892. The company, CCS, stated "it has already tracked and removed 3,400 sites containing pro audio software on behalf of other clients." *Id.*

[261] See WAYNER, *supra* note 80, for a description of computer programming techniques for defending copyrighted data. These techniques are not foolproof, but may make it easier for

version of the Secure Digital Music Initiative (SDMI), which is an agreement among the major record producers to use a standard distribution format.[262]

Fair use must be curtailed in the electronic arena because exchange is too easy and uncontrollable. The United States' Fair Use Doctrine and the treaties' "unreasonably prejudice" standard[263] are written broadly, to allow for uses where increased access results in a greater public benefit.[264] When applying these standards, the likely conclusion is that increased access to digital materials allows for widespread copying and is thus harmful to the copyright holder's interests. This conclusion should be explicitly stated in the treaties.

The current treaties lack enforcement rights for private parties, since a private party does not have standing in the DSU or the International Court of Justice. Standard civil remedies, such as injunctions or punitive damages should be created where they do not currently exist.[265] There must be clear and effective legal processes. It is difficult and expensive for a copyright holder to enforce her rights against numerous infringers located far away. Only the very successful artists, such as Paul McCartney and Phil Collins,[266] or the industry associations, such as the RIAA or IFPI, have the resources to bring such actions. Thus, there should also be standards for enforcement of criminal anti-piracy laws. This proposed paradigm of global cooperation is unprece-

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someone to simply buy a copy instead of trying to steal it. *Id.* at 1. Watermarking encodes digitized information in the sound recording. Watermarks cannot be heard by the listener, cannot be removed without severe degradation, do not interfere with the quality of the music file, remain recognizable through file conversions, and can be used to prevent copying. Rosemarie F. Jones, Comment, *Wet Footprints? Digital Watermarks: A Trail to the Copyright Infringer on the Internet*, 26 PEPP. L. REV. 559, 568-69 (1999).

[262] SDMI is a collaboration among over 120 companies and organizations representing technology and recording industries. Members have been meeting since February, 1999 and are working to develop a voluntary, open framework which will enable copyright protection for digital music. SDMI, *Secure Digital Music Initiative (SDMI) Fact Sheet*, *at* http://www.sdmi.org/public_doc/FinalFactSheet.htm (last visited Dec. 19, 2000). No one is really sure how SDMI will affect MP3s technically, or whether it will even work. An interesting side note is that the chairman of the SDMI is also the chairman of the MPEG (Moving Pictures Expert Group) organization, which developed the MP3 technology. Varanini, *supra* note 252.

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

[264] Newby, *supra* note 122, at 1637.

[265] *See generally* Haskins, *supra* note 259, at 1155-56 (providing examples of how China and Mexico fail to provide adequate legal processes to protect copyright holders).

[266] Phil Collins brought suit to enjoin the distribution of a bootlegged recording in Germany, where the law provided a cause of action for such infringements, but only for German nationals. Case 92/92, Phil Collins v. Imtrat Handelsgesellschraft mbH, 1993 E.C.R. I-5145, 3 C.M.L.R. 773 (E.C.J. 1993). The European Court of Justice held that the German law violated the Berne Convention's principle of non-discrimination, which prohibits discrimination on the grounds of nationality between nationals of member states. *Id.* at I-5170.

dented; however, because of the global penetration of the internet and the potential for digital music piracy, this type of global response is essential.

## V. CONCLUSION

Music piracy takes on a much larger international dimension with the advent of MP3 technology. The United States has promulgated laws that are effective against the individual hackers posting millions of dollars worth of intellectual property online, and against the "willful" contributory infringers. These laws, however, cannot adequately protect the U.S. copyright holder against infringement that originates outside U.S. borders. As our laws are strengthened and enforced, pirates will simply move offshore and out of the reach of these laws, with little disruption in their internet activity.

The treaties currently in force do not adequately protect digital material. Older treaties designed to address copyright and intellectual property issues address traditional methods of piracy by focusing on CD manufacturers and border controls. These treaty provisions will not be adequate in the digital age. The internet treaties and TRIPS address the new technology, but require implementing legislation by the signatory countries and are without effective means for enforcement by the individual copyright holder. Efforts of the WIPO and the WTO are to be applauded, and future strides are to be encouraged as we monitor the effect of these recent treaties, yet the potential for on-line piracy will only intensify with the increasing sophistication of developing countries. Until an international convention can be convened to correct the problems in these treaties, a daunting and lengthy undertaking, pirates will continue to capitalize on the lack of consensus.

The first step is to agree that enforcement is necessary and good. MP3 technology is here to stay and can only improve in terms of sound quality, file size and speed of file transfer. The file sharing facilitators are receiving the brunt of the media and legal attention, but underlying this problem is the paradigm shift of the consumers. Unless there is a speedy resolution, the next generation of music-lovers may grow up believing that free music is a constitutional right. The music providers may devise new distribution models based on subscription service, per-track charges or advertising-subsidized web sites, but these systems will surely fail if the consumer can access the same material for free. It is increasingly apparent that new laws are needed to explicitly define the rights and limitations of the new breed of file sharing facilitators. Yet these laws must extend beyond our borders if we wish for them to be effective within our borders.

Ultimately, there must be an incentive for recording artists to create, and for recording companies to subsidize new artists. It is conceivable that new distribution mechanisms and different royalty schemes may result from

increased access to music; that the market system's checks and balances will ultimately find the right model, for the benefit of both musicians and consumers. But we can probably all agree that no one wants a system where only the privileged could produce music, or a system of patronage, where music is subsidized by the government, or wealthy entities, with no regard for profitability. Such a system would stifle creativity and freedom of expression in music.

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# IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause

## I. INTRODUCTION

All fifty states and the District of Columbia have approved Interest on Lawyer Trust Fund Accounts ("IOLTA"), requiring or permitting lawyers to deposit nominal client funds into special interest-bearing bank accounts.[1] The interest generated by these accounts is typically funneled to the state bar association, which in turn distributes the money to foundations that service the legal needs of low-income individuals.[2] Since its inception in 1981, IOLTA has been regularly challenged in state[3] and federal[4] courts as an unconstitutional taking of private property.[5] Until 1998, courts consistently held that clients do not have property rights in the interest created by their funds and thus that IOLTA does not implicate Fifth Amendment rights.[6]

In *Phillips v. Washington Legal Found.*,[7] the U.S. Supreme Court rejected the rationale of previous courts, concluding that interest earned on IOLTA accounts is the property of the client for the purposes of the Takings Clause of the Fifth Amendment.[8] The Court refused, however, to consider the underlying issue of whether the appropriation of that interest actually

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[1] *See* Christine A. Klein, *Beating a Dead Mouse: Do IOLTA Programs Create An Unconstitutional Taking of Private Property?*, 1999 DET. C. L. REV. 1, 5 (1999).

[2] Phillips v. Wash. Legal Found., 524 U.S. 156, 161 (1998).

[3] Carroll v. State Bar, 166 Cal. App. 3d 1193 (1985); *In re* Mass. Bar Ass'n, 478 N.E.2d 715 (Mass. 1985); *In re* Minnesota State Bar Ass'n, 332 N.W.2d 151 (Minn. 1982); *In re* New Hampshire Bar Ass'n, 453 A.2d 1258 (N.H. 1982)(per curiam); *In re* Interest on Trust Accts., 402 So. 2d 389 (Fla. 1981).

[4] Cone v. State Bar of Fla., 819 F.2d 1002 (11th Cir. 1987); Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962 (1st Cir. 1993); Wash. Legal Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 996 (5th Cir. 1996).

[5] IOLTA programs have also been challenged as a violation of the First Amendment on the theory that they compel clients to associate with organizations with whom they disagree. *See Texas Equal Access I*, 94 F.3d at 1004; *Mass. Bar Found.*, 993 F.2d at 962. Any First Amendment issues are beyond the scope of this comment. For a discussion of the First Amendment and IOLTA, see Charles E. Rounds, Jr., *Social Investing, IOLTA and the Law of Trusts: The Settlor's Case Against the Political Use of Charitable and Client Funds*, 22 LOY. U. CHI. L.J. 163 (1980).

[6] *See Cone*, 819 F.2d at 1002; *In re Mass. Bar Found.*, 993 F.2d at 962; *In re Interest on Trust Accts.*, 402 So. 2d at 389.

[7] 524 U.S. 156 (1998).

[8] *Id.* at 171.

amounted to an unconstitutional taking.[9] In *Washington Legal Found. v. Texas Equal Access to Justice Found. II*,[10] the federal district court for the Western District of Texas addressed the remanded takings issue and held that IOLTA did not violate the Fifth Amendment,[11] thus bringing the question of whether mandatory IOLTA programs effect a taking in violation of the Fifth Amendment squarely before the Fifth Circuit.

This comment shows that mandatory IOLTA programs amount to an unconstitutional taking by allowing the state to physically occupy private property.[12] It subsequently suggests that IOLTA can be made constitutionally infirm if modified to give clients control over the interested generated by such programs. Part II discusses the factual and legal background of IOLTA programs. Part III explains why IOLTA programs violate the Fifth Amendment, with particular emphasis placed on the physical invasion and deprivation of the right to exclude suffered by clients whose funds are placed in IOLTA programs. Part IV explores constitutional and practical remedies for IOLTA's taking of client interest. This comment concludes that, as currently structured, IOLTA constitutes a government-sponsored physical occupation

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[9] *Id.*

[10] No. A-94-CA-081 (W.D. Tex. Jan. 28, 2000). This slip opinion represents the second time the District Court for the Western District of Texas has ruled in the IOLTA matter. Thus, for ease of identification, it will be denominated by the numeral "II." In contrast, the first *Texas Equal Access* series - culminating in *Phillips* - will be denominated by the numeral "I."

[11] *Id.*, slip op., at 33.

[12] The literature discussing the Fifth Amendment implications of IOLTA is extensive. *See, e.g.*, James D. Anderson, Note, *The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs*, 99 U. ILL. L. REV. 717 (1999); Thomas E. Baker & Robert E. Wood, Jr., *"Taking" A Constitutional Look at the State Bar of Texas Proposal to Collect Interest on Attorney-Client Trust Accounts*, 14 TEX. TECH. L. REV. 327 (1983); Terence E. Doherty, *The Constitutionality of IOLTA Accounts*, 19 WHITTIER L. REV. 487 (1998); Michael A. Heller & James E. Krier, *Making Something Out of Nothing: The Law of Takings and* Phillips v. Wash. Legal Found., 7 SUP. CT. ECON. REV. 285 (1999); Matthew Davis, Comment, *Can the Ends Justify the Means? Illinois Lawyers Trust Fund: A Constitutional Analysis*, 23 S. ILL. U. L. J. 693 (1999); Cicily W. Kerr, Note, *Nothing Taken, Something Gained: State Action As An Alternative Defense For IOLTA Programs in the Aftermath of* Phillips v. Wash. Legal Found., 31 CONN. L. REV. 1543 (1999); David J. Hrina, Comment, *The Future of IOLTA: Has the Death Knell Been Sounded For Mandatory IOLTA Programs?*, 32 AKRON L. REV. 301 (1999); Jay Carlson, Note, *Interest or Principles?: The Legal Challenge to IOLTA in Wash. State*, 74 WASH. L. REV. 1119 (1999). However, relatively few articles have concluded that IOLTA is a per se taking. Among those that have are: Stephen E. Abraham, *Other People's Money:* Wash. Legal Found. v. Texas Equal Access to Justice Found., 6 Fall KAN. J.L. & PUB. POL'Y 56 (1997); Kevin H. Douglas, Note, *IOLTAs Unmasked: Legal Aid Programs' Funding Results in Taking of Clients Property*, 50 VAND. L. REV. 197, 1298 (1997); Kymberlee Barrow-Stapleton, *IOLTA's Uncertain Future After* Phillips v. Wash. Legal Found., 35 WILLAMETTE L. REV. 211 (1999).

that can and must be retooled to conform to the requirements of the Fifth Amendment.

## II. BACKGROUND

### *A. The Rise of IOLTA*

Lawyers often hold client funds for short periods of time in order to pay filing fees, cover real estate transaction costs and to carry out settlements.[13] In each of these situations, professional ethical standards require that client money be held apart from an attorney's own funds[14] and remain available to clients on demand.[15] Accordingly, lawyers traditionally deposited all client funds in a separate checking account.[16] Prior to 1980, federal banking laws prohibited banks from paying interest on these demand accounts.[17] Thus, during this time, nominal client deposits functioned as interest-free loans to the banks.[18]

In 1980, Congress relaxed restrictions on demand accounts by authorizing Negotiable Order of Withdrawal ("NOW") Accounts.[19] NOW accounts are interest-bearing checking accounts, the "entire beneficial interest" of which must go to individuals or an organization dedicated to charitable purposes.[20] NOW accounts made it theoretically possible for clients to earn interest on funds left in the hands of lawyers.[21] Nevertheless, small deposits and funds held for short periods often could not earn enough interest to pay the administrative costs of the account.[22] As a result, lawyers continued to place nominal client funds in non-interest bearing checking accounts.[23]

In 1981, the federal government altered certain banking and tax laws, and thus made Interest on Lawyer Trust Account ("IOLTA") programs viable. Specifically, the Federal Reserve determined that corporate and partnership funds could be deposited in NOW accounts so long as a charitable

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[13] Paul Marcotte, *Big Interest in Small Change*, ABA JOURNAL 70, 71 (July 1, 1987).

[14] MODEL CODE OF PROF'L RESPONSIBILITY DR 9-102(A)(1995).

[15] MODEL CODE OF PROF'L RESPONSIBILITY DR 9-102 (1995); MODEL RULES OF PROF'L CONDUCT Rule 1.15 (1998).

[16] Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998).

[17] *Id.* (citing 12 U.S.C. § 371a, 1464(b)(1)(B), 12828(g)).

[18] *See* Barrow-Stapleton, *supra* note 12, at 215.

[19] *Phillips*, 524 U.S. at 161.

[20] *Id.* (quoting 12 U.S.C § 1832 (a)(2)).

[21] Wash. Legal Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 996, 998 (5th Cir. 1996).

[22] *Id.*

[23] *See* Douglas, *supra* note 12, at 1301.

organization maintained exclusive control over the interest.[24] At about the same time, the Internal Revenue Service ruled that it would not impose taxes on income from lawyer trust accounts, provided that clients exercised no control over the accounts.[25] Starting with Florida, states soon began requiring lawyers to place nominal and short-term funds[26] in an IOLTA, a special, state-controlled NOW account.[27] By 1996, twenty-seven states had adopted mandatory IOLTA programs.[28]

By pooling nominal client funds into one account, IOLTA generates significant interest income from money that ordinarily could not earn net interest income for the client.[29] Nationwide, IOLTA programs earn approximately $143 million in interest per year.[30] A non-profit organization is established as the benificiary of these funds to ensure that the program conforms to the requirement that NOW interest accrue to individuals or charitable organizations.[31] In turn, the designated organization distributes IOLTA funds to agencies that serve the legal needs of low-income individuals.[32]

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[24] *Phillips*, 524 U.S. at 171. (citing Letter from Michael Bradford, Federal Reserve Board General Counsel, to Donald Middlebrooks (Oct. 15, 1981)).

[25] *Id.*

[26] Client funds are considered "nominal in amount" or "held for a short period of time" if the attorney determines that "'such funds, considered without regard to funds of other clients . . . could not reasonably be expected to earn interest for the client or if the interest . . . is not likely to be sufficient to offset the cost of establishing and maintaining the account.'" *Phillips*, 524 U.S. at 162 (citing Texas IOLTA Rule 6).

[27] *Id.* at 1929. Some IOLTA critics view the program as driven by lawyers' desire to avoid legislative pro bono requirements, rather than as an altruistic attempt to help the poor. *See* Janet Elliot, *Judge Considers Novel IOLTA Approach; Clients' OK Would be required Before Money Goes into Accounts*, TEXAS LAWYER, Oct. 4, 1999. Thus, in closing arguments during *Texas Equal Access II*, one of the named plaintiffs stated that "IOLTA is especially outrageous because lawyers are saying, 'if we get together with judges and take client funds to pay other lawyers to represent poor people, than us, the lawyers, don't have to work for free.'" *Id.*

[28] Heller & Krier, *supra* note 12, at 287. Twenty states created "opt-out" programs from which a lawyer may seek exemption, and four maintain voluntary programs. *Id.*

[29] *Id.*

[30] Janet Elliot, *Texas Judge Says IOLTA Is Not a "Taking"*, THE LEGAL INTELLIGENCER, Feb. 2, 2000, at 4.

[31] *See* Barrow-Stapleton, *supra* note 12, at 216.

[32] *See Phillips*, 524 U.S. at 162. IOLTA beneficiaries are normally prohibited from using IOLTA funds for political activities. They can, however, use them to "finance suits against governmental entities on behalf of individuals to secure entitlement to benefits," such as Social Security, Medicaid, and public housing. *See, e.g.*, Wash. Legal Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 996, 998 n.6 (5th Cir. 1996)(citing TEXAS RULES OF COURT – STATE, RULES GOVERNING THE OPERATION OF THE TEXAS EQUAL ACCESS TO JUSTICE PROGRAM RULE 15). Moreover, some states allow IOLTA proceeds to fund "any charitable nonprofit program," "attorney grievance procedures," and mediation clinics. Marcotte, *supra* note 13, at 72.

### *B. A Brief Overview of Takings Law*

#### *1. General framework*

The Takings Clause of the Fifth Amendment to the U.S. Constitution states: "private property [shall not] be taken for public use without just compensation."[33] Although the U.S. Supreme Court has declared that takings questions are normally resolved through an ad-hoc factual inquiry,[34] its recent jurisprudence establishes several general rules. For example, it is now settled that a permanent physical occupation of property violates the Takings Clause regardless of the extent of the occupation[35] or whether the action achieves an important public benefit or has only minimal economic impact on the owner.[36] Further, a denial of an owner's right to exclude is a physical occupation that requires just compensation under the Fifth Amendment.[37] In *Lucas v. South Carolina Coastal Council*,[38] the Court extended the per se takings rule associated with physical occupations to regulations that deprive a property owner of all economically beneficial use of private property.[39]

When regulation denies a property owner less than all economically beneficial use of property, a balancing test is used to determine if there is a taking. Specifically, under *Penn Central Transportation Co. v. City of New York*,[40] courts are directed to consider the character of the challenged governmental action, the economic impact of that action, and the extent to which the action has interfered with a property owner's distinct investment backed expectations.[41] The same multi-factor *Penn Central* test is also employed to resolve takings claims involving economic legislation that seeks to "adjust the benefits and burdens of economic life."[42]

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[33] U.S. CONST. amend. V.

[34] Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978).

[35] Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 441 (1982).

[36] *Id.*

[37] Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979).

[38] 505 U.S. 1003 (1992).

[39] *Lucas'* total regulatory takings rule does not apply, however, when challenged property restrictions emanate from background principles of a state's property law and thus inhere in a property owner's title. *Id.* at 1027.

[40] 438 U.S. 104 (1978).

[41] *Penn Central*, 438 U.S. at 124.

[42] *See* Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (applying the *Penn Central* factors in concluding that legislation requiring Eastern to pay the health care costs of former employees constituted a taking); Concrete Pipe & Prod's of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993) (applying the *Penn Central* factors in finding that a multi-employer pension plan did not effect a taking by imposing withdrawal liability on an employer); Connolly

*2. Webb's Fabulous Pharmacies v Beckwith: A takings standard for interest income*

In *Webb's Fabulous Pharmacies v. Beckwith*,[43] the U.S. Supreme Court held that the state of Florida violated the Takings Clause when it allowed a county court to confiscate the interest earned on a private interpleader fund.[44] The case arose when a prospective buyer of Webb's Fabulous Pharmacies, Inc. filed an interpleader action against the company and its creditors and tendered the almost two million dollar purchase price to the court.[45] Pursuant to a Florida statute, the court ordered that the money be deposited in an interest bearing account while it considered claims on the funds.[46] A year after the deposit was made, a receiver for Webb's demanded access to the interpleaded funds. After deducting a service fee and keeping $100,000 in accrued interest, the county turned over the remaining principal to the receiver.[47]

In considering whether retention of the interest violated the Takings Clause, the Court rejected the argument that the interest was not private property because it was generated by a state authorized account.[48] Instead, the court applied the general rule that "the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."[49] Without specifying the controlling rule, the Court held that the state of Florida violated the Takings Clause by attempting to transform the privately owned interest into public funds.[50] It therefore established a distinct, additional, takings framework for government confiscation of interest income.

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v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986) (applying the *Penn Central* factors in holding that legislation requiring employers to pay into a pension plan was not a taking).

[43] 449 U.S. 155 (1980).

[44] An interpleader fund is "consideration [that is] to be deposited into the registry of the court." *Id.* at 157 n.2 (citing Florida Bulk Transfers Act, FLA. STAT. § 676.106(4) (1977)). After the deposit is made, the court "shall decree the goods to be free and clear of the claims of . . . creditors and that . . . creditors should file their claims with the court." *Id.*

[45] *Webb's*, 449 U.S. at 156-57. The prospective purchaser of Webb's filed the interpleader action after learning that the company's debts appeared to surpass its purchase price. *Id.* at 156.

[46] *Id.* at 157.

[47] *Id.* at 158.

[48] *Id.* at 163-64.

[49] *Id.* at 164.

[50] *Id.* at 164-65.

### *C. Fifth Amendment Challenges to IOLTA*

IOLTA programs have faced numerous takings claims since the first program went into effect in Florida.[51] Yet, because the issue of whether IOLTA implicates private property for Fifth Amendment purposes was not resolved until a 1998 decision of the U.S. Supreme Court, only one federal court has directly addressed the question of whether IOLTA "takes" property.[52] A few other courts have considered the issue in dicta.[53] All have inexplicably and incorrectly[54] rejected a physical occupation takings analysis in favor of the balancing approach in *Penn Central.*

#### *1. Early federal cases*

In the 1987 case of *Cone v. State Bar of Florida*,[55] the Eleventh Circuit became the first federal circuit court to consider whether an IOLTA program violated the Fifth Amendment.[56] There, a client whose funds generated interest in Florida's IOLTA[57] program challenged the appropriation of that interest as an uncompensated, and thus unconstitutional, taking.[58] Like the district court below, the Eleventh Circuit concluded that the legal client had no "legitimate claim of entitlement to the interest which she claimed was taken" because her deposit was so small that it could not have earned net interest without IOLTA.[59]

In arriving at its determination, the court distinguished *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[60] on the ground, that, unlike IOLTA deposits, the principal in *Webb's* was sufficiently large to give rise to a "legitimate expectation of interest exclusive of administrative costs."[61] Concluding that the plaintiffs did not have a property interest in IOLTA interest, the court held

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[51] *See supra* note 3, 4 and accompanying text.

[52] Wash. Legal Found. v. Texas Equal Access to Justice Found. II, No. A-94-CA-081 (W.D. Tex. Jan. 28, 2000).

[53] Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 974-76 (1st Cir. 1993).

[54] *See* discussion *infra* section III.

[55] 819 F.2d 1002 (11th Cir. 1987).

[56] For state cases that consider the Fifth Amendment implications of IOLTA, see *supra* note 3.

[57] Florida's "IOLTA" program is called "Interest on Trust Accounts," and thus abbreviated "IOTA." *Cone*, 819 F.2d at 1003. However, in the interest of consistency, Florida's program will be referred to as "IOLTA" in this comment.

[58] *Id.* at 1004.

[59] *Id.*

[60] 449 U.S. 155 (1980).

[61] *Cone*, 819 F.2d at 1007.

that the program did not implicate the Fifth Amendment.[62] However, in so holding, the court cautioned:

> [W]e are not establishing a de minimis standard for Fifth Amendment Takings, or due process violations. We do not wish to imply that the state may constitutionally appropriate property so long as the property is very small property.[63]

Thus, while *Cone* emphatically rejected the contention that IOLTA interest was privately owned, it seemingly left open the possibility that IOLTA effected a taking but for that conclusion.

In the 1993 case of *Washington Legal Found. v. Massachusetts Bar Found.*,[64] the First Circuit Court of Appeals suggested that IOLTA was not a taking even if the program implicated private property interests.[65] In *Massachusetts Bar Found.*, a non-profit, public interest legal organization and four other plaintiffs filed a takings suit against the administrators of the Massachusetts IOLTA program.[66] Instead of premising their claim on ownership of IOLTA-generated interest, as in *Cone*, the plaintiffs alleged that IOLTA took private property by infringing on their right to "control and exclude others from the beneficial use" of the principal.[67] Rejecting the claims, the court concluded that IOLTA did not create a formal trust that gave clients sole authority to control IOLTA deposits[68] and further, that plaintiffs failed to show how the right to exclude was applicable to personal property.[69]

In dictum, the First Circuit took on the issue of whether IOLTA amounted to a taking assuming plaintiffs could establish private interests in the program.[70] Applying the balancing approach set out in *Penn Central Transportation Co. v. New York City*,[71] the court concluded that IOLTA was

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[62] *Id.*

[63] *Id.* at 1007.

[64] 993 F.2d 962 (1st Cir. 1993).

[65] *Id.* at 974-76.

[66] Other than the Massachusetts Bar Foundation, the specific defendants were the Boston Bar Foundation, the Massachusetts Legal Assistance Corporation, Katherine S. McHugh (in her capacity as chair of the Massachusetts IOLTA Committee), Fran F. Burns (in his capacity as chair of the Board of Bar Overseers), and the Justices of the Supreme Judicial Court of Massachusetts. *Id.* at 969.

[67] *Id.* at 973.

[68] *Id.* at 974. In the words of the court, "[w]e are not convinced that the deposit of 'clients' funds into IOLT[A] accounts transforms a lawyer's fiduciary obligation to clients into a formal trust with the reserved right to control the beneficial use of the funds as claimed by the plaintiffs." *Id.*

[69] *Id.* at 974. The court asserted that it was unable to identify any non-real property cases that established a constitutionally protected right to exclude. *Id.*

[70] *Mass. Bar Found.*, 993 F.2d at 974.

[71] *See supra*, note 38 and accompanying text.

not impermissible as a physical invasion because such invasions were found solely in real property cases.[72] The court dismissed the notion that *Webb's*[73] compelled a contrary conclusion because, unlike the plaintiffs in *Webb's*, IOLTA claimants did not have "a recognized property right to the interest earned on their funds."[74]

In considering the second *Penn Central* factor–the economic consequences of the alleged taking–the First Circuit emphasized that clients could not earn interest income from their nominal deposits without the mechanisms provided the program.[75] Consequently, it concluded that they suffered no adverse economic impact from loss of the claimed right to exclude others from IOLTA-generated interest.[76] Finally, in an unexplained departure from the traditional *Penn Central* test, the court weighed the plaintiffs' claimed loss of the right to exclude against the property rights that remained in their bundle,[77] and held that IOLTA did not cause a taking under this standard or the traditional *Penn Central* test.[78]

Undaunted by their defeat in Massachusetts, the Washington Legal Foundation filed a takings claim against the Texas IOLTA program. They achieved a partial, but critical, victory in *Washington Legal Found. v. Texas Equal Access to Justice Found. I*,[79] when the Fifth Circuit rejected the rationale of previous courts and concluded that interest generated by Texas' program was private property.[80] In the court's view, the property issue was controlled by the traditional Texas state rule that "interest . . . belongs to the owner of the principal."[81] It additionally emphasized that IOLTA was governed by *Webb's* conclusion that "earnings of a fund are incidents of ownership of the fund

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[72] *See Mass. Bar Found.*, 993 F.2d at 975. Contrasting it with real property, the court characterized the right to exclude as an "intangible" property right. *Id.* Notably, the court failed to explain how the right to possess, the basis for the takings claim upheld in *Webb's*, was any more "tangible" than the right to exclude.

[73] Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980).

[74] *Mass. Bar Found.*, 993 F.2d at 975-76.

[75] *Mass. Bar Found.*, 993 F.2d at 976.

[76] *Id.*

[77] *Id.* The court relied on a test that balanced the loss of the right to exclude against remaining property rights because "the destruction of one 'strand' in the bundle [of property rights] is not a taking." *Id.* (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

[78] *Mass. Bar Found.*, 993 F.2d at 976. In the court's view, "the plaintiffs claim, at best, a thin strand in the commonly recognized bundle of property rights." *Id.* This conclusion is at odds with the U.S. Supreme Court's treatment of the right to exclude. *See infra* notes 171-89 and accompanying text.

[79] 94 F.3d 996 (1996).

[80] *Id.* at 1004.

[81] *See* Wash. Legal Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 1000, 1002 (5th Cir. 1996).

itself and are property just as the fund itself is property."[82] The court read *Webb's* broadly for the broad proposition that interest is private property "independent of the amount or value of interest at issue."[83] Holding that plaintiffs had cognizable property rights in IOLTA interest,[84] the court's decision created a split among the circuits and set the stage for intervention by the U.S. Supreme Court.

### *2. Phillips v. Washington Legal Found.: Privatizing IOLTA-generated interest*

In the aftermath of the Fifth Circuit's decision, the U.S. Supreme Court granted certiorari to resolve the conflict between the circuits concerning whether IOLTA-generated interest was private property.[85] Thus, in *Phillips v. Washington Legal Found.*,[86] the Court considered only the narrow question of whether IOLTA-generated interest was private property for the purposes of the Takings Clause.[87] While recognizing that a state can generally define property, the Court declared: "at least as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."[88] Simply put, Texas could not ignore its own rules so as to convert private property into public property without compensation.[89] Emphasizing that Texas traditionally adhered to an "interest follows principal" rule, the Court held that interest generated from principal deposited in IOLTA was private property.[90]

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] 117 S. Ct. 2535 (1997).

[86] 524 U.S. 156 (1998).

[87] *Id.* at 164 n.4. The Court declined to address the underlying takings claim at the same time as the question of property ownership because "Petitioners . . . did not argue in their petition for certiorari that it was error for the Fifth Circuit to address the property issue alone." *Id.* The Court noted that it would be improper for it to raise the takings question *sua sponte* since its rules required it to consider only "questions set forth in the petition, or fairly included therein." *Id.*

[88] *Id.* at 1931 (citing Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 163-64 (1980); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992)).

[89] *Phillips*, 524 U.S. at 168-69.

[90] *See id.*

In reaching its conclusion, the Court rejected the dissent's contention[91] that the "interest follows principal" rule was inapplicable in the context of IOLTA because client deposits could not earn net interest without IOLTA.[92] In so doing, the Court noted that it "had never held that a physical item is not 'property' simply because it lacks a positive economic or market value."[93] On the contrary, the Court explained that property is composed of attributes beyond economic value, including possession, control, and disposition,[94] and thus, that individuals have valuable private property rights in IOLTA interest even if it has no economically realizable value.[95]

In affirming the Fifth Circuit's determination that interest in Texas' IOLTA program was the property of individual clients,[96] the Court rejected entreaties from several dissenting justices[97] to consider the property issue only in

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[91] In a dissenting opinion joined by Justices Souter, Ginsberg and Stevens, Justice Breyer argued that the rule that interest follows principal normally applied to situations in which principal is "capable of generating interest for whoever holds it." *Id.* at 180. Since nominal client funds could earn interest only when pooled in IOLTA accounts, the rule was therefore inapplicable to the question of whether IOLTA-generated interest was private. *Id.* at 181. Breyer subsequently concluded that *Webb's* said "little" about the property question because, unlike with IOLTA, the principal in *Webb's* would have earned interest without state intervention. *Id.* at 182. Finally, Breyer noted that government is generally not required to pay for any increase in property value created by a lawful taking. *Id.* To Breyer, this suggested that individuals had no right to the valuable interest generated by IOLTA. *Id.*

[92] *Id.* at 171. The Court similarly rejected the contention that individuals had no property rights in IOLTA interest because that interest was "government-created value." *Id.* It pointed out that the economic value inherent in IOLTA interest accrued to the government only because it made it costly for clients to control that value. *Id.* For the Court, "waiver of these costs if the property is remitted to the State hardly constitutes 'government-created value.'" *Id.*

[93] *Id.* at 170-71. To illustrate, the Court pointed to *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419 (1982) (holding that a property right was unconstitutionally taken even though government invasion of the property arguably increased its value). *Id.*

[94] *Id.*

[95] *Id.* at 171. In emphasizing that takings claims are not dependent on the existence of positive value in the appropriated property, the Court noted that the government may not seize rents received by the owner of a building simply because it can prove that the owner's costs in collecting the rents exceed the amount collected. *Id.*

[96] Joining the majority opinion by Chief Justice Rehnquist were Justices Scalia, Thomas, O'Conner and Kennedy. *Id.* at 158.

[97] In a dissenting opinion joined by Justices Stevens, Ginsburg and Breyer, Justice Souter took the *Phillips* majority to task for failing to consider the issue of whether IOLTA effected a taking without just compensation. *Id.* at 172. In Souter's view, resolution of the taking and compensation issues was central to the property issue. *Id.* at 173-74. To illustrate, he pointed out that if it were determined that IOLTA did not effect a taking "there would be no practical consequence in recognizing a client's property right in the [IOLTA] interest . . . in the first place." *Id.* at 174. Moreover, recognition of a property right without a corresponding takings determination would result in "takings challenges whenever the government holds and makes use of the principal of private parties, as it frequently does[.]" *Id.* at 178. Souter therefore

conjunction with the takings question.[98] To some, this suggests that *Phillips* is an abstract vindication of property rights that gives little guidance about the constitutionality of IOLTA.[99] Even so, that vindication was consequential to those with an interest in IOLTA[100] as it clearly allowed the takings issue to take center stage in the IOLTA dispute.[101]

### *3. Washington Legal Found. v. Texas Equal Access to Justice Found. II: Direct consideration of the takings question*

On remand from the U.S. Supreme Court, the district court for the Western District of Texas became the first federal court[102] to squarely consider whether IOLTA took what was now incontestably private interest income.[103] In *Washington Legal Found. v. Texas Equal Access to Justice Found. II*,[104] the court stressed that the Fifth Amendment proscribes a taking only when it

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concluded that it was proper to determine "what is property only in connection with what is a compensable taking[.]" *Id.* at 175. Accordingly, he favored vacating and remanding *Phillips* for full Fifth Amendment consideration. *Id.* at 179.

[98] *See id.* at 164 n.4.

[99] *See* Klein, *supra* note 1, at 16 (stating that *Phillips* might be an "[i]nconsequential abstraction").

[100] Some indication of the importance of *Phillips* can be seen in the treatment of the parties following the decision. In particular, one named plaintiff, a lawyer, noted that he and his client had been "vilified for challenging the popular program," while the losing attorneys were "given the President's Award from the State Bar of Texas." Janet Elliot, *Judge Considers Novel IOLTA Approach; Clients' OK Would be Required Before Money Goes into Accounts*, TEXAS LAWYER, Oct. 4, 1999. Interestingly, the federal district judge who considered *Phillips* on remand, and ultimately held that IOLTA was not a taking, apparently told the beleaguered IOLTA plaintiffs that "many are not extolled as heroes until well after their time." *Id.*

[101] The federal district court that took up *Phillips* on remand suggested that, but for the Court's explicit direction, it would not have considered the takings issue. *See* Wash. Legal Found. v. Texas Equal Access to Justice Found. II, No. A-94-CA-081 at 21 (W.D. Texas Jan. 28, 2000).

[102] Only one state court has directly addressed the merits of a takings claim under the presumption that IOLTA-generated interest is private. In *Carroll v. State Bar of California*, 213 Cal. Rptr. 305 (Cal. Ct. App. 1985), the California Court of Appeals concluded that the *Penn Central* test determined whether compensation is required for "economic injuries caused by public action." *Id.* at 311. Applying the second prong to California's mandatory IOLTA program, the court held that clients "suffer no real economic loss" from having their funds deposited in IOLTA because they could not earn net interest if the money were deposited in an individual account. *Id.* Additionally, the court suggested that the program would survive Fifth Amendment scrutiny even if it resulted in some economic burden since "[w]here the public good is great, and a 'taking' is minimal, [the taking] is permissible." *Id.* at 312 (citing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

[103] *See Wash. Legal Found. v. Texas Equal Access to Justice Found. II*, No. A-94-CA-081 at 33 (W.D. Tex. Jan. 28, 2000).

[104] *Id.*

occurs without just compensation.[105] It therefore focused on determining whether, and to what degree, just compensation was owed to unwilling IOLTA participants.[106] Toward that end, the court looked for any losses that clients might have suffered because of IOLTA.[107] Significantly, the court found that they could not earn net-interest through banking techniques other than IOLTA.[108] It therefore concluded that interest earned on client funds had "no economically realizable value."[109] Since the plaintiffs did not suffer a compensable loss,[110] the court held that "there has been no taking without compensation in violation of the Fifth Amendment."[111]

Although it appeared to uphold IOLTA solely on the ground that it did not cause clients to suffer a compensable loss,[112] the district court nevertheless considered whether the program effected a taking.[113] As an initial matter, the court concluded that a physical invasion analysis was inapplicable because that methodology arose from cases dealing solely with real property.[114] Similarly, the court concluded that an analysis based on a claimed loss of the right to

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[105] *Id.*

[106] *Id.*

[107] *Id.* The court specifically asked "what award would be needed to place [plaintiff] in as good a position as he would have enjoyed without the alleged taking." *Id.* at 22.

[108] *Id.* at 23-30. The court dismissed testimony that clients could profit from "in-firm pooling" and "sub-accounting" techniques. *Id.* In in-firm pooling, a lawyer places all client funds in one interest-earning account and spreads out administrative costs so that individual clients profit from the interest earned by the pooled funds. *Id.* at 23-24. Sub-accounting is a "banking product where an entity such as a law firm opens a master account in its name and a linked sub-account for each client for whom the firm is holding funds." *Id.* at 25. The court rejected in-firm pooling as a replacement for IOLTA on the basis that 1) funds placed in in-firm pooling would often earn a net benefit for the client without in-firm pooling, 2) large deposits "in effect pay for the costs of the smaller amounts and allow those smaller amounts to earn interest," and 3) in-firm pooling is not a demand account as required by professional ethics rules. *Id.* at 24-25. Although noting that sub-accounts can earn interest, the court concluded that sub-accounting could not produce a net benefit from nominal client funds because the administrative and banking costs of the product normally exceeded those of IOLTA. *Id.* at 30.

[109] *Id.* at 32.

[110] *Id.* Interestingly, the court rejected the notion that client losses, and thus, the just award, was equal to the amount of interest earned on plaintiff's funds. *Id.* Without explaining its reasoning, the court stated that such a conclusion flowed only from a "per se [takings] analysis," which it refused to apply. *Id.*

[111] *Id.* In a footnote, the court emphasized that Plaintiffs had to "prove that a taking occurred 'without just compensation' in order to establish a violation of the Fifth Amendment, which is a prerequisite to relief." *Id.* at 33 n.8 (citing First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987)).

[112] *Id.* at 32-33. The court stated: "Without an identifiable compensable loss, there has been no taking without compensation in violation of the Fifth Amendment. Accordingly, Plaintiffs [sic] Fifth Amendment claims fail." *Id.*

[113] *Id.* at 34.

[114] *Id.*

exclude was inapplicable since that right was established in real property cases, and because IOLTA "deals with money, which is fungible."[115] Finally, the court concluded that *Webb's* was inapposite because the funds in *Webb's* were large enough to have earned interest in any account, whereas with IOLTA, "there is no money to confiscate outside the mechanisms which make IOLTA possible."[116] IOLTA therefore did not qualify as a "confiscatory" taking in the *Webb's* sense.[117] The court subsequently applied *Penn Central*'s balancing test[118] and held that IOLTA did not constitute a taking under that standard.[119]

The district court's conclusions in *Texas Equal Access II* are not surprising given its earlier conclusion that clients had no property interest in IOLTA,[120] and the fact that most federal and state courts seem reluctant to vindicate takings claims against IOLTA. Yet, considering that the Fifth Circuit has already reversed the district court on the IOLTA property issue, the lower court's conclusions are likely to be scrutinized with considerable skepticism on appeal.[121] In light of current takings law, such skepticism is entirely appropriate.

## III. IOLTA'S CONFISCATION OF CLIENT INTEREST AMOUNTS TO A PER SE TAKING

The Fifth Circuit should overrule the district court's conclusions in *Washington Legal Found. v. Texas Equal Access to Justice II*, and hold that IOLTA effects a taking without just compensation. Indeed, Supreme Court precedent compels the conclusion that IOLTA violates the Fifth Amendment both by allowing government to permanently occupy private property and by depriving clients of the right to exclude others from their interest without just

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[115] *Id.* (citing United States v. Sperry, 493 U.S. 52, 62 n.9 (1989)).

[116] *Id.* at 36.

[117] *Id.* Without explaining its reasoning, the court asserted that *Webb's* "seems to fall somewhere between a per se and regulatory analysis." *Id.* at 36 n.10.

[118] *Id.* at 37. Like previous courts that have applied *Penn Central*, the district court determined that clients suffer no adverse economic impact, frustration of investment-backed expectations, or unfair burden from IOLTA because the program results in no adverse costs. *Id.* at 38-39.

[119] *Id.* at 39.

[120] Wash. Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1 (W.D. Tex. 1995), *overruled by* Wash. Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996).

[121] After the district court's decision in *Texas Equal Access II*, the Washington Legal Foundation indicated that it would appeal the decision to the Fifth Circuit and to the U.S. Supreme Court if necessary. *See Texas System of Providing Lawyers to Poor Upheld*, DALLAS MORNING NEWS, Feb. 2, 2000.

compensation. The fact that IOLTA involves personal, rather than real, property in no way undermines these conclusions.

### *A. IOLTA Amounts to a Permanent Physical Occupation*

#### *1. IOLTA is a taking under the rationale of Loretto v. Manhattan Teleprompter CATV Corp.*

IOLTA amounts to a physical occupation and therefore effects a taking of private property under the reasoning in *Loretto v. Manhattan Teleprompter CATV Corp.*[122] In *Loretto*, the Supreme Court concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[123] The Court's more recent takings cases reiterate that such an occupation automatically violates the Fifth Amendment.[124] In arriving at its decision in *Loretto*, the Court explained why a permanent physical occupation without just compensation violates the Fifth Amendment:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of property; he not only cannot exclude others, but can make no use of the property . . . . Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty that right of any value, since the purchaser will also be unable to make any use of the property.[125]

Thus, the *Loretto* Court found the basis for its strict physical occupation takings standard in the extent to which occupation interfered with traditional property rights.

Mandatory IOLTA programs interfere with the traditional property rights of clients to the same degree as a physical invasion. Specifically, when compelled to participate in the program,[126] clients cannot assert possession

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[122] 458 U.S. 419 (1982).

[123] *Id.* at 426.

[124] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

[125] Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 435-36 (1982); *see also* Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998) (noting that *Loretto* was premised on a recognition that property consists of a number of rights, including "possession, control and disposition").

[126] Clients have no choice to participate in "voluntary" IOLTA programs or in "mandatory" programs. The difference between voluntary and mandatory programs lies only in the fact that, in voluntary IOLTAs, *attorneys* can choose to participate in the program. *See* Wash. Legal

over the interest generated from their principal, cannot control those funds,[127] and are prevented from excluding the state from IOLTA interest. Accordingly, their ability to sell or devise their rights in IOLTA-generated interest is devoid of value. In sum, the government maintains complete control over the interest generated in IOLTA programs.[128] Since it is now settled that this interest is private property, it follows that IOLTA effects a permanent physical occupation of private property.

*2. The physical occupation standard is not limited to real property*

Some courts[129] and commentators[130] have suggested that a physical occupation analysis is inapplicable to IOLTA because that doctrine arises from cases dealing with real property[131] and because such a proposition was implicitly rejected by the Court in a footnote in *United States v. Sperry*.[132] Yet, a close reading of *Loretto* and *Sperry* reveals that neither case limits the physical occupation analysis to situations involving real property.

It is true that the physical occupation rule arose in a real property context.[133] Nevertheless, in establishing the rule that a permanent physical occupation of property is always a taking, the *Loretto* Court did not focus on the real property facts before it or distinguish in any way between real and personal property.[134] Moreover, the Court did not ground the rule on any special

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Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 996, 998-99 (5th Cir. 1996).

[127] *See* Douglas, *supra* note 12, at 1329 (noting that clients can prevent the government from controlling their funds only by "refrain[ing] from dealing with attorneys in a manner that would require the surrender of trust funds").

[128] *See* Jason Lacey, Note, *IOLTA Programs and Professional Responsibility: Dealing with the Aftermath of* Phillips v. Wash. Legal Found., 47 KAN. L. REV. 911, 931 (1999) (noting that tax rules applicable to IOLTA require "the complete abrogation of client control over the disposition of the interest").

[129] Wash. Legal Found. v. Texas Equal Access to Justice II, No. A-94-CA-081, at 34 (W.D. Tex. Jan. 28, 2000); Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 975 (1st Cir. 1993).

[130] *See* Carlson, *supra* note 12.

[131] *See Texas Equal Access II*, No. A-94-CA-081, slip op. at 34.

[132] 493 U.S. 52, 62 n.9 (1989).

[133] *Loretto* involved the government's attempt to compel the placement of a cable box on a privately owned apartment building. *See* Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 421-24 (1982).

[134] In establishing the rule that a permanent physical occupation of private property is always a taking, the *Loretto* Court repeatedly referred to "property" in general: "we conclude that such a physical occupation of *property* is a taking," *id.* at 421 (emphasis added); "we have long considered a physical intrusion by government to be a *property* restriction of an unusually serious character," *id.* at 426 (emphasis added); "[m]ore recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that restricts the use of *property*," *id.* at 430 (emphasis added); "[t]he historical rule

characteristic of real property.[135] Instead, as noted above, it emphasized that a permanent physical occupation is always a taking because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."[136]

The bundle of rights to which the *Loretto* Court referred is not exclusive to real property, but instead applies to personal property as well.[137] Indeed, in a case that predates *Loretto*, the Court clearly stated that the bundle of property rights recognized in *Loretto* inhered in personal property.[138] Accordingly, it would be illogical to conclude that the *Loretto* physical occupation rule applies to real property, but not to interest income.

Despite the generality of *Loretto*, the *Texas Equal Access II* court rejected application of the *Loretto* rule to IOLTA. It based this decision largely on the authority of *United States v. Sperry*.[139] In *United States v. Sperry*,[140] the Supreme Court held that the United States did not violate the Takings Clause when it appropriated as a "user fee" a portion of the money recovered by American claimants before the Iran-United States Claims Tribunal.[141] Rejecting the contention that the *Loretto* permanent physical occupation rule governed its analysis, the Court said:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of Loretto.[142]

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that a permanent physical occupation of another's *property* is a taking has more than tradition to commend it." *Id.* at 435 (emphasis added).

[135] *See* Fred P. Bosselman, *Land As a Privileged Form of Property* in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS, 32 (David Callies ed., 1996).

[136] *See Loretto*, 458 U.S. at 435.

[137] *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998) (noting that "property" consists of "the right to possess, use and dispose of it").

[138] Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (using the "bundle of sticks" metaphor in considering whether the government took private property when it prohibited the sale of eagle feathers).

[139] Wash. Legal Found. v. Texas Equal Access to Justice Found. II, No. A-94 CA-081 JN at 34-35 (W. D. Tex. Jan. 28, 2000).

[140] 493 U.S. 52 (1989).

[141] *Id.* at 59.

[142] *Id.* at 62 n.9.

While some courts have relied on this footnote to preclude application of the physical occupation rule to takings cases involving "money,"[143] a careful reading suggests that the language cannot be interpreted so broadly. In light of its first sentence, the statement is properly read as an admonition that a physical occupation analysis does not apply when government exacts a user fee from one who benefits from a government service.[144] Similarly, when read in context, the statement that "[u]nlike real or personal property, money is fungible" merely explains why the government may *directly* deduct money without triggering a physical occupation takings inquiry.[145]

Even if one can read *Sperry*'s comments on *Loretto* to apply to more than user fees, there is no reason to believe that they apply to interest income. Instead, given the facts of the case, *Sperry*'s use of the term "money" can logically stretch no further than government-mandated financial obligations. Recent federal court cases support this limited definition of "money" for Fifth Amendment purposes. For instance, in *Commonwealth Edison Company v. United States*,[146] the Court of Federal Claims directly considered whether money was amenable to takings claims.[147] While concluding that it generally was not, the court relied on *Webb's* in distinguishing accrued interest from those forms of money not subject to a takings claim:

> Webb's is distinguishable . . . because in *Webb's, a specific property interest was at stake–the actual interest accruing on a specific, separately identifiable fund* . . . *Webb's* did not involve the taking of money based on the imposition of a financial burden in the nature of a tax . . .[148]

In *Eastern Enterprises v. Apfel*,[149] Justice Kennedy also distinguished interest in concluding that a forced payment of money was not subject to the Takings Clause.[150]

The courts' repeated separation of interest from other types of money, and the nature of the funds at issue in *Sperry*, compel the conclusion that *Sperry*'s vague reference to "money" does not preclude application of a per se takings analysis to interest income. It is uncontested that IOLTA funds are accrued interest income. Furthermore, the government supplies no service to clients

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[143] *See, e.g.*, Nixon v. United States, 978 F.3d 1269, 1285 (D.C. Cir. 1992) (citing *Sperry* for the proposition that "money . . . is not subject to the per se doctrine because it is fungible").

[144] Wash. Legal Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 996, 1002 n.38 (5th Cir. 1996); Douglas, *supra* note 12, at 1301.

[145] *Texas Equal Access I*, 94 F.3d at 1002 n.38 (emphasis added).

[146] 46 Fed. Cl. 29 (2000).

[147] *Id.* at 37.

[148] *Id.* at 41 n.11.

[149] 524 U.S. 498 (1998).

[150] *Id.* at 540 (Kennedy, J., concurring) (emphasizing that a financial obligation did not implicate the Fifth Amendment because it did not "appropriate . . . accrued interest").

that could cause the taking of their interest to be deemed a "user fee,"[151] or an obligation to pay a "tax." Accordingly, even under its broadest reading, *Sperry*'s suggestion that money is not subject to the physical occupation standard does not apply to the interest at issue in IOLTA. In sum, since neither *Sperry* nor *Loretto* direct a court to reject the applicability of the physical occupation standard to interest income, IOLTA takes private property under the rationale of Loretto v. Manhattan Teleprompter CATV Corp.

### *3. IOLTA is a physical occupation under Webb's*

Even if a court can limit *Loretto* to real property, *Webb's Fabulous Pharmacies v. Beckwith*[152] directly establishes a physical occupation takings rule for accrued interest income.[153] *Webb's* was, of course, decided before *Loretto* and thus does not explicitly refer to or apply a per se physical occupation rule as it is now known.[154] However, close analysis of the opinion reveals that the Court was applying a categorical rule similar to that in *Loretto* rather than a balancing approach in the tradition of *Penn Central*. First, there is the simple fact that the Court refrained from applying the multi-factor test established in *Penn Central* although it created the test only two years before.[155] Second, there is the Court's assertion in *Webb's* that Florida had not "adjusted the benefits and burdens of economic life to promote the common good" when it confiscated the interest earned on interpleader funds.[156] Since it is such an adjustment that leads a court to weigh the *Penn Central* factors,[157] the Court's conclusion that no adjustment of "benefits and burdens" occurred in *Webb's* shows that *Penn Central* was irrelevant to that case.

The *Webb's* Court's reliance on *United States v. Causby*[158] also shows that it viewed the case as a traditional physical occupation of property.[159] In

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[151] Phillips v. Wash. Legal Found., 524 U.S. 156, 171 (1998) (noting that "the state . . . cannot argue that its confiscation of respondents' interest income amounts to a fee for services performed").

[152] 449 U.S. 155 (1980).

[153] Bosselman, *supra*, note 135, at 32. In contrast, the *Texas Equal Access II* court asserted that *Webb's* established a test that fell between a per se rule and the regulatory takings framework of *Penn Central*. Wash. Legal Found. v. Texas Equal Access to Justice II, No. A-94-CA-081 at 36 (W.D. Tex. Jan. 28, 2000).

[154] *Webb's* was decided in 1980. *Loretto v. Manhattan Teleprompter CATV Corp.* was decided in 1982.

[155] *Pennsylvania Transportation Co. v. City of New York*, 438 U.S. 104 (1978), was decided in 1978.

[156] *Webb's*, 449 U.S. at 163 (quoting *Penn Central*, 438 U.S. at 124).

[157] *See Penn Central*, 438 U.S. at 124.

[158] 328 U.S. 256 (1946).

[159] This point is well made by Douglas, *supra* note 12, at 1326.

*Causby*, the Court held that the government took private property when it conducted flights over the claimant's land because it had not "merely destroyed property [but was] using a part of it for the flight of its planes."[160] *Causby* is thus a quintessential physical occupation case, a fact which the Court later recognized in *Loretto*.[161] By analogizing *Webb's* to *Causby* instead of to *Penn Central*, *Webb's* establishes that a confiscation of private interest is controlled by a takings rule devoid of economic or police power balancing. Accordingly, one can only conclude that *Webb's* was decided under a per se takings rule.[162]

IOLTA clearly falls under the *Webb's* per se rule since, as in *Webb's*, the program does not adjust the benefit and burdens of any aspect of economic life.[163] Indeed, IOLTA is qualitatively different from cases in which the Court has considered legislative attempts to redistribute private assets as an adjustment of economic benefits and burdens requiring *Penn Central*'s balancing approach.[164] The Court normally finds such an adjustment when government requires a party to distribute assets to others in order to correct a problem traceable to the prior receipt of an economic benefit.[165] For instance, in *Connolly v. Pension Guaranty Corp.*,[166] the Court turned to *Penn Central*'s multi-factor test when considering the constitutionality of legislation that required employers to fund a large share of their employee's pension plans. Similarly, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for S. Cal.*,[167] the Court considered whether the Multiemployer Pension Plan Amendments of 1980 violated the Fifth Amendment by requiring employers who withdrew from the plan to pay a

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[160] *Causby*, 328 U.S. at 262-63.

[161] *See* Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 433 (1982).

[162] *See* Bosselman, *supra*, note 135.

[163] *See Webb's*, 449 U.S. at 163 (concluding that the confiscation of private interest in *Webb's* did not involve an adjustment of economic benefits and burdens).

[164] *See* Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (applying the *Penn Central* factors to "economic regulation" requiring a company to pay the health care costs of former employees); Concrete Pipe & Prod's of S. Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 637, 643 (1993) (applying *Penn Central* to a takings claim against a pension plan after noting that "legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality"); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222-23 (1986) (applying the *Penn Central* factors to legislation requiring employers to pay into a pension plan after noting that "legislation re-adjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations").

[165] *See* Wash. Legal Found. v. Texas Equal Access to Justice Found. II, No. A-94-CA-081 at 39 (W.D. Tex. Jan 28, 2000) (citing *Eastern Enterprises* for the contention that IOLTA clients cannot be "unfairly singled out by the government to bear a burden they had no role in creating").

[166] 475 U.S. 211 (1986).

[167] 508 U.S. 602 (1992).

fixed debt to the plan.[168] There, the Court applied the *Penn Central* factors after noting that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality."[169] In *Eastern Enterprises v. Apfel*,[170] the Court relied on the *Penn Central* balancing approach in considering the constitutionality of legislation that required a former coalmining operator to pay the health care costs of former employees.[171]

Unlike the legislative schemes in *Connolly*, *Concrete Pipe* and *Eastern Enterprises*, the economic burdens imposed by IOLTA are unrelated to a problem caused, or benefit gained, by the class forced to bear those burdens. Without such a connection between client conduct and IOLTA's economic burden, IOLTA can not be characterized as a case in which an adjustment of "benefits and burdens of economic life" calls for application of the *Penn Central* balancing test.[172] Consequently, IOLTA falls squarely within the per se takings standard established in *Webb's* and must be considered a taking on the strength of that case.[173]

### *B. IOLTA Violates the Fifth Amendment by Taking Clients' Right to Exclude Others*

IOLTA violates the Takings Clause not only under the physical occupation standards established in *Loretto* and *Webb's*, but also as an interference with the fundamental right to exclude others from private property. Federal courts have long recognized that the right to exclude others is an essential property right.[174] In *United States v. Kaiser Aetna*,[175] the U.S. Supreme Court compared deprivation of the right to a physical invasion and therefore held that the right to exclude "falls within this category of interests that the Government cannot take without compensation."[176] Courts have nevertheless rejected the propriety of the right to exclude claim against IOLTA on the ground that such a right has

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[168] *Id.* at 607.

[169] *Id.* at 637.

[170] 524 U.S. 498 (1998).

[171] *Id.* at 529-37.

[172] In *Eastern Enterprises*, the Court described both *Connolly* and *Concrete Pipe* as cases in which "statutory liability was linked to the employers' conduct." *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 530 (1998).

[173] *See* Barrow-Stapleton, *supra* note 12, at 235; Douglas, *supra* note 12, at 1324.

[174] *See generally*, David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 J. URB. L. AND POL'Y 39 (2000).

[175] 444 U.S. 164 (1979).

[176] *Id.* at 179-80.

not been established in personal property cases.[177] Yet, aside from overstating the situation,[178] this line of reasoning is based on an unnecessarily narrow reading of those real property cases[179] that have established the fundamental nature of the right to exclude.[180]

Far from premising its Fifth Amendment significance on whether or not real property is involved, courts have characterized the right to exclude as an essential element of private property in the broadest sense.[181] This approach mirrors the traditional common law view that the right to exclude is an essential element of property in general.[182] One would have to ignore that common law principle to conclude that the right to exclude is inapplicable to Fifth Amendment challenges to IOLTA. Since the IOLTA program is predicated on keeping clients from exercising any control over the interest generated by their funds,[183] a correctly applied right to exclude claim requires a court to conclude that IOLTA takes private property under that standard as well under the *Loretto* rule.[184]

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[177] *See* Wash. Legal Found. v. Texas Equal Access to Justice II, No. A-94-CA-081 at 34 (W.D. Tex. Jan. 28, 2000); Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 974 (1st Cir. 1993).

[178] The important nature of the right to exclude has been recognized in several federal cases involving personal property. *See* Nixon v. United States, 978 F.3d 1269 (D.C. Cir. 1992) (dealing with former President Nixon's right to exclude others from his presidential papers); United States v. Lutz, 295 F.2d 736, 740-41 (5th Cir. 1961) (involving disputed ownership of insurance proceeds).

[179] Federal real property cases recognizing the fundamental right to exclude others include Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Hodel v. Irving, 481 U.S. 704 (1987); Evers v. County of Custer, 745 F.2d 1196 (9th Cir. 1984); Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

[180] *See* Abraham, *supra* note 12, at 68. (noting that the right to exclude was "intended to apply to all property").

[181] *See Kaiser-Aetna*, 444 U.S. at 179-80 (holding that the right to exclude is a "fundamental element of *the property right*") (emphasis added)). It is telling that the *Kaiser-Aetna* Court relied on two federal cases involving personal property in reaching this conclusion. *See id.* (citing *Lutz*, 295 F.2d at 740 and International News Serv. v. Assoc. Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)).

[182] *See* 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766). In Blackstone's view:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external *things* of this world, in total exclusion of the right of any other individual in the universe.

*Id.* (emphasis added).

[183] *See* Anderson, *supra* note 12, at 745-46 (noting that clients are "excluded from any decision making when it came to the IOLTA program").

[184] *But see* Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 975 (1st Cir. 1993)(concluding that IOLTA does not effect a taking by interfering with a client's right to exclude because IOLTA deals with "intangible property").

## IV. MAKING IOLTA CONSTITUTIONAL

The purpose of the Takings Clause is to ensure that property owners receive "just compensation" when they suffer unwanted but otherwise legitimate governmental interference with private property.[185] Accordingly, the conclusion that governmental action amounts to a taking does not automatically mean that the action is constitutionally impermissible. On the contrary, the appropriation of private property conforms perfectly with the Fifth Amendment when it includes just compensation for the aggrieved property owner[186] or when it occurs with the property owner's consent.[187] Thus, although it amounts to a per se taking, IOLTA is constitutionally sound as long as clients are offered compensation or the opportunity to consent.[188]

### *A. Just Compensation*

In *Texas Equal Access II*, the court concluded that IOLTA did not constitute a taking without just compensation because clients could not earn net interest on nominal funds without IOLTA and thus suffered no compensable economic losses.[189] This line of thinking misconstrues the nature of just compensation. While it is true that just compensation is calculated by reference to a property owner's economic losses, such losses are themselves measured by the value of the appropriated property.[190] Ultimately, just compensation requires that "[t]he owner is to be put in as good position pecuniarily as he would have occupied *if his property had not been taken*."[191] Thus, with respect to the taking effected by IOLTA, just compensation simply requires that the state reimburse unwilling participants for the monetary value of the interest generated by their principal.[192] Since IOLTA programs do not offer such compensation, they clearly effect an unconstitutional taking *without just*

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[185] First Eng. Evangelical Luth. Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987).

[186] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 174 (1985).

[187] Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

[188] For an extended discussion of the manner in which client consent can be used to save IOLTA from constitutional invalidity, see Anderson, *supra* note 12, at 744-50.

[189] *See* Wash. Legal Found. v. Texas Equal Access II, No. A-94-CA-081 at 32 (W.D. Tex. Jan. 28, 2000).

[190] United States v. Miller, 317 U.S. 369, 375-77 (1946); United States v. Reynolds, 397 U.S. 14, 16 (1970); Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[191] *Miller*, 317 U.S. at 373 (emphasis added).

[192] *See Texas Equal Access II*, No. A-94-CA-081, slip. op. at 22 (conceding that this conclusion was only appropriate in conjunction with a "per se analysis").

*compensation*. As the foregoing indicates, the constitutional remedy for a taking without just compensation is monetary reimbursement.[193] Accordingly, claimants against IOLTA have properly sought an injunction halting the program and restitution for the confiscated interest.[194] However, in *Washington Legal Found. v. Texas Equal Access to Justice Found. I*, the Fifth Circuit determined that the Eleventh Amendment barred restitutionary claims against IOLTA.[195] Subsequent challengers have sought only injunctive[196] and declaratory relief.[197]

Regardless of the specific relief granted, the conclusion that IOLTA is a taking without just compensation effectively halts the program.[198] By recognizing that the program's constitutionality hinges on the provision of compensation, a court would transform IOLTA into a "wash transaction,"[199] and thereby render it financially inoperable.[200] Thus, while IOLTA could theoretically coexist with the Fifth Amendment by refunding the money that it takes, its practical survival hinges on achieving constitutionality through other means.

### *B. Client Consent*

Aside from just compensation, the clearest way to conform IOLTA to the Fifth Amendment is to ensure that legal funds are deposited into the program with the consent of affected clients.[201] At a minimum, a consent-based IOLTA would offer clients the option to deposit nominal funds in an IOLTA account or in a non-interest bearing demand account.[202] In a more advanced scheme,

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[193] *Miller*, 317 U.S. at 373 (stating that the Takings Clause requires the government to reimburse property owners when it appropriates private property).

[194] *See* Wash. Legal Found. v. Texas Equal Access to Justice Found. I, 94 F.3d 996, 1000 (5th Cir. 1996).

[195] *Id.* at 1001-03.

[196] *Id.* at 1005. The Fifth Circuit pointed out that states are not protected from claims for injunctive relief. *Id.*

[197] *See Texas Equal Access II*, No. A-94-CA-081, slip. op. at 32.

[198] *See* Barrow-Stapleton, *supra* note 12, at 239 (noting that if a court "issues an injunction or orders restitution, the program will be unable to continue").

[199] Phillips v. Wash. Legal Found., 524 U.S. 156, 177 (1998) (Souter, J., dissenting) (stating that a just compensation requirement "would convert any 'taking' into a wash transaction from the client's standpoint").

[200] *See* Baker & Wood, *supra* note 12, at 366 (arguing that the just compensation requirement would render the Texas IOLTA program "infeasible").

[201] *Texas Equal Access I*, 94 F.3d at 1004 (noting that to prevail on its takings claim, plaintiffs must show that the taking "was against the will of the property owner").

[202] *See generally*, Anderson, *supra* note 12; Brent Salmons, *IOLTAs: Good Work or Good Riddance?* 11 GEO. J. LEGAL ETHICS 259 (1998).

clients would have the opportunity to select a beneficiary for their funds after agreeing to participate in the program.

In choosing to participate in IOLTA, a client would waive all property interests in IOLTA-generated interest and thereby relinquish any legal claim to those funds. On the other hand, non-participation would return the client to the pre-IOLTA status quo, allowing her to access nominal funds on demand and placing lawyers under no obligation to identify or return any interest, since none would exist.[203] In addition to fulfilling the Fifth Amendment, this simple consent-based scheme would satisfy lawyers' ethical obligations, particularly the obligation to notify the client when the lawyer receives property in which the client has an interest and to turn over such property unless the client has "agreed otherwise."[204]

Notably, under current Internal Revenue Service rules, voluntary IOLTA participants would be subject to taxation on the interest generated by their principal.[205] Some commentators have suggested that these tax penalties would discourage participation in a voluntary IOLTA program.[206] While it is probably true that taxation would dissuade some clients from participating, the de minimis nature of the taxable interest, and thus of the tax itself, militates against the conclusion that taxation would appreciably undermine a consent-based IOLTA.[207] Moreover, the history of IOLTA suggests that ideological opposition to the purposes of the program, not individual financial concern, most threatens participation in IOLTA programs that maintain traditional beneficiaries.[208]

Ultimately, the minimal program outlined above could be expanded to allow consenting IOLTA depositors to select a beneficiary for the interest from their funds. Since banks now have software that allows them to track the interest earned from small deposits,[209] IOLTA programs could allow clients to direct their interest to pre-selected beneficiaries. As a clearinghouse that made

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[203] Salmons, *supra* note 201, at 271-73.

[204] *See* Lacey, *supra* note 128, at 929.

[205] IRS Rule 81-209, which exempts the owner's of IOLTA deposits from taxation requires that, among other things, the client is unable to individually elect whether or not to participate in IOLTA. *See* Lacey, *supra* note 128, at 931-32.

[206] *Id.* at 931.

[207] *See* Anderson, *supra* note 12; *see also* Salmon, *supra* note 201 (suggesting that Congress would be willing to rescind the IRS rules that impose tax penalties on a consent-base IOLTA program).

[208] Persistent claims that IOLTA violates the First Amendment by compelling clients to "support lobbying and litigation for ideological and political causes" support the idea that ideological opposition drives legal challenges to the program. *See* Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 976 (1st Cir. 1993).

[209] *See* Marcotte, *supra* note 13.

diverse organizations, including so-called conservative legal foundations,[210] available as beneficiaries, the expanded consent-based IOLTA would neutralize organized opposition.[211] Further, the inclusion of diverse beneficiaries would generate participation from individual clients and attorneys who would otherwise be opposed to the program's traditional purposes. Consent-based IOLTA programs would therefore realize enhanced financial, as well as legal, security. To be sure, mere consent would satisfy the Takings Clause, regardless of whether clients have control over who receives their funds. Yet giving clients the additional option to choose a beneficiary would go a long way toward mending and ending the long constitutional fight over IOLTA.[212]

## V. CONCLUSION

Given that the U.S. Supreme Court now recognizes IOLTA-generated interest as private property, it is only a matter of time before it or another court concludes that mandatory IOLTA programs are a taking under the per se rules established in *Loretto* and *Webb's*.[213] Court invalidation on these grounds

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[210] Like current IOLTA beneficiaries, non-profit "conservative" legal Foundations often go to court to vindicate the property rights of those who would not otherwise be able to bring their claims. *See generally* William Rusher, *Property Rights Rescue Mission*, THE WASHINGTON TIMES, Dec. 9, 1999, at A15. Thus, the inclusion of IOLTA's foes as beneficiaries is not as dramatic a change as it first appears.

[211] The Wash. Legal Foundation "has been the lead plaintiff in every federal court lawsuit to challenge IOLTA this decade." *Mass. Bar Found.*, 993 F.2d at 976. The Washington Legal Foundation is typically viewed as a conservative organization. *See, e.g.*, Carlson, *supra* note 12, at 1132. Thus, the inclusion of organizations like the Washington Legal Foundation as IOLTA beneficiaries would make ideological attacks against the program self-defeating.

[212] In 1999, the chief counsel of the Washington Legal Foundation suggested that client consent and beneficiary disclosure would "satisfy his concerns." *See* Elliot, *supra* note 27.

[213] One week before this comment went to print, the Ninth Circuit Court of Appeals held that Washington's IOLTA program caused a taking in violation of the Fifth Amendment. *See* Wash. Legal Found. v. Legal Found. of Wash., 2001 U.S. App. LEXIS 314, at 40 (9th Cir. Jan. 10, 2001). In reaching its decision, the court first dismissed the contention that *United States v. Sperry Corp.*, 493 U.S. 52 (1989), mandates that "the government can confiscate people's money without it being a taking." *Id.* at 36. In the court's view, "[t]he Fifth Amendment protection of property would be eviscerated were to construe confiscation of fungible intangibles as not amounting to a takings, as defendants urge." *Id.* Further, the court noted that an application of takings law was appropriate because:

> *Phillips* holds that even where although the interest may have no economically realizable value to its owner, possession, control and disposition are nonetheless valuable rights that inhere in the property.

*Id.* at 34 (citing Phillips v. Wash. Legal Found. 524 U.S. 156, 170 (1998)).

The court then applied Supreme Court takings precedent to the IOLTA program, rejecting the regulatory takings balancing test articulated in *Penn Central Transportation Company v.*

would be an appropriate end to IOLTA, for it is axiomatic that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[214] The Just Compensation remedy will halt current mandatory IOLTA programs.[215] However, the general IOLTA framework, and the public benefits that accrue therefrom, can be preserved by a "shorter cut" than compensation: consent. IOLTA can and should be altered to allow clients to choose to participate and, after consenting, to select a beneficiary for their funds. A program guided by these principles would comport with the Takings Clause, end ideological opposition, and continue to generate funds for many worthy public interest organizations.

J. David Breemer[216]

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*City of New York*, 438 U.S. 104 (1978), in favor of the per se physical invasion test established in *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419 (1982). *Id.* at 38-40. The court was compelled to make this determination because while "[t]he [*Penn Central*] economic impact test would have relevance if the IOLTA rule merely regulated how the client used his interest, or where the interest was kept, or for how long," it was inapposite to IOLTA since "[t]he IOLTA rule entirely appropriates the interest on the client's principal . . . " *Id.* at 39. Therefore, under the rationale of *Loretto*, the court held:

> If the clients' money is to be taken by the state of Washington for the worthy public purpose of funding legal services for indigents or anything else, then the State of Washington has to pay just compensation for the taking. That serves the purpose of imposing the costs on society as a whole for worthwhile social programs, rather than on the individuals who have the misfortune to be standing where the cost first falls.

*Id.* at 54.

On the issue of what compensation was owed to clients whose funds are diverted to IOLTA, the court indicated that it was possible that "the interest gained by the defendant's exceeds the amount of loss by the clients." *Id.* at 46-47. More specifically, it suggested that the IOLTA program may be entitled to keep some of the funds generated by IOLTA as "reasonable fees" for helping to generate the interest. *Id.* at 49-50. Consequently, though the court emphasized that clients had indeed lost something of value through IOLTA and were therefore entitled to some compensation, it remanded the just compensation issue for further development. *Id.* at 48-49.

[214] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[215] *See* discussion *supra*, section III. A.

[216] Class of 2001, William S. Richardson School of Law, University of Hawai'i at Manoa. The author wishes to thank his wife, Mirabai Breemer for her support and Prof. David L. Callies for his helpful comments and suggestions during the writing of this Comment.

# Elian Doesn't Live Here Anymore: One Little Boy in the Maze of U.S. Immigration & Family Law

## I. INTRODUCTION

As fishermen rescued five-year old Elian Gonzalez from his inner-tube off the Florida coast over Thanksgiving weekend in 1999,[1] it is unlikely that Elian thought about his citizenship or living the American dream. It is also unlikely that, weeks later as he visited Disney World with his American relatives,[2] the young child fully understood that he was the focus of a major international custody battle presenting complex legal issues unique to the United States' relationship with his Cuban homeland.

While the press and the public focused on Elian's movie-like story, the legal community debated various issues related to Elian's situation. This comment explores the most significant of these issues and explains why the courts properly granted custody to Elian's father. Even if Congress had passed a bill granting Elian permanent residency, an analysis of state law indicates that he would have been returned to his father in Cuba. Part II details the intriguing factual background of Elian's presence in the United States. Part III explains the unique history between the United States and Cuba. Part IV explores the issues surrounding jurisdiction in this case. Part V touches upon the immigration issues that Elian's arrival on American soil brought to life. Part VI examines the family law and jurisdiction issues relevant to Elian's case. Last, Part VII concludes that Elian's return to Cuba was the proper ending to this emotional legal battle.

## II. THE STORY BEHIND THE STORY: ELIAN'S ARRIVAL ON AMERICAN SOIL

On Thanksgiving weekend 1999, Florida fishermen discovered five-year-old Elian Gonzalez ("Elian") clinging for life on an inner-tube in the Atlantic Ocean.[3] The young child was one of three survivors of a boatload of thirteen

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[1] *U.S. Asks Cuba to Let Child's Father Get Him; Miami Exiles Could Protest*, FLA. TIMES UNION (Jacksonville), Jan. 4, 2000, at A4.

[2] Franklin Foer & Linda Robinson, *Caught in the Middle; Everyone Wants a Piece of Little Elian Gonzalez*, U.S. NEWS & WORLD REP., Feb. 7, 2000, at 26.

[3] *U.S. Asks Cuba to Let Child's Father Get Him; Miami Exiles Could Protest*, *supra* note 1, at A4.

Cubans attempting to escape from Cuba to the United States.[4] The disastrous capsize claimed Elian's mother among its fatalities.[5]

While Elian's survival in the Florida Straits captivated audiences, it was only the beginning of his newfound fame. Upon arrival in Florida, Elian's great-uncle, Lazaro Gonzalez ("Lazaro"), took custody of him and vowed to retain such custody.[6] Under normal circumstances, such generosity would have been automatically accepted, if not applauded. However, this was not a normal situation. This was a situation involving Cuba, the United States, and the poster-boy qualities of young Elian.

One-hundred fifty miles away, Elian's father, Juan Miguel Gonzalez ("Juan Miguel") immediately and vehemently sought the return of Elian.[7] Again, this would have been a perfectly acceptable and expected reaction from the father of a young child, had Juan Miguel not been in communist Cuba, a dictatorship run by Fidel Castro. Americans, particularly Cuban-Americans, reflexively questioned Juan Miguel's sincerity and accused him of speaking under the coercion of Castro, and not under his own beliefs or in the best interests of Elian.[8]

Meanwhile, Elian remained in the United States with his American relatives. He had a puppy.[9] He went to Disney World.[10] He ate at McDonald's.[11] He attended school in Florida.[12] In other words, he lived the dream life of many American children.

At the same time, the American justice system worked hard to determine the legal answer to this messy immigration question. On January 5, 2000, the Immigration and Naturalization Service ("INS") ordered that Elian be returned to his father by January 14.[13] However, on January 10, 2000, Florida family-court Judge Rosa Rodriguez ("Rodriguez") determined that Elian's American relatives had the legal right to keep Elian until the court could hold a full

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[4] Joshua Cooper Ramo, *Whose Child Is This? The Odyssey of Elian Gonzalez*, TIME, Jan. 17, 2000, at 58.

[5] *U.S. Asks Cuba to Let Child's Father Get Him; Miami Exiles Could Protest*, *supra* note 1, at A4.

[6] *Castro's Coup: Cuba: Castro, the Exiles and the Boy*, The ECONOMIST, Jan. 15, 2000.

[7] Warren Richey, *Case of Cuban Boy May Test US Custody Law*, CHRISTIAN SCI. MONITOR, Dec. 8, 1999, at 1.

[8] Alice G. Abreau & Jan C. Ting, *Shall Little Elian Stay or Go Home?*, NAT'L L.J., Dec. 27, 1999, at A21.

[9] Sue Anne Pressley, *Family Feud, Global Debate; As Elian Awaits Federal and State Court Dates, Family Comes Under Scrutiny–But It Might Not Make a Difference*, WASH. POST, Feb. 14, 2000, at A3.

[10] Foer & Robinson, *supra* note 2, at 26.

[11] Foer & Robinson, *supra* note 2, at 26.

[12] *Castro's Coup: Cuba: Castro, the Exiles and the Boy*, *supra* note 6.

[13] INS Decision in the Elian Gonzalez Case, I.N.S. Statement, Jan. 5, 2000.

hearing on March 6, 2000 regarding the custody issue.[14] Although the Cuban exile community applauded this decision, the public immediately scrutinized it.[15] The media questioned the court order as a political message from Rodriguez, who was an elected judge in a community with a high population of Cuban-exiles.[16]

Additionally, United States Attorney General Janet Reno ("Reno") opined that the Florida state courts have no jurisdiction over immigration cases, including Elian's.[17] However, in spite of the INS's determination that Juan Miguel was the only person who could speak for Elian, Reno announced that Elian's Miami relatives should be given the opportunity to fight for custody in federal court.[18] In granting the deadline extension, she wrote, "It is not appropriate to commence removal proceedings against this 6-year-old boy."[19] A letter from the INS to the American relatives' attorneys explained that Elian received temporary parole status.[20] Thus, Elian could legally remain in the United States until the INS determined his ultimate status.[21]

On January 19, Lazaro filed a lawsuit alleging that Reno and INS Commissioner Doris Meissner refused to consider political asylum for Elian, thus violating Elian's constitutional rights.[22] In response, the government asked the federal district judge to dismiss the suit, arguing that the federal courts had no jurisdiction to review the INS ruling.[23] In the alternative, the government claimed that only Juan Miguel had legal standing to request asylum on behalf of Elian.[24]

Although a hearing in state court never occurred on March 6, on March 21, federal district court Judge Michael Moore ("Judge Moore") dismissed the lawsuit requesting political asylum on Elian's behalf.[25] Judge Moore explained that the Attorney General had the discretion to grant or withhold asylum and the authority to determine who may speak on behalf of Elian.[26] As

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[14] *CNN: Worldview* (CNN television broadcast, Jan. 10, 2000).

[15] *Castro's Coup: Cuba: Castro, the Exiles and the Boy*, *supra* note 6.

[16] Richey, *supra* note 7, at 1.

[17] *Castro's Coup: Cuba: Castro, the Exiles and the Boy*, *supra* note 6; INS Decision in the Elian Gonzalez Case, *supra* note 13.

[18] Anita Snow, *Cuban Mothers Seek Elian's Return*, AP ONLINE, Jan. 14, 2000.

[19] Tom Carter, *Reno: Elian Must Go; State Court Lacks Jurisdiction to Decide Boy's Fate*, WASH. TIMES, Jan. 13, 2000, at A1.

[20] Karen DeYoung & Juliet Eilperin, *Elian to Meet With His Grandmothers Today; Agreement Comes After INS Threatens 6-Year-Old's Status*, WASH. POST, Jan. 26, 2000, at A3.

[21] *See infra* notes 113-26 and accompanying text.

[22] Karen DeYoung, *Federal Judge in Elian Case Speeds Up Decision on Jurisdiction*, WASH. POST, Jan. 29, 2000, at A2.

[23] *Id.*

[24] *Id.*

[25] Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1175 (S.D. Fla. 2000).

[26] *Id.* at 1177.

a result, Reno announced that she would not grant Elian asylum and that he should be returned promptly to his father in Cuba.[27]

In response to Judge Moore's ruling, several politicians, most notably presidential candidates Al Gore and George W. Bush, announced intentions to support a bill that would grant Elian permanent residency in the United States.[28] Upon Elian's initial arrival in the United States, Florida Congressmen filed bills to grant him American citizenship or permanent residency.[29] Although the momentum of passing the bill stalled when the courts heard the case, Judge Moore's ruling prompted renewed interest in the bill.[30] Such a bill would have removed the immigration issues from the multitude of controversies surrounding Elian, and would have allowed a Florida state court to decide the custody issues.[31]

Also in response to Judge Moore's ruling, Lazaro filed a lawsuit in Florida state court seeking custody of Elian while his American family pursued political asylum on his behalf.[32] On April 13, 2000, Miami-Dade circuit Judge Jennifer Bailey dismissed the suit on jurisdictional issues, and lifted Judge Rodriguez's January 10 emergency protective order requiring Elian to stay with Lazaro.[33]

On April 19, 2000, the Eleventh Circuit Court of Appeals enjoined Elian from leaving the United States pending his appeal with that court.[34] In its decision, the Eleventh Circuit granted the injunction because it was unclear whether the INS was consistent in interpreting the asylum statute in Elian's case compared to previous cases.[35]

On June 1, 2000, the Eleventh Circuit ruled on the merits of Elian's appeal of the federal district court's order.[36] The court ruled that the INS's policy–that a six-year old child lacks the capacity to file an asylum application on his own behalf–was a reasonable interpretation of the asylum statute.[37] On June

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[27] Rick Bragg, *Judge Upholds Plan for Return of Boy to Cuba*, N.Y. TIMES, March 22, 2000, at A1.

[28] *Morning Edition: Vice President Al Gore's Position on the Elian Gonzalez Case* (NPR radio broadcast, Mar. 31, 2000); Bill Douthat & Monika Gonzalez Mesa, *Ruling Reaffirms Right of Elian's Father to Decide Boy's Future*, COX NEWS SERVICE, Mar. 21, 2000.

[29] DeYoung, *supra* note 22, at A2.

[30] Douthat & Gonzalez Mesa, *supra* note 28.

[31] *Id.*

[32] Jay Weaver, *State Judge Dismisses Miami Family's Suit Seeking Custody*, MIAMI HERALD, Apr. 14, 2000.

[33] *Id.*

[34] Gonzalez v. Reno, No. 00-11424-D, 2000 WL 381901 *4 (11th Cir. Apr. 19, 2000).

[35] *Id.*

[36] Gonzalez v. Reno, 212 F.3d 1338, 1356 (11th Cir. 2000).

[37] *Id.* at 1351.

29, 2000, within hours after the Supreme Court refused to hear an appeal filed by Elian's relatives; Elian flew home to Cuba.[38]

## III. HISTORY OF IMMIGRATION FROM CUBA TO THE UNITED STATES

The modern history between the United States and Cuba began upon Fidel Castro's ("Castro") accession to power.[39] On January 1, 1959, Castro organized a revolutionary strike that sent former dictator Fulgencio Batista into exile.[40] Upon his rise to Cuba's leadership, Castro immediately made drastic changes in the Cuban economy, substantially raising the minimum wage, slashing telephone and electricity rates, and limiting the size of most land holdings to 1000 acres.[41] These policies marked "a sense of despair and outrage" among the Cuban elite and Americans who had interests in Cuba.[42]

### *A. Welcoming the First Immigrants*

In response to Castro's policies, a total of 26,527 Cubans quickly immigrated to the United States during Castro's first six months in power.[43] The vast majority of them were members of the Cuban elite who "left the island when they lost all of their property, or because they feared being arrested for supporting Fulgencio Batista, or because they were certain that the revolution would develop its own excesses, label them as counter-revolutionaries and enemies of the state, and punish them and their families."[44]

In 1960 and 1961, more than 14,000 unaccompanied children arrived in the United States.[45] Parents fearful of Castro's regime sent their children via student visas to the United States, entrusting church groups to take care of them, in what became known as "Operation Pedro Pan."[46] United States immigration officials granted nearly all of the children, and eighty-nine percent of the period's Cuban immigrants, "parole" status,[47] thus protecting them from deportation proceedings. The Cuban Adjustment Act of 1966

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[38] Tom Carter, *Elian Back in Cuba; Stay Application from Miami Kin Meets Rejection*, WASH. TIMES, June 29, 2000, at A1.

[39] MIGUEL GONZALEZ-PANDO, THE CUBAN AMERICANS 21 (1998).

[40] JAMES S. OLSON & JUDITH E. OLSON, CUBAN AMERICANS: FROM TRAUMA TO TRIUMPH 52 (1995).

[41] *Id.* at 52-53.

[42] *Id.* at 53.

[43] *Id.*

[44] *Id.*

[45] VICTOR A. TRIAY, FLEEING CASTRO: OPERATION PEDRO PAN AND THE CUBAN CHILDREN'S PROGRAM xiv (1998); GONZALEZ-PANDO, *supra* note 39, at 21.

[46] TRIAY, *supra* note 45, at 17-18.

[47] *Id.* at 26.

allowed Cuban refugees to apply for permanent residency one year after being paroled.[48]

In the meantime, many unaccompanied children received financial aid from the Cuban Refugee Program, a program designed to meet President Kennedy's objectives of assisting Cuban exiles.[49] Although the children were away from their parents and received financial assistance from American agencies, their parents retained legal custody of them.[50]

### *B. Use of Parole Status: Accepting the Marielitos*

Throughout most of the 1970s, Cuban immigrants in the United States enjoyed the favorable reputation of being hardworking, law-abiding economic assets.[51] Many of the first Cuban immigrants quickly adjusted to their new surroundings with the help of friends and relatives already in the United States.[52] In addition, the first immigrants reinvested their earnings in Miami because Cuba banned the dollar.[53]

In December 1978, Castro allowed Cuban-Americans "one-week trips to Cuba to visit their families."[54] Consequently, more than 100,000 Cuban American families flew into Havana and spent more than $100 million on the island in just a few months.[55] Appreciating the boost in economy, Castro realized that "Cuban Americans were a major source of hard currency, and a little more emigration to the United States would augment that capital source."[56] Thus on April 21, 1980, Castro authorized any Cuban wanting to go directly to the United States permission to do so through the port of Mariel, Cuba.[57]

Cuban-Americans enthusiastically responded to Castro's new policy and sent boats to pick up their relatives.[58] However, Cuban officials maintained complete control over the exodus, forcing Cuban-Americans to take back some of the island's undesirable criminals and mental patients.[59]

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[48] *See infra* notes 201-06 and accompanying text.

[49] TRIAY, *supra* note 45, at 45-46.

[50] *Id.* at 49.

[51] OLSON & OLSON, *supra* note 40, at 78.

[52] GONZALEZ-PANDO, *supra* note 39, at 33.

[53] *The Tragedy of Elian*, THE ECONOMIST, Apr. 8, 2000.

[54] OLSON & OLSON, *supra* note 40, at 79.

[55] *Id.* at 80.

[56] *Id.* at 81.

[57] *Id.*

[58] Matias F. Travieso-Diaz, *Immigration Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234, 242 (1998).

[59] Geoffrey W. Hymans, *Outlawing the Use of Refugees as Tools of Foreign Policy*, 3 ILSA J. INT'L & COMP. L. 149, 152 (1996).

Between April 21 and September 26, 1980, more than 124,000 Cubans left the island for the United States in the "Mariel boatlift."[60] In stark contrast to earlier Cuban immigrants, the Marielitos included people of color who were blue-collar workers or social outcasts in Cuba.[61] As such, the Marielitos had a much more difficult time adjusting to United States than their white, wealthy predecessors.[62] Although only about two percent of the Marielitos were serious criminals, the press portrayed the Marielitos as an unattractive group.[63]

Despite the questionable composition of the Marielitos, President Carter kept the border open to new Cuban exiles.[64] The large number of Cuban immigrants stopped arriving only when Castro closed the port of Mariel at the end of the summer in 1980.[65]

The United States granted the Marielitos parole status, "allowing them to remain in the United States until they commit[ted] a crime or [were] discovered to have committed a crime in Cuba before their immigration. Once either one of those events occurred, they were detained under the status of 'excludable alien,'" meaning that the INS held them in federal prisons until it could review their status and decide whether to send them back to Cuba.[66]

The Marielito situation concluded with the 1984 Joint Communique on Immigration.[67] In that agreement, the United States agreed to annually issue up to 20,000 preference visas to Cuban nationals living in Cuba.[68] In return, Cuba agreed to accept 2,746 Marielitos who should never have been allowed to immigrate to the United States because of their criminal records.[69]

### *C. The 1994 Cuban Refugee Crisis: Closing the Borders*

Economic and social conditions continued to decline in Cuba, causing massive unrest and discontent.[70] Many Cubans risked their lives and fled from

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[60] OLSON & OLSON, *supra* note 40, at 81.

[61] Travieso-Diaz, *supra* note 58, at 242.

[62] OLSON & OLSON, *supra* note 40, at 86.

[63] Travieso-Diaz, *supra* note 58, at 242; *see also* SCARFACE (Universal Pictures 1983).

[64] Travieso-Diaz, *supra* note 58, at 242.

[65] GONZALEZ-PANDO, *supra* note 39, at 70.

[66] OLSON & OLSON, *supra* note 40, at 89. The INS holds "excludable aliens" while reviewing their cases. During the Marielito boatlift, the INS detained over 2,800 Marielitos in federal detention centers while the agency reviewed their status, and eventually deported most of these individuals. *Id.*

[67] Joint Communique Between The United States of America and Cuba, Dec. 14, 1984, U.S.-Cuba, T.I.A.S. No. 11,057.

[68] *Id.*

[69] *Id.*

[70] Travieso-Diaz, *supra* note 58, at 243.

Cuba in boats or rafts.[71] On August 5, 1994, hundreds of Cubans protested the Castro regime, the first anti-government riot since Castro ascended to power.[72] The protesters attacked police, shouted anti-Castro epithets, and praised the United States.[73]

While simultaneously blaming the United States' trade embargo for his country's woes,[74] Castro responded to the riots by announcing on August 8, 1994 that "he would not oppose the emigration of any Cuban wanting to leave for America,"[75] that he would not block those wanting to leave the country, and that he could not guard the coasts of the United States.[76] Immediately, Cubans rushed to the open sea on their makeshift boats and rafts without fear of retaliation from the Cuban government.[77] By mid-September, more than 35,000 refugees had been picked up and transferred to holding centers.[78] Thousands more had drowned at sea.[79]

In the summer of 1994, as the numbers of refugees escalated to crisis figures, President Clinton suspended the Cuban Adjustment Act of 1966, which had generously allowed Cubans to apply for permanent residency one year after arriving on American soil.[80] In other words, Cubans were no longer guaranteed the benefits of permanent residency simply by reaching American soil.[81] Additionally, Clinton barred Cuban refugees' direct entry into the United States, and ordered refugees found at sea to be detained at Guantanamo Naval Base, which is ironically in Cuba.[82] Attorney General Reno stated that the United States would not admit new Cuban refugees.[83]

In response to the resultant problem of the mass migration of Cubans, the United States and Cuba agreed to migration policies in 1994 and 1995.[84] The

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[71] *Id.*

[72] Hymans, *supra* note 59, at 153; *see* OLSON & OLSON, *supra* note 40, at 111.

[73] OLSON & OLSON, *supra* note 40, at 111.

[74] Hymans, *supra* note 59, at 154-55.

[75] OLSON & OLSON, *supra* note 40, at 111.

[76] Hymans, *supra* note 59, at 153.

[77] OLSON & OLSON, *supra* note 40, at 111.

[78] *Id.*

[79] *Id.*

[80] *Id.* For a discussion on whether President Clinton had the authority to revoke the CAA, see David Lyons, *Asylum Rule Change Decried: Administration Says It Has Discretion to Alter 1966 Cuban Adjustment Act*, NAT'L L.J., Sept. 5, 1994, at A6 (stating that legal scholars conclude that case law supports the legality of Clinton's executive decision).

[81] OLSON & OLSON, *supra* note 40, at 111.

[82] Hymans, *supra* note 59, at 153; GONZALEZ-PANDO, *supra* note 39, at 76-77.

[83] OLSON & OLSON, *supra* note 40, at 111.

[84] Joint Communique Concerning Normalizing Migration Procedures, Sept. 9, 1994, U.S.-Cuba, State Dept. No. 94-232, KAV No. 4031 [hereinafter 1994 Joint Communique]; Joint Statement Regarding Normalization of Migration Procedures, May 2, 1995, U.S.-Cuba, State Dept. No. 95-126, KAV No. 4259 [hereinafter 1995 Joint Statement].

policies included the United States' promise to increase the number of Cubans allowed into the United States.[85] In return, Cuba agreed to persuade its citizens against leaving unsafely and to not retaliate against those who returned after unsuccessfully attempting to immigrate to the United States.[86]

## IV. THE INS HAD JURISDICTION TO DETERMINE ELIAN'S FATE

### *A. The Federal Government Has Exclusive Jurisdiction Over Immigration Matters*

Much of the legal confusion that arose over Elian's presence in the United States stemmed from jurisdictional issues. The fact that Judge Rosa Rodriguez ruled that Lazaro Gonzalez ("Lazaro") could have temporary custody of Elian indicates that at least one Florida state court believed it could properly decide legal issues related to this case.[87] This section explores the Immigration and Naturalization Services' ("INS") and the federal court's jurisdiction over Elian's case.

The controversy surrounding Elian is an immigration issue. Thus, the Attorney General and the INS have the exclusive power to determine who may speak on behalf of Elian.[88] Although family matters are typically delegated to the states, the Supreme Court in *Chae Chan Ping v. United States*[89] explained that the power to exclude foreigners is a power incidental to sovereignty belonging to the federal government, as delegated by the Constitution.[90] Thus, the Attorney General has the authority to administer laws relating to immigration, and she, in turn, has the authority to delegate such power to the INS.[91] Specifically, the Immigration and Nationality Act ("INA") provides that:

> The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: Provided,

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[85] 1994 Joint Communique, *supra* note 84.

[86] *Id.*; 1995 Joint Statement *supra* note 84.

[87] *See supra* note 14 and accompanying text.

[88] Jan C. Ting, *Q: Is Sending Elian Gonzalez Back to Cuba the Wrong Thing to Do? No: U.S. Officials Correctly Recognize the Legal Standing of the Boy's Father in Cuba*, WASH. TIMES, Feb. 14, 2000, at 41.

[89] 130 U.S. 581 (1889).

[90] Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889); *see also* U.S. CONST. art. I, § 8, cl. 4.

[91] *See* 8 U.S.C.A. § 1103 (2000).

> [sic] however, That [sic] determination and ruling by the Attorney General with respect to all questions of law shall be controlling.[92]

Because the federal government has exclusive jurisdiction over immigration matters, state courts may not decide custody issues if the INS renders a decision. The Minnesota Court of Appeals addressed this exact issue in 1996.[93] In *Matter of the Welfare of C.M.K.*,[94] a teenager from China arrived illegally in the United States.[95] After the immigration court found C.M.K. deportable, his American foster parents filed a motion in a county juvenile court, seeking long-term foster care over C.M.K.[96] The Minnesota Court of Appeals held that "federal immigration proceedings preempted state court proceedings and, therefore, the state court was without jurisdiction to find C.M.K. dependent."[97] The court cited *Hines v. Davidowitz*, a United States Supreme Court case, for the proposition that "'when the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land.'"[98]

In Elian's case, Florida state Judge Jennifer Bailey correctly dismissed Lazaro's lawsuit seeking temporary custody of Elian during Lazaro's pursuit for political asylum on Elian's behalf.[99] Applying reasoning very similar to the Minnesota Court of Appeals, Judge Bailey explained that the federal courts have exclusive jurisdiction to determine Elian's presence in the United States.[100] She explained that the "fundamental nature" of Elian's case "is an immigration case, not a family case."[101] Thus, the Attorney General's discretionary power over immigration issues subsumed any state court's ability to determine where Elian should live.[102]

### *B. Federal Courts May Review Some INS Decisions*

The INA dictates that federal courts may review some of the Attorney General's decisions. For instance, although the Attorney General has

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92 8 U.S.C.A. § 1103(a)(1) (2000).

93 *In re* Welfare of C.M.K., 552 N.W.2d 768 (Minn. Ct. App. 1996).

94 *Id.*

95 *Id.* at 769.

96 *Id.*

97 *Id.* at 770.

98 *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941)).

99 Weaver, *supra* note 32.

100 *Id.*

101 *Id.*

102 *Id.*

discretion to grant or deny asylum,[103] the federal courts may review her decisions.[104] The decision whether "to grant relief under [the asylum statute, 8 U.S.C. § 1158] . . . shall be conclusive unless manifestly contrary to law and an abuse of discretion."[105]

Like asylum, the Attorney General has discretion to grant or deny parole.[106] However, unlike asylum, *no* court has jurisdiction to review the Attorney General's decision on whether or not to grant parole.[107] Thus, neither federal courts nor state courts have jurisdiction to review an INS parole decision, even if custody over a young child is involved.[108]

Federal District Court Judge Moore correctly concluded that the Attorney General had discretion to determine the fate of Elian.[109] In response to Lazaro's complaint that the INS violated Elian's constitutional rights by refusing to consider asylum petitions filed on his behalf, Judge Moore explained that his court had jurisdiction to review the Attorney General's decisions on asylum petitions.[110] The court deferred to the INS's jurisdiction to determine immigration issues,[111] and found that the decision to give Juan Miguel custody of Elian was not "manifestly contrary to the law" nor was it "an abuse of discretion."[112] Judge Moore's ruling is appropriate recognition of the INS's exclusive jurisdiction to determine immigration issues, including Elian's situation.

## V. IMMIGRATION LAWS REQUIRE THAT ELIAN BE RETURNED TO JUAN MIGUEL

As expected, immigration laws vary significantly for Cuban immigrants and for those arriving from other countries. This section will first examine general immigration laws, as applicable to Elian's case. Next, the section will discuss the laws and policies specific to Cuban immigrants that affect Elian as a potential Cuban exile.

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[103] *See* 8 U.S.C.A. § 1158(b)(1) (2000); INS v. Cardoza-Fonseca, 480 U.S. 421, 450 (1987).

[104] *See* 8 U.S.C.A. § 1252(b)(4)(D) (2000).

[105] *Id.*

[106] *See* 8 U.S.C.A. § 1182(d)(5)(A) (2000).

[107] *See* 8 U.S.C.A. § 1252(a)(2)(B) (1999) (providing that no court has the jurisdiction to review a decision "of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title"). *Id.*

[108] *CNN Burden of Proof* (CNN Television Broadcast Transcript #00012600V12, Jan. 26, 2000) (quoting Paul Virtue, former INS general counsel).

[109] Gonzalez v. Reno, 86 F. Supp. 2d 1167, 1187 (S.D. Fla. 2000).

[110] *Id.* at 1179.

[111] *Id.* at 1188.

[112] *Id.* at 1188-89.

### A. *The Attorney General Correctly Granted Elian Parole Status*

Parole allows aliens to remain in the United States "until a decision is made as to their ultimate status."[113] Prior to 1980, "the parole provision allowed the [Attorney General] to permit the entry of aliens into the U.S. without formal admission for emergency reasons or reasons deemed strictly in the public interest."[114] For example, the United States paroled the Marielitos[115] until Congress utilized the Cuban Refugee Adjustment Act of 1966 to make them lawful permanent residents.[116]

However, upon the passage of the Refugee Act in 1980, the Attorney General could only parole for "compelling reasons in the public's interest with respect to that particular alien."[117] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") further limited the Attorney General's parole authority.[118] Thus, juveniles,[119] those with serious medical conditions,[120] and pregnant women[121] may be justifiably paroled for "urgent humanitarian reasons."[122] Otherwise, an alien may only receive parole for a justifiable "significant public benefit,"[123] such as being a witness to a judicial proceeding.[124] These current provisions on parole represent a drastic departure from previous practice, where the Attorney General used his parole authority to parole thousands of aliens into the United States at one time.[125] Instead of granting blanket parole status to groups of aliens, the Attorney General must now "channel aliens through the refugee or asylum process designated under the act."[126]

Upon Elian's arrival, the Attorney General correctly paroled him into the United States, allowing him to legally stay here until the INS made its decision as to his ultimate status. Although parole is not granted as generously as it was

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[113] IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 282 (1998); 8 U.S.C.A. § 1182(d)(5)(A) (1999).

[114] KURZBAN, *supra* note 113, at 281.

[115] *See supra* notes 51-69 and accompanying text.

[116] KURZBAN, *supra* note 113, at 282.

[117] *Id.* at 281 (citing 8 U.S.C. §§ 1182(d)(5)(A, B)).

[118] *Id.* (citing 8 U.S.C. § 1182(d)(5)(A)).

[119] 8 C.F.R. § 212.5(a)(3) (2000).

[120] 8 C.F.R. § 212.5(a)(1) (2000).

[121] 8 C.F.R. § 212.5(a)(2) (2000).

[122] 8 C.F.R. § 212.5(a) (2000).

[123] *Id.*

[124] 8 C.F.R. § 212.5(a)(4) (2000).

[125] KURZBAN, *supra* note 113, at 281.

[126] *Id.* at 282.

during the Marielito crisis, the Attorney General was within her power to parole Elian because he was a juvenile and required urgent medical care.

### *B. Elian Was Not Eligible for Asylum*

"Every alien has a protected interest, whether statutory or constitutional, to petition for political asylum or withholding."[127] Asylum allows an alien to remain in the country under a more permanent status than parole. Unlike parole, which may be revoked at any time by the Attorney General, an asylee retains such status for an indefinite period.[128] It is only revocable under certain circumstances.[129]

#### *1. The Eleventh Circuit correctly decided that Elian could not file an asylum application on his own behalf*

The statute defining the asylum procedure is 8 U.S.C. § 1158, which allows "[a]ny alien who is physically present in the United States . . . irrespective of such alien's status, [to] apply for asylum."[130] Lazaro Gonzalez ("Lazaro"), as Elian's next friend, argued that Elian could apply for asylum on his own behalf, and against the wishes of his father, because he is "any alien."[131]

The Eleventh Circuit rejected this argument, and affirmed the INS's determination that a six-year child lacked the capacity to file his own asylum application.[132] The court noted that 8 U.S.C. § 1158 is unclear on "whether a six-year-old child has applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent."[133] The court also explained that, "[a]s a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS) to choose how to fill such gaps."[134] Accordingly, the court ruled that the INS

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[127] *Id.* at 318 (citing Maldonado-Perez v. INS, 865 F.2d 328, 332 (D.C. Cir. 1989)); Jean v. Nelson, 727 F.2d 957, 976, 981-83 (11th Cir. 1984) (en banc).

[128] 8 C.F.R. § 208.14(d) (2000).

[129] KURZBAN, *supra* note 113, at 309. An asylee may lose her status if: (1) there is fraud in the application; (2) the application is filed after April 1, 1997 and the person meets one of the categories specified in INA § 208(a)(2); or (3) the application was filed before April 1, 1998 and the applicant no longer has a well-founded fear because there are changed conditions in the country of origin. *See id.*

[130] 8 U.S.C.A. § 1158(a) (2000).

[131] Gonzalez v. Reno, 212 F.3d 1338, 1347 (11th Cir. 2000).

[132] *Id.* at 1354.

[133] *Id.* at 1347-48.

[134] *Id.* at 1348-49.

"did not act arbitrarily or abuse its discretion in rejecting [Elian's] own purported asylum application as void."[135]

The Eleventh Circuit acknowledged Lazaro's concern that the Cuban government may have improperly coerced Juan Miguel Gonzalez ("Juan Miguel") into publicly proclaiming his desire to have Elian return to Cuba.[136] The court explained that the INS considers the possibility of undue governmental influence, "such as a definite coercion directed at an individual parent."[137] However, pointing to the INS's meetings with Juan Miguel in Cuba, the court concluded that the INS did not act arbitrarily in determining that Juan Miguel's decisions did not result from duress or coercion.[138]

### *2. Even if Elian could have filed an asylum application, the Attorney General would not have granted him asylum*

In order for the Attorney General to grant asylum, the alien must qualify as a refugee.[139] The term "refugee" is a specific class of aliens, statutorily defined as follows:

> any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[140]

"Fear of persecution" means that the alien has "a genuine apprehension or awareness of danger in another country"[141] that he will be subject to "a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive."[142] An alien must demonstrate both a subjective fear of returning to his country and an objective basis for his fear.[143] "Fear," by its very definition, is a subjective condition.[144] The primary

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[135] *Id.* at 1354.

[136] *Id.*

[137] *Id.* at 1353.

[138] *Id.* at 1354.

[139] 8 U.S.C.A. § 1158(b) (2000) (stating that the Attorney General may grant asylum to an alien if she determines that the alien is a refugee within the meaning of 8 U.S.C.A. § 1101(a)(42)(A)).

[140] 8 U.S.C.A. § 1101(a)(42)(A) (1999). A typical example of persons seeking asylum is the Marielito applicants who sought refuge in the United States. *See* KURZBAN, *supra* note 113, at 254.

[141] *In re* Acosta, 19 I&N Dec. 211, 221 (BIA 1985).

[142] *Id.* at 222.

[143] Cordero-Trejo v. INS, 40 F.3d 482, 491 (1st Cir. 1994); Estrada-Posadas v. INS, 924 F.2d 916, 918 (9th Cir. 1991).

[144] *Acosta*, 19 I&N Dec. at 221.

motivation for seeking refuge in the United States must be fear of danger in another country.[145] "No other motivation, such as dissent or disagreement or awareness of danger in another country or a desire to experience greater economic advantage of personal freedom in the United States, satisfies the definition of a refugee created in the Act."[146]

To establish an objective fear of persecution, the alien need only show that he faces a "reasonable possibility" of persecution upon return.[147] In *In re Mogharrabi*,[148] the Board of Immigration Appeals ("BIA") adopted a four-part test to determine whether an asylum applicant's well-founded fear is objectively reasonable:

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.[149]

An alien's objective fear depends upon the credibility and believability that arise from the evidence he presents.[150] His testimony may sufficiently sustain his burden of proof without further corroboration.[151] Thus, an objective fear of persecution means that an alien "with only a 'one in ten' chance of persecution may be eligible for asylum."[152] The burden of proof is always on the asylum applicant.[153]

For example, in *Vides-Vides v. INS*,[154] an El Salvador citizen entered the United States illegally and applied for asylum.[155] Vides-Vides alleged that he had a well-founded fear of persecution because he wished to remain neutral in the El Salvador civil war and that he feared for his safety if he refused to join a group.[156] However, Vides-Vides admitted that the military had not contacted him in any manner.[157] He traced the source of his fear to his unverifiable belief

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[145] *Id.*

[146] *Id.* at 221-22.

[147] *See* INS v. Cardoza-Fonseca 480 U.S. 421, 440 (1987).

[148] 19 I&N Dec. 439 (BIA 1987).

[149] *Id.* at 446 (quoting *In re* Acosta, 19 I&N Dec. 211, 226 (BIA 1985)).

[150] *See Cordero-Trejo*, 40 F.3d at 491; *Estrada-Posadas*, 924 F. 2d at 918-19 (stating that, without corroborating evidence, an alien's testimony is sufficient to establish a well-founded fear if such testimony is "credible, persuasive, and specific").

[151] *Estrada-Posadas*, 924 F.2d at 918-19.

[152] *See* 1 IMMIGRATION & NATIONALITY LAW HANDBOOK 698 (R. Patrick Murphy, ed., 2000) (citing INS v. Cardoza-Fonseca 480 U.S. 421, 448 (1987)).

[153] KURZBAN, *supra* note 113, at 324.

[154] 783 F.2d 1463 (9th Cir. 1986).

[155] *Id.* at 1465.

[156] *Id.*

[157] *Id.*

that the military had killed one of his siblings because the sibling did not belong to any political organizations.[158]

The Ninth Circuit examined Vides-Vides' claims and found that he was sincerely afraid to return to El Salvador, thus satisfying the subjective component of "well-founded fear."[159] However, Vides-Vides failed to convince the court that he had been persecuted individually because of his political opinions.[160] The court held that his situation was *no different* from the dangers faced by others in El Salvador, and thus not sufficiently specific to meet the objective criterion of a well-founded fear of political persecution.[161]

Also illustrative is the Ninth Circuit's holding in *Kotasz v. INS*.[162] Kotasz was an anti-communist Hungarian who served at a labor camp because he refused to serve in the Hungarian military.[163] Subsequently, he participated in peaceful demonstrations at which the police arrested him, beat him, and called him an anti-communist.[164] Kotasz and his family entered the United States as nonimmigrant visitors and immediately applied for political asylum.[165]

The BIA determined that Kotasz failed to prove the "particularized persecution necessary to demonstrate statutory eligibility for asylum under the INA."[166] The BIA explained that there was no evidence indicating that Kotasz was singled out for persecution, but was instead one of many arrested and incarcerated for short periods of time.[167]

However, the Ninth Circuit vacated this decision.[168] The court explained that it was irrelevant that Kotasz was merely one of a group of people targeted by the Hungarian government.[169] Because active anti-Communists composed this particular group, they faced a greater threat of persecution than most anti-Communists.[170] Thus, although Kotasz was not "singled-out" for persecution, he was personally targeted, and his claim was individualized enough to establish an objective basis for his fear of persecution based on his political beliefs.[171]

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158 *Id.*
159 *Id.* at 1469.
160 *Id.*
161 *Id.*
162 31 F.3d 847 (9th Cir. 1994).
163 *Id.* at 849.
164 *Id.* at 850.
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.* at 855.
169 *Id.* at 854.
170 *Id.* at 855.
171 *Id.* at 854.

Additionally, in *INS v. Cardoza-Fonseca*,[172] the Supreme Court directly addressed the issue of whether "well-founded fear" equaled the "more likely than not" burden of proof required to evade deportation.[173] The Court stated "that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country."'[174]

Elian's applications for asylum claimed that he "had a well-founded fear of persecution because many members of [his] family had been persecuted by the Castro government in Cuba."[175] The applications pointed to various specific incidents to illustrate Elian's fear of persecution: his stepfather's imprisonment resulting from his opposition to the Cuban government, his great-uncles' imprisonment resulting from political acts, and the government's harassment and intimidation of Elian's mother.[176] The applications also alleged that the Cuban government would use Elian as a propaganda tool upon his return to Cuba, and that he "would be subjected to involuntary indoctrination into the tenets of communism."[177]

The courts did not address the substantive portions of Elian's asylum claim because his applications were dismissed.[178] However, it is likely that the INS and the courts would have rejected Elian's asylum applications on their merits. Although Elian may have been able to establish that he had a subjective well-founded fear of persecution, mere awareness of the dangers in Cuba is probably insufficient to establish an objective fear of danger in Cuba.

Elian would have had difficulty proving an objective basis for his fear. Applying the test in *Mogharrabi*,[179] it is doubtful that Elian would have succeeded: (1) Elian may have, as a product of his mother's philosophies, possessed a belief or characteristic Fidel Castro ("Castro") sought to overcome by means of punishment; (2) Castro was undoubtedly aware of Elian's belief; (3) Castro, as dictator of Cuba, had the capability of punishing Elian; but (4) it is unlikely that Castro had the inclination to punish Elian since he would be the poster-boy for Cuba if returned to the island.

Even if Castro were inclined to punish Elian, Elian would also need to establish that his predicament was appreciably different from the dangers faced by other Cubans.[180] Castro, by the terms of the 1994 treaty, agreed not to

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[172] 480 U.S. 421 (1987).
[173] *Id.* at 423.
[174] *Id.* at 449.
[175] Gonzalez v. Reno, 212 F.3d 1338, 1344 (11th Cir. 2000).
[176] *Id.* at 1345.
[177] *Id.*
[178] *See supra* notes 130-38 and accompanying text.
[179] *See supra* note 149 and accompanying text.
[180] *See supra* note 179 and accompanying text.

retaliate against those Cubans who unsuccessfully attempted to flee the country.[181] Thus, Elian's main fear would be life in Communist Cuba; he would be living in a situation no different than any of his comrades. However, Elian may have been able to convince the Attorney General that he would be subject to particularized persecution, as required in *Kotasz*,[182] because of his high-profile attempt to flee, thus satisfying the objective component of "well-founded fear."

Finally, assuming that Elian could have convinced the Attorney General that he has a well-founded fear of persecution based upon his political opinions, her granting of asylum is discretionary.[183] Given the high profile of this case and the public show-downs between Attorney General Janet Reno and the Cuban-American population in Miami, it would not have been surprising if she denied Elian's application for asylum. This analysis of Elian's asylum application is purely hypothetical since the Eleventh Circuit did not order the district court to examine the substantive issue of Elian's asylum application.[184]

### *C. Elian's Status Would Not Have Been Adjusted*

Cuban immigrants enjoy preferential treatment in the United States. If Elian's father did not want him to return to Cuba, these policies may have allowed Elian to remain in the United States. This section will explore immigration policies specific to Cubans.

#### *1. 1994 and 1995 agreements between the United States and Cuba could have prevented Elian from arriving on American soil*

In response to the alarming number of Cubans fleeing Cuba for the United States, the two countries made significant migration agreements in 1994 and 1995.[185] On September 9, 1994, the United States agreed to allow *at least* 20,000 Cubans to enter the United States annually, a switch from the 20,000 ceiling imposed by the 1984 Joint Communique.[186] The 20,000 figure did not include immediate relatives of United States citizens.[187] Those refugees would "continue to be admitted through the previously established visa processing

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[181] *See supra* note 86 and accompanying text.

[182] *See supra* notes 162-71 and accompanying text.

[183] *See supra* note 103 and accompanying text.

[184] *See generally* Gonzalez v. Reno, 212 F.3d 1338 (11th Cir. 2000) (holding that the INS did not act arbitrarily or unreasonably in rejecting Elian's asylum application as void).

[185] *See supra* note 84 and accompanying text.

[186] *See supra* note 67 and accompanying text; *Hymans*, *supra* note 59, at 156.

[187] *Id.* at 156-57.

system."[188] The United States also agreed to a one-year period during which it would admit qualified Cuban nationals who were already "on the waiting list for immigrant visas due to petitions from U.S. citizen or legal permanent resident relatives."[189]

Most importantly, the 1994 agreement marked a reversal of the American policy of automatically paroling every Cuban refugee into the United States.[190] Thus, Cubans reaching American soil in *irregular* ways no longer received parole status.[191] Also, Cubans rescued at sea would not be allowed to enter the United States, but would instead be taken to facilities outside American soil.[192] Through its provisions in the 1994 agreement, the United States "reiterated that it was discontinuing its policy of granting Cubans immediate provisional admission into the U.S. with permanent residency following after one year."[193] In return for the efforts put forth by the United States, Cuba agreed to prevent unsafe departures in every way possible "using mainly persuasive methods."[194]

On May 5, 1995, the Clinton administration held secret meetings with Cuba and agreed to parole the 21,000 refugees still being held at Guantanamo Bay.[195] However, in the future the United States promised to return Cubans found at sea.[196] Cuba, in return, assured the United States that it would impose no action against those returned to Cuba after attempting to immigrate to the United States.[197]

It is questionable if Elian should have ever been allowed to arrive on American soil. The sport fishermen who found Elian turned him over to the United States Coast Guard while still offshore.[198] Although American officials explained that they brought Elian to American soil for humanitarian medical treatment, the plain language of the text dictates that Elian should have been returned to Cuba immediately.[199]

However, Elian did arrive on American soil, and it is probable that it was in his best physical interest for the Coast Guard to bring him here. After all, he was at sea for two and one-half days during which he weathered a severe

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[188] Sonia Mikolic-Torreira, *The Cuban Migration Agreement, Implications of the Clinton-Castro Immigration Policy*, 8 GEO. IMMIGR. L.J. 667, 668 (1994).

[189] 1994 Joint Communique, *supra* note 84.

[190] *Id.*; Hymans, *supra* note 59, at 157.

[191] 1994 Joint Communique, *supra* note 84.

[192] *Id.*

[193] Mikolic-Torreira, *supra* note 188, at 667.

[194] 1994 Joint Communique, *supra* note 84.

[195] Travieso-Diaz, *supra* note 58, at 247; *see also* Hymans, *supra* note 59, at 157.

[196] 1995 Joint Statement *supra* note 84.

[197] *Id.*

[198] Richey, *supra* note 7, at 1.

[199] *Id.*

storm, suffered dehydration, and most dramatically, witnessed the drowning of his mother.[200]

### *2. It is unlikely that the Attorney General would have granted Elian an adjustment of status under the Cuban Adjustment Act*

Also particular to Cuba is the Cuban Adjustment Act ("Act") of 1966, which allows a Cuban national to qualify for permanent residency after having lived in the United States for one year and one day.[201] The Act allows the Attorney General, in her discretion, to adjust to permanent residence "the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled in the United States subsequent to January 1, 1959 and has been physically present in the United States for at least one year."[202]

Although President Clinton suspended the Act in 1994,[203] Congress in 1996 enacted legislation to retain the Act until a democratic government controls Cuba.[204] Thus, the law today states that "any Cuban national (including after acquired spouses and children) can apply for permanent residence in the U.S. one year after they have been inspected, admitted or paroled into the country."[205] However, a critical feature of the Cuban Adjustment Act is that adjustment occurs at the *discretion* of the Attorney General.

Some legal analysts have suggested that the Cuban Adjustment Act would have allowed Elian to become a permanent resident after having lived in the United States for one year.[206] Thus, an appeal to the Eleventh Circuit and a subsequent appeal to the United States Supreme Court could have bought Elian's relatives the time necessary for Elian to hit the one-year mark and gain residency.

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[200] Ramo, *supra* note 4, at 58.

[201] Cuban Adjustment Act of 1966, Pub. L. 89-732, 80 Stat. 1161 (codified at 8 U.S.C. § 1255).

[202] *Id.*

[203] *See supra* notes 80-81 and accompanying text.

[204] Travieso-Diaz, *supra* note 58, at 250 (citing Pub. L. No. 104-208, Title VI, § 606, 110 Stat. 3009-695, 8 U.S.C.A. § 1255 note (1996)).

[205] KURZBAN, *supra* note 113, at 351.

[206] Douthat & Gonzalez Mesa, *supra* note 28. "'A lot of people say the government has a victory, but it might by a pyrrhic victory because of the period of time under the Cuban Adjustment Act,' said Bernard Perlmutter, director of the University of Miami's Children and Youth Law Clinic." *Id.*; *see also* Maya Bell, *Delay Aids Efforts of Miami Relatives: After Year and a Day, Special Law Takes Effect, Boy's Lawyer Sees 'No Need to Rush'*, SUN-SENTINEL FT. LAUDERDALE, Mar. 14, 2000, at 1B. "[A] number of immigration experts said that they saw no reason why the child wouldn't be eligible under the 1996 act, which allows most Cubans to become permanent residents if they have been here a year and a day." *Id.*

However, it is unlikely that Attorney General Janet Reno would have granted adjustment since Juan Miguel was a fit parent demanding Elian's return to Cuba. First, an application for adjustment would have been dismissed for the same reasons the INS dismissed Lazaro's asylum application for Elian: Juan Miguel was the only person who could speak on behalf of Elian since he was a surviving, fit parent. Also, Attorney General Reno would have been within her power to withhold adjustment since the granting of adjustment under the Cuban Adjustment Act is discretionary.

### *3. NACARA would not have affected Elian since he arrived after 1995*

Another act specific to Cuban immigrants is the Nicaraguan Adjustment and Central American Relief Act ("NACARA"), which provides for the adjustment of status for Cubans physically present in the United States since December 1, 1995.[207] In contrast to the Cuban Adjustment Act, NACARA allows a Cuban exile to adjust even if she has been absent from the United States for up to 180 days.[208] So long as the Cuban exile applies for adjustment of status before April 1, 2000, she may adjust, even if she "has been ordered excluded, deported, removed, or ordered to depart voluntarily from the United States."[209] However, NACARA would not have affected Elian's attempts to adjust his status since Elian arrived in the United States after 1995.

## VI. EVEN IF ELIAN GAINED RESIDENCY, FAMILY LAW REQUIRES THAT ELIAN BE RETURNED TO JUAN MIGUEL

Although a Florida state court determined that Elian's relatives had the legal right to keep him until it could hold a hearing on his permanent custody,[210] the INS correctly decided that this was an immigration issue, thus barring a state court from jurisdiction. Although immigration laws ultimately determined Elian's case, Florida state family law *would* have been applicable if Congress passed a bill granting Elian permanent residency or American citizenship.[211] In such a situation, the Florida state courts would have had to determine who should have custody of Elian.[212]

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[207] Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, Title II, § 202 (Nov. 19, 1997).

[208] *Id.*

[209] *Id.*

[210] *CNN: Worldview*, *supra* note 14.

[211] *See supra* note 31 and accompanying text.

[212] *Morning Edition: Vice President Al Gore's Position on the Elian Gonzalez Case*, *supra* note 28.

The issue behind Elian's custody battle may appropriately be viewed as a struggle between two of the most revered American values. On one hand, "the right to conceive and raise one's own children is essential and fundamental, entitled to special [due process] protection . . . ."[213] On the other hand, the government must ensure that the child's well-being is addressed, an interest that may be of greater significance than parental rights.[214] This section will examine the relevant custody issues related to Elian's case.

### *A. Under the Rules of the UCCJA, Florida Does Not Have Jurisdiction*

Since Elian's father made it clear that he wanted Elian to return to Cuba,[215] Elian would only be able to stay in the United States if the legal system determined that Elian's American relatives could speak for him.

Florida adopted the Uniform Child Custody Jurisdiction Act ("UCCJA"),[216] an act adopted by all fifty states.[217] Some of the purposes of the act are:

> avoiding jurisdictional competition and conflict with courts of other states in matters of child custody; promoting cooperation with the courts of other states to the end that a custody decree is rendered in the state which can best decide the case in the interest of the child; assuring that litigation concerning the custody of a child takes place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning the child's care, protection, training, and personal relationships is most readily available; discouraging continuing controversies over child custody; and avoiding relitigation of custody decisions of other states.[218]

For these reasons, Florida courts have jurisdiction to make child custody determinations in four situations. The first situation occurs when Florida is the child's "home state," the place he lived for six consecutive months at the time the proceedings commenced.[219] The second situation is when it would be in the best interest of the child for Florida courts to hear his case because the child or his parents have a significant connection with the state or because there is substantial evidence in the state relating to the child's present or future

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[213] John E. Theuman, *Annotation: Constitutional Principles Applicable to Award or Modification of Custody of Child–Supreme Court Cases*, 80 L. ED. 2d 886 (1999).

[214] *Id.*

[215] *INS Decision in the Elian Gonzalez Case*, *supra* note 13.

[216] FLA. STAT. ANN. § 61.1302 (West 1999).

[217] Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)–A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 N.D. L. REV. 301, 302 (1999).

[218] Siegel v. Siegel, 575 So. 2d 1267, 1269 (Fla. 1991).

[219] FLA. STAT. ANN. §§ 61.1306(5), 61.1308(1)(a) (West 1999).

care and protection.[220] The third situation is when the child is physically present in Florida and it is urgently necessary to make a determination because the child had been abandoned or is subject to abuse or neglect.[221] The last situation is when it appears that no other states would have jurisdiction and it is in the best interest of the child for Florida to assume jurisdiction.[222]

Important here is the fact that Florida's UCCJA also dictates that "[t]he general policies of this act extend to the international area" so long as "reasonable notice and opportunity to be heard were given to all affected persons."[223]

In Elian's case, the most likely way Florida would have had jurisdiction is if the courts determined that Elian had been abandoned or subjected to neglect or abuse. Elian's American relatives would have likely argued that Florida should have asserted its jurisdiction and determine custody because Elian would have been subjected to abuse if returned to Cuba, simply by being exposed to Castro's stifling Communist policies. However, it is unlikely that Elian's relatives would have prevailed with this argument. Although the economy in Cuba is suffering and many of its citizens are unhappy, Elian's relatives have no substantial evidence that Elian would have been subjected to abuse or neglect if returned to such an environment.

### *B. If Florida had Jurisdiction, Its Courts Should Have Awarded Custody to Juan Miguel*

If UCCJA conferred jurisdiction to Florida state courts in Elian's case, then Florida state courts could have determined the pivotal custody issue at bar if Elian became a permanent resident or citizen of the United States.

Florida's policy on child custody mirrors that of the Hague Convention Treaty.[224] In Florida, the general principle is that the state court will give

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[220] FLA. STAT. ANN. § 61.1308(1)(b) (West 1999).

[221] FLA. STAT. ANN. § 61.1308(1)(c) (West 1999).

[222] FLA. STAT. ANN. § 61.1308(1)(d) (West 1999).

[223] FLA. STAT. ANN. § 61.1348 (West 1999).

[224] The Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention") is a treaty that ensures "that relocation and custody questions are decided in the state or country where the child has been living." John Crouch, *International Child Custody Cases*, 16 GP SOLO & SMALL FIRM LAW. 24, 25 (1999). The treaty provides for the immediate return of a child taken from his country of habitual residence in violation of custody rights. Convention on the Civil Aspects of International Child Abduction, Hague Convention Treaty, Oct. 25, 1980, T.I.A.S. No. 11670 [hereinafter Hague Convention]. While ignoring substantive custody issues, the treaty generally seeks to return children back to their primary residence, mandating that a child under 16 shall be returned to his country of habitual residence if he was "wrongfully removed or retained." *Id.* art. 12.

While the concise language of Hague Convention would simplify the decision of whether

custody to a natural living parent so long as such custody will not be detrimental to the child.[225] Florida law provides that:

> the court shall first determine whether there is a parent with whom the child was not residing at the time the events or conditions arose that brought the child within the jurisdiction of the court who desires to assume custody of the child and, if such parent requests custody, the court shall place the child with the parent unless it finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.[226]

Specifically, Florida courts noted that "[i]f one parent dies, the natural guardianship shall pass to the surviving parent."[227] The person challenging the surviving parent's custodial right must "prove by clear and convincing evidence that the parent is unfit and that the best interests of the child would be promoted by giving custody to the nonparent."[228] In other words, even if a child would, in some regards, have a better life with the nonparent, the court will award custody to a fit surviving parent. Florida imposes this high burden of proof to promote the principle that a child's welfare is most protected in a

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to return Elian back to Cuba, the treaty requires that both the home country and the receiving country be signatories. Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief–Can Something More Be Done?*, N.Y. INT'L L. REV. 95, 104 (1995) (citing Mohsen v. Mohsen, 715 F.Supp. 1063 (D. Wyo. 1989)). In *Mohsen*, the district court determined that a father, a resident of Bahrain, had no rights to seek return of his child under the treaty because Bahrain was not a signatory member. *See Mohsen*, 715 F. Supp. at 1065. Because Cuba is not a signatory member of the treaty, the courts will have to work with domestic law to determine who may speak on Elian's behalf. Elliot H. Gourvitz, *Safeguards for Preventing Parental Abductions to Other Countries*, 17 No. 10 MATRIMONIAL STRATEGIST 1 (1999). The signatory countries are: Argentina, Australia, the Bahamas, Belize, Bosnia-Herzegovina, Burkina Faso, Canada, Chile, Croatia, Cyprus, Denmark, Ecuador, Finland, former Yugoslav Republic of Macedonia, France, Germany, Greece, Honduras, Hungary, Ireland, Israel, Luxembourg, Mauritius, Mexico, Monaco, the Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Romania, Spain, Sweden, Switzerland, the United Kingdom, and the United States. *Id.*

If Cuba *was* a signatory country, Juan Miguel could demand immediate return of Elian if he could prove that Elian was wrongfully removed from his habitual residence, and that Lazaro violated custody rights by keeping him in the United States. *See* Crouch, *supra* note 224, at 25. However, until Cuba signs the treaty, domestic law applies in situations such as Elian's.

[225] Paul v. Lusco, 530 So. 2d 362, 364 (Fla. Dist. Ct. App. 1988) (citing State *ex rel.* Sparks v. Reeves, 97 So. 2d 18, 20 (Fla. 1957)).

[226] V.P. v. Dep't of Children & Families, 746 So. 2d 590 (quoting FLA. STAT. ANN. § 39.508(8) (Fla. Dist. Ct. App. 1999)).

[227] Webb v. Webb, 546 So. 2d 1062, 1065 (Fla. Dist. Ct. App. 1989) (citing Fla. Stat. Ann. § 744.301(1) (1987)).

[228] *Id.*

natural family environment, except in cases where evidence to the contrary is clear and convincing.[229]

If Florida legitimately has jurisdiction to hear Elian's case, it is still unlikely that his American relatives would have gained custody of him. Since Florida will generally give custody to a natural living parent so long as such a determination would not be detrimental to the child, the presumption is that Juan Miguel Gonzalez ("Juan Miguel") would gain custody of Elian.[230] Elian's American relatives would have had to prove by clear and convincing evidence that Juan Miguel was unfit in order to overcome this presumption.[231]

In *In re B.G.*,[232] a California case from 1974, a resident of Czechoslovakia sought to recover custody of her children who lived with foster parents after their father died in California.[233] She did not consent to or know about the children's initial departure from Czechoslovakia.[234]

The juvenile court "expressly found that the mother was a fit parent for the children," but expressed concern about the difficulties she had in showing warmth to her children, the fact that the children had forgotten the Czech language, and the children's adaptation to American life.[235] Although the juvenile court concluded that the foster parents should retain custody of the children, it made no finding on whether the children would be harmed if their mother received custody.[236]

On appeal, the Supreme Court of California explained that California's Family Law Act, like the law in Florida, required a court to award custody to a parent unless such a placement would be detrimental to the child.[237] Thus, the court remanded the case because the lower court "made no finding that an award of custody to the mother would be detrimental to the children, although such finding is essential to sustain an order granting custody to a nonparent in preference to parental claims."[238]

The policy reasons that made the lower court in *B.G.* apprehensive about returning the children to their mother in Czechoslovakia are not nearly as difficult in Elian's case. Juan Miguel showed only affectionate emotions toward Elian, Elian had only been in the United States for a few months, and it is unlikely that he would have had trouble readjusting to Cuba. Although

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[229] *Id.*

[230] *See supra* note 225 and accompanying text.

[231] *See supra* note 228 and accompanying text.

[232] 523 P.2d 244 (Cal. 1974).

[233] *Id.* at 246.

[234] *Id.*

[235] *Id.* at 248-49. At the time of this ruling, it had been nearly three years since the father had died. *Id.* at 248.

[236] *Id.* at 249.

[237] *Id.* at 255.

[238] *Id.* at 258.

Juan Miguel lived in a stifled economy, which would present fewer opportunities to Elian so long as Castro was in control, there was little evidence indicating that he was an unfit parent. In fact, from the Immigration and Naturalization Service interviews, he appeared to be a caring parent who was very much involved in Elian's life prior to his departure. Juan Miguel "painted a portrait of a deep and emotional relationship," able to answer questions that revealed a sincere interest in his son: "What size shoes does your child wear? Who are his friends? What are his teachers' names?"[239]

In addition to an emotional bond, Juan Miguel was able to offer Elian a comfortable lifestyle. Juan Miguel was one of few Cubans paid in American dollars and provided Elian with a spacious bedroom of his own, unlike the one he shared with cousins in the United States.[240] Also important is that Elian would have been among all four of his grandparents in Cuba.[241] Although *B.G.* is not binding precedent, it would have been very persuasive in helping the courts determine what standards should apply when making Elian's custody determination.

Thus, even if Florida had jurisdiction over the case, Elian's American relatives would have difficulty overcoming the presumption that Elian's father is the one who should be awarded custody. Unless new evidence arose that indicated Juan Miguel was an unfit parent or that placing Elian with his father would be detrimental to his safety or well-being, the Florida courts would have awarded custody to Juan Miguel, even if Elian was a permanent resident of the United States.

## VII. CONCLUSION

Upon review of immigration laws, Elian's return to Cuba was legally appropriate. First, as the Eleventh Circuit confirmed, only Elian's father could speak on his behalf. Even if the Eleventh Circuit determined that Elian was competent to speak on his own behalf, it is doubtful that the Attorney General would have granted Elian asylum. He did not have the necessary well-founded fear of persecution based on his political beliefs, and the Attorney General has the discretion to make such a determination.

Additionally, Elian could not have stayed in the country under the Cuban Adjustment Act. The Act requires that Elian be in the country, under parole status, for at least one year. If Elian weathered the appeals process to the Supreme Court and managed to physically stay in the country for the necessary period, he would have needed a competent guardian to file the application on

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[239] Ramo, *supra* note 4, at 58.

[240] *Id.*

[241] *Id.*

his behalf, thus facing the same hurdle he faced with asylum. Again, since granting residency under the Cuban Adjustment Act is discretionary, it is unlikely that Attorney General Reno would have decided to grant him permanent residency.

Even if Congress passed a bill granting Elian permanent residency and thus taking this issue out of the purview of immigration law, Florida's laws on child custody require Elian's return to his father unless such placement would have endangered his safety, well-being, or physical, mental, or emotional health.

As the days passed, the decision to return Elian to Cuba became more emotional and more difficult. He lost his mother and had since become very close to his Miami relatives. However, upon review of all the laws that apply to Elian's situation, his father correctly regained custody of him.

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# The United States and the International Criminal Court: Legal Potential for Non-Party State Jurisdiction

## I. INTRODUCTION

On August 8, 1945 the Allied powers signed into existence "an ad hoc military International Military Tribunal [("IMT")] to try war criminals whose offen[s]es 'have no particular geographical location,'"[1] to bring to justice those most responsible for the terrible crimes committed during World War II.[2] The United Nations ("U.N.") General Assembly followed this action by approving both the principles enunciated in the Charter of the Tribunal and its judgment. The U.N. opinion on the trial of the war criminals represented "[a] quasi-totality of civil[z]ed states at the time"[3] supporting the prosecution of war criminals.[4] The trials conducted at Nuremberg established an international precedent that a criminal court of an international nature may exert power over the nationals of any state who commit these acts, regardless of the nationality of the individuals.[5] Comprised of jurists from the four Allied powers acting as prosecution, defense and arbiter, the Tribunal passed judgment on individuals accused of the most egregious violations of the law of nations including war crimes, crimes of aggression, crimes against peace and crimes against humanity.[6]

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[1] ROBERT WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 3 (2d ed. 1962); Alexandr Lounev, *Legal Aspects of the Activities of the International Military Tribunal for the Far East*, *in* THE TOKYO WAR CRIMES TRIAL, AN INTERNATIONAL SYMPOSIUM 31, 32 (Chihiro Hosoya et al. eds., 1986).

[2] WOETZEL, *supra* note 1, at 40.

[3] *Id.* at 55.

[4] *Id.* at 55-57.

[5] *See* Henry King & Theodore Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W. RES. J. INT'L L. 47, 52 (1999); *see also* Richard Falk, *Telford Taylor and the Legacy of Nuremberg*, 37 COLUM. J. TRANSNAT'L L. 693, 696 (1999).

[6] Rome Statute of the International Criminal Court (Mar. 12, 2000), *available at* Art. 5, (Mar. 12, 2000) http://www.un.org/icc (last visited March 15, 2000) [hereinafter Rome Statute]. These crimes are essentially the same as those included under the Rome Treaty. *See id.* According to the Statute of the Court:

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

*Id.* *See generally* WOETZEL, *supra* note 1 (discussing the international nature of the crimes brought before the IMT at Nuremberg); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS, A PERSONAL MEMOIR (1992) (describing preparation of the claims against the German

Aside from the actions of Germany during World War II, numerous situations in the twentieth century have emphasized the need for a permanent international body to adjudicate large-scale criminal violations. The slaughter of Armenians after World War I,[7] heinous human rights violations during the civil wars in Cambodia, Bosnia, Rwanda, the Congo, Sierra Leone, and Liberia,[8] and the treatment of Kurds in Turkey and Iraq[9] suggest that a greater authority is needed to protect the rights of groups attacked on a large scale.[10] When an individual state is unable or unwilling to ensure justice for parties injured as part of a pattern of violence that violates international law, the international community must provide some mechanism to deter potential violators and ensure that actual violators are prosecuted and punished in a fair manner.[11]

A half-century of precedent regarding the importance of human rights and multilateral judicial action supports the creation of an international criminal court to adjudicate these violations. Over fifty years after the end of World War II, the vast majority of states[12] in existence convened in Rome, Italy to complete a treaty that would effectively establish a permanent court with the

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defendants at Nuremberg).

[7] *See generally* Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989) (describing the unanswered atrocities against Armenians after World War I).

[8] Ruth Wedgewood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L LAW 93 (1999); *see also* M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 420-21 (2000) (specifically mentioning possible use of the International Criminal Court [hereinafter ICC] to resolve issues in Sierra Leone).

[9] *See generally* Joseph R. Crowley Program, *Justice on Trial: State Security Courts, Police Impunity, and the Intimidation of Human Rights Defenders in Turkey*, 22 FORDHAM INT'L L.J. 2129 (1999) (describing a pattern of human rights violations of Kurds in Turkey, including violation of the right to a fair trial and the right to freedom from torture); Lt. Com. Catherine S. Knowles, *Life and Human Dignity, The Birthright of All Human Beings: An Analysis of the Iraqi Genocide of the Kurds and Effective Enforcement of Human Rights*, 45 NAVAL L. REV. 152 (1998) (describing patterns of human rights violations of Kurds in Iraq).

[10] Wedgewood, *supra* note 8, at 93.

[11] Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 463 (1999); *see also* Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 873-74 (1999).

[12] *See generally* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999). The Rome Conference included 160 state participants, 33 inter-governmental organizations ("IGOs"), and 236 Non-Governmental Organizations ("NGOs"). The vote of states adopting the Rome Statute of the International Criminal Court recorded 120 votes in favor, 7 against, and 21 abstentions. *Id.*; Brown, *supra* note 11, at 855.

same basic purpose as the IMT at Nuremberg.[13] This tribunal, called the International Criminal Court ("ICC"), would prosecute the most heinous violations of international law. Despite strong international support for the court, a small number of nations,[14] including the United States, strongly oppose the Rome Treaty (and the court it would establish) as it currently stands.[15]

The provision for jurisdiction contained in Article 12 of the Statute of the Court[16] creates the most difficult obstacle to U.S. agreement to the ICC.[17] Principally, the United States asserts Article 12 would allow jurisdiction over the nationals of non-party states in violation of international law.[18]

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[13] Charney, *supra* note 11, at 454; King & Theofrastous, *supra* note 5, at 95-98; Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Reply To Ambassador Scheffer* 47-51 (1999) (written submission to the panel of the Rome Treaty on the International Criminal Court) (on file with author).

[14] Scharf, *supra* note 13, at 10. China, Libya, Iraq, Israel, Qatar, and Yemen joined the United States in opposition to the Rome Treaty. *Id.*

[15] *Id.* Although President Clinton signed the treaty during his final days in office, the act was wholly symbolic. The signature keeps the United States involved in the process to create the ICC, but a staunchly opposed Republican Senate makes true party status for the United States extremely unlikely at present. Only the reasons for opposition presented by the United States are discussed in this article. Other states may have different reasons for opposition.

[16] Rome Statute, *supra* note 6, at 927. The text of Art. 12 of the Statute of the International Criminal Court, in relevant part, states:

> Art. 12 Preconditions to the Exercise of Jurisdiction
>
> 1. A State which becomes a Party to this Statute thereby accepts jurisdiction of the Court with respect to the crimes referred to in art. 5.
> 2. In the case of [referral's to the Prosecutor by a State Party or initiated by the Prosecutor], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) the *State on the territory of which the conduct in question occurred* or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) the *State of which the person accused of the crime is a national.*

*Id.* (emphasis added); *see also* Ruth Wedgewood, *The United States and the International Criminal Court: Achieving a Wider Consensus Through the "Ithaca Package,"* 32 CORNELL INT'L L.J. 535, 540-41 (1999) (describing the numerous problems article 12 presents); Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L L. 337, 369 (1999); Todd Sailer, *The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 339-40 (1999).

[17] David, *supra* note 16, at 356.

[18] David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 19-20 (1999). David Scheffer currently serves as the United States Ambassador-at-large for War Crimes. Ambassador Scheffer notes the increased liability for U.S. personnel due to U.S. security commitments abroad. *Id.*

Despite U.S. opposition, both Germany and South Korea proposed provisions authorizing wider jurisdiction at the Rome Diplomatic Conference.[19] One proposal would have allowed automatic jurisdiction over all crimes within the subject matter of the Court.[20] The second proposal would have permitted jurisdiction once consent is given by the territorial state (the state where the crime(s) occurred), the state of nationality of the accused, the state of nationality of the victim, or the state with custody of the accused.[21]

The United States proposed a stringent alternative for jurisdiction that would require "consent of the [s]tate of nationality of the offender as a precondition for exercise of jurisdiction over war crimes and crimes against humanity . . . ."[22] The Conference Bureau[23] presented a final proposal, a compromise that has become the jurisdictional provision contained in the current Statute of the Court.[24] The provision requires the consent of either the state of nationality of the accused or the territorial state for the court to assert jurisdiction.[25]

Although the United States asserts that the Court cannot bind a state's nationals if the state is not a party to the convention in question, several jurisdictional principles permit adjudication. The most prominent of these principles is jurisdiction based on the crimes themselves as violations of the law of nations.[26] Even if universal jurisdiction permits the ICC to adjudicate the issues of law, the United States also contests exercise of jurisdiction over

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[19] Scharf, *supra* note 13, at 10. The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("Rome Diplomatic Conference"), which created the Rome Treaty on the International Criminal Court, was held from June 15 to July 17, 1998 at the headquarters of the Food and Agriculture Organization. *Id.*

[20] *Id.*

[21] Wedgewood, *supra* note 8, at 10; Scharf, *supra* note 13, at 10.

[22] Scharf, *supra* note 13, at 10.

[23] *See* Arsanjani, *supra* note 12, at 23-24. The Conference Bureau assisted the Conference Chairmen, Adriaan Bos and Philippe Kirsch, with organizing the negotiations process. *See id.*

[24] Scharf, *supra* note 13, at 10.

[25] Rome Statute, *supra* note 6, art. 12.

[26] *See* LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 102-10 (1992). The other long-standing principles used for jurisdiction are described in the Harvard Research Draft Convention on Jurisdiction With Respect to Crime of 1935 as:

> [first,] the territorial principle referring to where the offense was committed; second, the nationality principle, referring to the nationality of the offender; third, the protective principle, referring to a national interest injured by the offense; fourth, the universality principle referring to the custody of the offender; and fifth, the passive personality principle referring to the nationality of the person injured by the offense.

*Id.* at 101-02; *see also* Knut Ipsen, *A Review of the Main Legal Aspects of the Tokyo Trial and their Influence on the Development of International Law*, *in* THE TOKYO WAR CRIMES TRIAL, AN INTERNATIONAL SYMPOSIUM 37, 39 (Chihiro Hosoya et al. eds., 1986).

a national whose state of nationality has not consented to the treaty provisions that create the jurisdictional rules.[27]

The ultimate question is whether an international convention can (or should) legally create international law obligations requiring a state's nationals to be amenable under provisions to which the state of nationality does not expressly agree. The United States argues that this scenario would violate U.S. sovereignty and threaten U.S. military activities abroad by allowing a court to erode the requirement for state acquiescence through nonconsensual obligations.[28] Conversely, supporters of the ICC argue the "egregious and international nature"[29] of the crimes committed validates the jurisdictional principles utilized by the ICC.[30] Further, ICC proponents argue that precedent of courts allowing prosecutions regardless of the nationality of the accused obviates the need for analysis of individual nationality.[31]

This comment analyzes whether the Court has the legal ability to assert jurisdiction over nationals of non-party states under current international law and, if so, what options, if any, does a state have to avoid compliance. Part I addresses the traditional concepts of state sovereignty and their implications for modern international law.[32] Part I further discusses the bases for international law under convention and custom,[33] and how they have changed with the advent of international human rights law.[34]

Part II describes the precedent for and against the assertion of jurisdiction over nationals of non-party states. In addition, Part II details the precedential impact of international criminal courts in the form of the IMTs at Nuremberg and Tokyo[35] and the U.N.-sponsored International Criminal Tribunals ("ICT") for the Former Republic of Yugoslavia and Rwanda.[36]

Part III analyzes the legality of jurisdiction over nationals of non-party states and elucidates the position taken by the United States in refraining from joining the consensus in support of the ICC,[37] and comments on remarks by

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[27] Scheffer, *supra* note 18, at 18-19.

[28] *Id.* at 18.

[29] "Egregious and international nature" is a term used in this paper to describe a level necessary to create a *jus cogens* principle that can be enforced by the ICC.

[30] Scharf, *supra* note 13, at 61.

[31] *Id.*; Richard Dicker, *Issues Facing the International Criminal Court's Preparatory Commission*, 32 CORNELL INT'L L.J. 471, 474-75 (1999).

[32] *Infra* section II.A.

[33] *Infra* section II.B-C.

[34] *Infra* section II.D.

[35] *Infra* section III.A.

[36] *Infra* section III.B.

[37] *Infra* section IV.A.

critics of the U.S. policy.[38] In addition, Part III analyzes the validity of the United States's arguments, and why they lack a legal basis.[39]

Finally, Part IV addresses the realistic implications of the position taken. This section concludes by outlining some proposed alternatives to improve the chances for U.S. ratification of the Rome Treaty.[40]

## II. THE PRINCIPLES OF TRADITIONAL STATE SOVEREIGNTY

### *A. Traditional Sovereignty as a Function of Consent*

The concept of state sovereignty has evolved over time.[41] Sovereignty is traditionally described as the legitimate authority of the supreme power within a territory to command.[42] It originally arose from the absolute "sovereign" right of kings[43] and developed into an assertion of royal or central authority over different factions in constructing territorial states.[44] The principle of state sovereignty permits a ruling government to exercise power over both a specific territory and peoples.[45] This modern understanding of sovereignty developed over the centuries since the Peace of Westphalia in 1648.[46] In the 1600s, Hugo Grotius set out concepts novel for the period, regarding the rights and responsibilities of states.[47] Grotius' understanding of international law

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[38] *Infra* section IV.B.

[39] *Infra* section IV.C.

[40] *Infra* section V.

[41] Daniel Philpott, *Ideas and the Evolution of Sovereignty, in* STATE SOVEREIGNTY, CHANGE AND PERSISTENCE IN INTERNATIONAL RELATIONS 15, 17 (Hashmi ed., 1997); GIDON GOTLIEB, NATION AGAINST STATE, A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY 15 (1993); Gene Lyons & Michael Mastanduno, *Introduction* to BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 1, 5-7 (Gene Lyons & Michael Mastanduno eds., 1995).

[42] Philpott, *supra* note 41, at 18-19; Gotlieb, *supra* note 41, at 15; Lyons & Mastanduno, *supra* note 41, at 7.

[43] Philpott, *supra* note 41, at 28-34.

[44] *Id.* at 17.

[45] GOTLIEB, *supra* note 41, at 15.

[46] Philpott, *supra* note 41, 31-33. The Peace of Westphalia was the culmination of the wars fought by the former principalities of the Holy Roman Empire, including France, Sweden, the Netherlands, and Germany, to establish their existence as sovereign states, separate and apart from their former Catholic authority. *Id.*; Jianming Shen, *The Basis of International Law: Why Nations Observe*, 17 DICK. J. INT'L L. 287, 291-92 (1999).

[47] MANFRED LACHS, THE TEACHER IN INTERNATIONAL LAW 53 (1982). Hugo Grotius was a 15th century Dutch writer "widely considered to be the 'founder' or 'father' of the law of nations." *Id.*; RICHARD FALK, LAW IN AN EMERGING GLOBAL VILLAGE, A POST-WESTPHALIAN PERSPECTIVE 4 (1998).

described a system of consensual obligations assumed by states to create law to solve multilateral problems in a multinational fashion.[48]

Present interpretations of the Grotius vision of state sovereignty follow two schools of thought: the naturalist theory, which focuses on inherent rights endowed in all individuals, and the positivist theory, which emphasizes the element of state discretion.[49] The naturalist theory of international law propounds that "the rules and principles governing human behavior and social order exist independently of any formal, enacted laws or systems governing any nation."[50] Under this theory, neither the state, nor the individuals who control it, have the power to limit the rights of the individual because certain rights are innate to all individuals.[51] Though the naturalist school of thought has gained ground with the advent of human rights law, the positivist concept of state consent still governs international law.[52]

Under the positivist theory of state sovereignty, it is "man's discretion and express direction" that governs the legal order on the international level.[53] "The proponents of the positivist doctrines maintain that the will of the state is absolutely sovereign and that it is the source of the validity of all law."[54] This notion of human control over the rights of the individual and the state creates a jurisprudence that recognizes the state as the primary organ of international law because it is the sovereign will that creates the law.[55] Positivist law eliminates inherent rights of an individual or obligations by a state in favor of common agreement among sovereign entities as the prime determinant of the rules that govern interactions between states.[56]

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[48] LACHS, *supra* note 47, at 52-53; FALK, *supra* note 47, at 4.

[49] Alfred Rubin, *Ethics and Authority In International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 335, 336-37 (1998); Shen, *supra* note 46, at 291-92.

[50] Rubin, *supra* note 49, at 337; Shen, *supra* note 46, at 292-93.

[51] *See* Rubin, *supra* note 49, at 336; Shen, *supra* note 46, at 295-96.

[52] Louis Henkin, *Sibley Lecture, March 1994 Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 33 (1995). "Until the Second World War, the system of states was a 'liberal' system of independent, 'impermeable,' monolithic states. Its cardinal principle, and its principle value, was that states should leave each other alone." *Id.*; Shen, *supra* note 46, at 311.

[53] Rubin, *supra* note 49, at 336; Shen, *supra* note 46, at 309.

[54] Shen, *supra* note 46, at 309.

[55] Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 2, 10 (1999); *see* Shen, *supra* note 46, at 309-10.

[56] Anghie, *supra* note 55, at 13. Anghie states:

> The sovereign was the highest authority and could only be bound by that to which it had agreed to be bound. Thus, for positivists, the rules of international law were to be discovered, not by speculative inquiries into the nature of justice or teleology, but by careful study of the actual behavior of states and the institutions and laws that those states created.

The laws that govern multilateral actions taken by states in a globalizing world community illustrate the concept of "sovereignty" that governs international law. Article 2(7) of the U.N. Charter gives immunity from U.N. action to "matters which are essentially within the domestic jurisdiction of any [S]tate . . . ."[57] The Statute of the International Court of Justice ("ICJ") also demands that jurisdiction of the Court be premised on state consent.[58]

These examples of positivist thought describe a basic premise that any law that is binding upon a state under international law requires the consent of the state.[59] Therefore, if a State does not show its positive consent to be bound by a rule expressly through treaty (or impliedly through custom), the State cannot be bound.[60] The philosophy of positivism and required consent demands that any binding international instruments must obtain consent to operate because of the necessity for coordination and cooperation among states.[61] The consent requirement is essential because it "plays an important role in maintaining an international legal order."[62]

The application of the consent doctrine hinges on whether one uses express or implied consent in the interpretation of the law. Three separate lines of thought describe the possible alternatives that arise when comparing the binding force of treaties with that of customary law.[63] The first theory describes the codification of international custom in a convention as a superceding action that eliminates the customary rules that preceded the convention.[64] The second, implicating actions of non-party states, describes the two sources of law as parallel.[65] Under this line of reasoning, the customary principles would not apply so long as the treaty was effective and

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*Id.*; Shen, *supra* note 46, at 311.

[57] U.N. CHARTER art. 2, para. 7.

[58] Statute of the International Court of Justice, art. 36(2), June 26, 1945, U.N.T.S. No. 993 [hereinafter ICJ Statute]. As the Statute of the ICJ states: "The state parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement . . . the jurisdiction of the Court . . . ." *Id.*

[59] Shen, *supra* note 46, at 314.

[60] *Id.*

[61] *Id.* at 316.

[62] *Id.*

[63] *See generally* MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES (1997) (examining the interplay between international convention and custom).

[64] *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 93 (June 27).

> the rules of customary international law . . . have been subsumed and supervened by those of international treaty law, and especially those of the United Nations Charter . . . [T]he existence of principles in the United Nations Charter [precluded] the possibility that similar rules might exist independently in customary international law . . . because existing customary rules had been incorporated into the Charter.

*Id.*; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 629 (5th ed. 1998).

[65] VILLIGER, *supra* note 63, at 151-52.

in force upon the parties. Even if the treaty no longer covers a state, however, customary principles would apply.[66] The final theory, and the reasoning espoused by the International Court of Justice, supports the idea that customary international law that rises to the level of *erga omnes* obligations[67] continues to apply for both parties and non-parties regardless of their treaty obligations.[68]

The distinction between these theories becomes increasingly important when examining the power of international custom.[69] Under the first line of reasoning, only a treaty may bind a state to obligations under international law.[70] The latter two lines create the possibility for the existence of obligations that a state must uphold, regardless of a lack of expressed consent by treaty.[71]

### *B. Express Consent Shown Through Treaties*

A treaty is the clearest substantive evidence of a state's consent to be bound by international law.[72] Generally, a treaty is "a written agreement by which two or more states or international organi[z]ations create or intend to create a relation between themselves operating within the sphere of international law."[73] The International Court of Justice has held states to their obligations as parties to treaties, illustrating the importance of the treaty as a state's

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[66] *Id.* at 152. This is consistent with the exception to the rule that treaty provisions only apply to the parties to the treaty which states that "a rule in a treaty may become binding on non-parties if it becomes a part of international custom." BROWNLIE, *supra* note 64, at 628.

[67] *See, e.g.*, Barcelona Traction, Light, and Power (Belg. v. Spain), 1970 I.C.J. 3, at 32 (Feb. 5) (Judgment) ([hereinafter Barcelona Traction]. *Erga omnes* obligations are those imperative responsibilities owed by state to the international community as a whole. *Infra* section II.D.

[68] VILLIGER, *supra* note 63, at 152-53. *Jus cogens* are recognized as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." BROWNLIE, *supra* note 64, at 515.

[69] For purposes of this discussion, there is no practical difference between the second and third arguments.

[70] This position is similar to that taken by the United States in relation to the ICC non-party state jurisdiction issue. *See* Scheffer, *supra* note 18, at 19-20.

[71] *See* discussion *infra* section I.C-D. In contrast to obligations under treaty, the concept of obligations created without expressed consent that are required by custom can be just as binding on a state if the second or third theories govern. *See id.*

[72] Shen, *supra* note 46, at 311. *See generally* Ignaz Seidl-Hohenveldern, *Hierarchy of Treaties, in* ESSAYS ON THE LAW OF TREATIES 7 (Jan Klabbers et al. eds., 1998) (explaining the value of treaties to express consent); VILLIGER, *supra* note 63 (describing the use of treaties to determine state consent).

[73] Seidl-Hohenveldern, *supra* note 72, at 7 (citing A.D. McNair, *The Law of Treaties* (1961)). Black's Law Dictionary defines a treaty as "an agreement, league, or contract between two or more nations or sovereigns, formally signed by commissioners properly authorized, and solemnly ratified by the several sovereigns or the supreme power of each state." BLACK'S LAW DICTIONARY 1502 (6th ed. 1990).

assertion of its intent to be bound.[74] Although international custom may exist, the U.S. interpretation of international law emphasized in construing the Rome Treaty states that only treaties mark the actual acquiescence of a state.[75] In the positivist scheme, this mutual compromise by states under a treaty is the only legal method available to limit a state's sovereignty and binds the state under principles of international law.[76]

The doctrine of *pacta sunt servanda*, that "agreements must be kept,"[77] creates the basis for consent in international law.[78] Although the idea of custom and usage as a basis for binding force is widely recognized, it is not as clear a form of consent as a written agreement or pact.[79] The written agreement creates a far more definitive statement of intent to be bound than questionable acts of custom, which raise threshold issues of how many states are necessary to form customary international law.[80]

### *C. Implied Consent Evidenced by Custom*

Although an international convention serves as a better objective criterion for measuring consent under international law, most scholars recognize that international custom creates a second basis around which international bodies and courts can find capacity for state consent.[81] A continuous, or repetitive

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[74] *See, e.g.*, Diplomatic and Consular Relations in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 32 (May 24). The Court found violations of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. *Id.*; *see also* Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3 (Dec. 19) (Jurisdiction and Admissibility); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 1994 I.C.J. 112 (July 1) (Jurisdiction and Admissibility). *See generally* Hohenveldern, *supra* note 72, at 7.

[75] *See* Scheffer, *supra* note 18, at 19-20. Scharf, *supra* note 13, at 39 ("Ambassador Scheffer argues that ICC jurisdiction over the nationals of a non-party [s]tate would violate the Vienna Convention on the Law of Treaties, which 'states rather clearly that treaties cannot bind non-party [s]tates.'").

[76] *See* Shen, *supra* note 46, at 314.

[77] BLACK'S, *supra* note 73, at 1502; *see also* Vienna Convention on the Law of Treaties, art. 42, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969), *compiled in* INTERNATIONAL LAW, SELECTED DOCUMENTS 49 (Barry Carter & Phillip Trimble eds., 1999-2000 ed. 1999) [hereinafter VCLT]; BROWNLIE, *supra* note 64, at 620.

[78] Shen, *supra* note 46, at 324.

[79] *Id.*

[80] *Id. See generally* Karol Wolfke, *Treaties and Custom: Aspects of Interrelation*, *in* ESSAYS ON THE LAW OF TREATIES 31, 32-33 (1998) (describing the relatively greater difficulty of proving consent to international custom, as opposed to proving consent to treaty).

[81] BROWNLIE, *supra* note 64, at 4-7 (defining international custom as "[t]he sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage."); *see also* MALCOLM SHAW, INTERNATIONAL LAW 76-78 (3rd ed. 1991); VILLIGER, *supra* note 63, at 15.

practice by a number of States over a period of time (state practice) combined with the notion that the practice is required by international law (*opinio juris*) defines international custom.[82] A treaty exerts its binding power once it enters into force.[83] Customary international law, however, often precedes the existence of international codified rules.[84] "[T]he element of reality consists of an already . . . spontaneously regulated conduct that, to become binding on the interested states, requires only passive acceptance as law in the form of tacit consent or mere acquiescence, most often presumed upon the conditions of practice itself."[85]

Despite assertions by traditional positivists that only a state's express consent can give rise to a binding obligation, many scholars posit that a state acting in compliance with rules of law consents to be bound regardless of formal expressed consent.[86] Both national and international courts have been willing to look to evidence of custom in determining the international nature of a crime.[87] International custom has, in fact, formed the basis for many of the international conventions created in the past,[88] and international conventions can also be evidence of international custom.[89]

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[82] BROWNLIE, *supra* note 64, at 4-11; SHAW, *supra* note 81, at 76-78; VILLIGER, *supra* note 63, at 15.

[83] SHAW, *supra* note 81, at 82.

[84] *Id.*

[85] Wolfke, *supra* note 80, at 32.

[86] Shen, *supra* note 46, at 316-17; CHARLES FENWICK, INTERNATIONAL LAW 35-36 (1965); J.L. BRIERLY, THE LAW OF NATIONS 51-52 (1963).

[87] *See generally* WOETZEL, *supra* note 1 (analyzing the origins of the charges brought against German defendants at Nuremberg); *see, e.g.*, Demjanjuk v. Petrovsky, 776 F.2d 571 (1985). *Accord* Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (Jerusalem Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962); Regina v. Bartle and the Commissioner of Police for the Metropolis and others *Ex Parte* Pinochet, 38 I.L.M. 581 (H.L. March 24, 1999) (opinion of the House of Lords requiring Senator Augusto Pinochet to be extradited).

[88] Diplomatic and Consular Relations in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 47-48 (24 May) (separate opinion of Manfred Lachs). Judge Lachs emphasized the universal custom of special protection for diplomatic and consular personnel:

> [Diplomatic protection] has been specifically enshrined in the Vienna Conventions of 1961 and 1963, which in my view, constitute, together with the rules of general international law, the basis of the present Judgment. The principles and rules of diplomatic privileges and immunities are not . . . the invention . . . or device of one group of nations, of one continent or one circle of culture, but have been established for centuries and are shared by nations of all races and all civilizations . . . . The laws in question are the common property of the international community and were confirmed in the interest of all.

*Id.*; *see also* Henkin, *supra* note 52, at 35-36.

[89] North Sea Continental Shelf (FRG v. Den./Neth.), 1969 I.C.J. 3. The Court found that the 1958 Geneva Convention on the Continental Shelf could be binding on the non-party Germany if "a very definite, very consistent course of conduct on the part of the state in the

### *D. A New Focus: Advent of Human Rights Law, Obligations Erga Omnes and Jus Cogens Principles*

Before World War II, the positivist state sovereignty model governed the actions of States in the international community.[90] Since the end of the war, however, issues of human rights have created an avalanche of change in international law, redirecting the focus of international conventions, international court decisions, and international custom to account for the growing respect for individual human rights.[91] A proliferation of human rights conventions in the post-World War II period expanded the scope of recognizable individual rights.[92]

Under the U.N. system, the General Assembly adopted the Universal Declaration of Human Rights ("UDHR"),[93] specifying the rights protected under Articles 55 and 56 of the U.N. Charter.[94] During the Cold War period, the international community followed the UDHR with a division of human rights into two politicized categories: civil and political rights, enumerated in

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situation of [Germany] could justify the Court in upholding [a provision in a treaty to which Germany was not a party]." *Id.* at 25. Further, sufficient state action and *opinio juris* supporting multilateral conventions such as the International Convention for the Prevention of Pollution from Ships and the International Convention for the Regulation of Whaling indicate newly-developed international custom. *See generally* Craig L. Carr & Gary L. Scott, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 DENV. J. INT'L L. & POL'Y 313, 321-24; *see also* Wolfke, *supra* note 80, at 32-33.

[90] Henkin, *supra* note 52, at 33; *see also* Shen, *supra* note 46, at 311.

[91] Henkin, *supra* note 52, at 35-36.

[92] *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III); U.N. Doc. A/810 (1948) *compiled in* INTERNATIONAL HUMAN RIGHTS 17 (Richard B. Lillich & Hurst Hannum eds., 1995) [hereinafter UDHR]; the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter European Convention], 312 U.N.T.S. 221, E.T.S. 5 *as amended by* Protocol No. 3, E.T.S. 45, Protocol No. 5 E.T.S. 55, Protocol No. 8, E.T.S. 118, and Protocol No. 11, E.T.S. 155, *compiled in* Nov. 22, 1969, 9 I.L.M. 673, *compiled in* INTERNATIONAL HUMAN RIGHTS 87 (Richard B. Lillich & Hurst Hannum eds., 1995); American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, *compiled in* INTERNATIONAL HUMAN RIGHTS 145 (Richard B. Lillich & Hurst Hannum eds., 1995) [hereinafter Inter-American Convention]; The African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59, *compiled in* INTERNATIONAL LAW 510 (Barry E. Carter & Phillip R. Trimble eds., 1999-2000 ed. 1999) [hereinafter Banjul Charter].

[93] UDHR, *supra* note 92; *see also* BROWNLIE, *supra* note 64, at 576.

[94] U.N. CHARTER, *supra* note 57, art. 55-56. The Charter obligates the U.N. to promote, "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* art. 55. The Charter also states that, "[a]ll members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Art. 55." *Id.* art. 56.

the International Covenant on Civil and Political Rights, and economic and cultural rights, outlined in the International Covenant on Economic, Social and Cultural Rights.[95] The post-war period also saw the creation of the Geneva Conventions governing state responsibility during times of war and the rights of individuals involved.[96] Three regions (the Americas, Europe and Africa) established regional conventions for the protection of human rights with supporting machinery in the form of multilateral commissions and/or courts.[97]

In addition, over the last half-century the international conventions, organizations, and courts created by the international community accepted the protection of human rights as an obligation owed by individual States.[98] These commitments, commonly described as obligations *erga omnes*, are those responsibilities owed by a State to the entire international community.[99] Obligations *erga omnes* differ from ordinary obligations of States assumed under treaty.[100] "[W]hen [an *erga omnes*] obligation in particular is in

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[95] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, *compiled in* INTERNATIONAL HUMAN RIGHTS 33 (Richard B. Lillich & Hurst Hannum eds., 1995) [hereinafter ICCPR]. The most prominent among these rights are the right to political self-determination and use of property, the right to be free from discrimination, and the right to appropriate remedy as determined by a competent authority. *See id.* art. 1-2; *see also* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, *compiled in* INTERNATIONAL HUMAN RIGHTS 145 (Richard B. Lillich & Hurst Hannum eds., 1995) [hereinafter ICESCR]. This covenant endorses rights such as the right to economic, social, and cultural self-determination, the right to sustainable development, the right to work, and the right to education. *Id.*; *see also* BROWNLIE, *supra* note 64, at 576; Joy Gordon, *The Concept of Human Rights: The History and Meaning of it's Politicization*, 23 BROOK. J. OF INT'L L. 689, 706 (1998).

[96] *See generally* INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF AUGUST 12, 1949 [hereinafter Geneva Conventions] (defining war crimes against non-military personnel).

[97] *See* BROWNLIE, *supra* note 64, at 578-81; *see, e.g.*, European Convention, *supra* note 92; Inter-American Convention, *supra* note 92; Banjul Charter, *supra* note 92.

[98] *See, e.g.*, U.N. CHARTER, *supra* note 57, art. 55, 56 (expressing universal respect for protection of human rights); *see also* UDHR, *supra* note 92 (identifying the specific rights of individuals under the U.N. CHARTER); ICCPR, *supra* note 95 (classifying individual rights such as the right to political participation and judicial remedy); ICESCR, *supra* note 95 (describing individual rights such as the right to employment and the right to education); European Convention, *supra* note 92 (identifying individual rights for those in the European Community); Inter-American Convention, *supra* note 92; The European Commission of Human Rights, *see* European Convention, *supra* note 92, arts. 19-37; the European Court of Human Rights, *see* European Convention, *supra* note 92, at 19, 38-56; the Inter-American Commission for Human Rights *see* Inter-American Convention, *supra* note 92, 34-47.

[99] *Barcelona Traction*, *supra* note 67, at 32. "In view of the importance of the rights involved, all [s]tates can be held to have a legal interest in their protection; they are obligations *erga omnes*." *Id.*

[100] Giorgio Gaja, *Obligations Erga Omnes, International Crimes and Jus Cogens: A Tenative Analysis of Three Related Concepts*, *in* INTERNATIONAL CRIMES OF STATE 151, 155

question, in a specific case . . . all States have a legal interest in its observance."[101] States, therefore, have the ability to bring claims against other states for violations of *erga omnes* obligations, regardless of whether that state's individual interests are directly affected.[102]

Obligations *erga omnes* become even more compelling when used to assert a claim for breach of a peremptory norm, often referred to as a *jus cogens* principle.[103] As the International Court of Justice has noted, the prohibition of a number of these *jus cogens* crimes create *erga omnes* obligations.[104] Included among these are the crimes enumerated in the Rome Treaty: Genocide, Crimes against Humanity, War Crimes, and Crimes of Aggression.[105] If sufficient evidence exists to show that the prohibition against these crimes create *jus cogens* principles and, therefore, establish *erga omnes* obligations for all members of the international community, the ICC's ability to extend its jurisdiction to nationals of non-party states becomes more reasonable on both legal and moral levels.

Many sources, including states and scholars, acknowledge that the four crimes described in the Statute of the ICC are *jus cogens* principles.[106]

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(Joseph H. H. Weiler et al. eds., 1989).

[101] *Barcelona Traction*, *supra* note 67, at 32.

[102] *See* Gaja, *supra* note 100, at 154-55.

[103] VCLT, *supra* note 77, art. 53. The concept of *jus cogens* has a variety of definitions, however the most frequently used is: "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*; *see also* Gaja, *supra* note 100, at 154-55; Marina Spinedi, *International Crimes of State: The Legislative History*, *in* INTERNATIONAL CRIMES OF STATE 7, 135-37 (Joseph H. H. Weiler et al. eds., 1989).

[104] Barcelona Traction, *supra* note 67, at 32. The opinion of the Court stated that:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person . . .

*Id.*; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 (1986) [hereinafter RFRL3]. The Restatement lists several crimes, including genocide, slavery, murder, and a consistent pattern of gross violations of internationally recognized human rights as rights "whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed." *Id.*

[105] Rome Statute, *supra* note 6, art. 5.

[106] *Barcelona Traction*, *supra* note 67, at 32; *see also* LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 1-2 (1991); Scharf, *supra* note 13, at 13-14; RFRL3, *supra* note 104, § 702.

Although the definitions of some of these crimes have not gained complete consensus among all States,[107] international custom can still obligate States to prohibit them.[108]

### *E. Jurisdictional Principles for International Courts*

When enough evidence of a substantive claim for a universally recognized wrong exists, precedent holds that customary international law obligations create *erga omnes* obligations.[109] Assertion of jurisdiction by a specific international court, however, is a separate hurdle to a court's ability to adjudicate the claim. Jurisdiction asserted by international courts traditionally draw their authority from one of five types of jurisdiction.[110] When a charge is brought by the prosecutor or is referred by a state party the two forms of jurisdiction used are territorial jurisdiction and nationality jurisdiction.[111] Also relevant is the concept of universal jurisdiction, which permits a court to adjudicate claims based on the international and egregious nature of the crime committed.[112] The ICC bases its jurisdiction on these three grounds. Together, they provide support for the ICC's claim to assert jurisdiction over the nationals of a non-party state by granting adjudicative jurisdiction when the crime occurs within some aspect granted to the court by the authority of its own Statute.[113]

## III. EVOLUTION OF INTERNATIONAL CRIMINAL TRIBUNALS TO ADJUDICATE EGREGIOUS WRONGS

### *A. The Beginnings of International Criminal Adjudication: Nuremberg and Tokyo*

Despite previous attempts to assert jurisdiction over individuals for crimes that constituted violations of international law, none succeeded prior to the International Military Tribunals for Germany, in Nuremberg, and for Japan,

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[107] Brown, *supra* note 11, at 867-68.

[108] *Id.* at 873-74. "[E]ven without complete accord on the exact definitional content of each offense, the delegations to the Rome Diplomatic Conference generally seemed confident as to the propriety of defining their scope for purposes of the ICC's jurisdiction." Scharf, *supra* note 13, at 14.

[109] *See Barcelona Traction*, *supra* note 67, at 32.

[110] Ipsen, *supra* note 26, at 43; *see also* SUNGA, *supra* note 26, at 102.

[111] Rome Statute, *supra* note 6, art. 12(2).

[112] Ipsen, *supra* note 26, at 39; *see also* SUNGA, *supra* note 26, at 102.

[113] Rome Statute, *supra* note 6, art. 12(2-3).

in Tokyo.[114] These two separate trials bear a close resemblance to each other in the law used as a premise for jurisdiction to conduct the trials, the types of individuals prosecuted, and the criminal charges brought against the individuals before the tribunals.[115] These trials have served as a precedent for future actions by international courts.[116] Despite the lack of consensus for an international criminal court at the time,[117] the post-war prosecution of conduct during World War II created a standard upon which the current Criminal Court Treaty could build.

"The International Military Tribunal at Nuremberg declared that the Allied states who sponsored the trial had merely decided to do together what each of them could have done separately."[118] The unified endeavor of the allies took the form of the London Agreement, which included the Charter of the International Military Tribunal ("Charter").[119] Twenty-three nations (including the four major allied powers) subscribed to the Charter.[120] The Charter originally provided for charges of war crimes, but was expanded to include crimes against peace and conspiracy to wage aggressive war (crimes of aggression).[121] The Tribunal tried twenty-two individuals, convicting eighteen and acquitting three,[122] illustrating the intent of the parties to the London Agreement to have the International Military Tribunal carry out justice, despite some sentiment, both in domestic and international circles, to conduct summary executions.[123]

Similarly, the allies intended the International Military Tribunal for the Far East in Tokyo to adjudicate the grave violations of international law ordered by the leaders of Japan's military, as well as to achieve justice for victims of

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[114] *See generally* WOETZEL, *supra* note 1 (discussing the punishment of individuals for gross violations of international law by a multilateral body supported by the international community).

[115] Ipsen, *supra* note 26, at 43.

[116] *See generally* Kristijan Zic, *The International Criminal Tribunal For the Former Yugoslavia: Applying International law to War Criminals*, 16 B.U. INT'L L.J. 507 (1998) (describing the creation of the International Tribunal for the Former Yugoslavia [hereinafter ICTY] and outlining the preeminent cases and points of law before the ICTY).

[117] Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 682-83 (1996); *see also* Ipsen, *supra* note 26, at 39.

[118] WOETZEL, *supra* note 1, at 58.

[119] *Id.* at 5-6.

[120] Wexler, *supra* note 117, at 675-76; *see* WOETZEL, *supra* note 1, at 6.

[121] *See generally* ROBERT JACKSON, THE NUREMBERG CASE (1947) (describing the development of the prosecution brought by the international body at Nuremberg against Nazi officials).

[122] Tending to indicate that the actions of international tribunal were not merely a kangaroo court providing a formality to summary execution.

[123] *See* B.V.A. Roling, *Introduction* to THE TOKYO WAR CRIMES TRIAL, AN INTERNATIONAL SYMPOSIUM 15, 16 (Chihiro Hosoya et al. eds., 1986).

Japan's military aggression.[124] The crimes included in the Charter for the court were the same as those for Nuremberg.[125]

Despite these similarities, the Tokyo tribunal had significant legal distinctions from its Nuremberg counterpart. For example, the Supreme Military Commander of the Allied forces in Asia, General Douglas MacArthur, created the Charter of the Tribunal.[126] General MacArthur appointed the president of the tribunal and the chief prosecutor, and permitted the U.S. defense counsel to be appointed, despite apparent conflicts of interest.[127] The Tokyo tribunal excluded the colonial peoples harmed by Japanese aggression from the process of creation and execution of the trials.[128] By contrast, a multilateral movement created the Nuremberg Charter, a multinational prosecution enforced it, and a multinational defense team defended those charged with its violation.[129]

The Allied powers utilized examples of past actions of justice carried out through international rule of law.[130] The earliest European example was the multilateral trial and execution of Sir Peter Hagenbach under the authority of Charles of Burgundy by Austria, France and several independent cities in 1474 for a regime of terror Hagenbach instituted against the town of Breisach.[131] The multilateral decision by Russia, Prussia, Austria, and England to give Napoleon over to the care of the British government after he breached the peace agreement, serves as another example.[132]

More recently, an update of the German Code of Military Justice, in response to French adjudication of German prisoners of war, provided a change from the policy that prisoners of war could not be tried by their captors for crimes committed before capture.[133] By the end of World War I, German courts tried Allied prisoners of war for violations of the laws of war and the Hague rules of Land Warfare of 1907 in German military tribunals.[134] The Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties recommended that the Allies create a High Tribunal to adjudicate violations of the laws of war and the laws of humanity through

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[124] Lounev, *supra* note 1, at 32.

[125] *Id.*

[126] *Id.* at 36.

[127] *Id.* at 32.

[128] *Id.* at 36-37.

[129] *See generally* WOETZEL, *supra* note 1 (discussing the international nature of the crimes brought before the IMT at Nuremberg).

[130] *Id.* at 17-39.

[131] *Id.* at 19-20.

[132] *Id.* at 23.

[133] *Id.* at 27.

[134] *Id.*

acts of aggression.[135] Although delegates of the United States protested the establishment of any international criminal machinery on the ground of lack of precedent,[136] the Commission's recommendations influenced provisions in the Treaty of Versailles to include the ability to try violators of international law and custom.[137] The Allies in the First World War failed to effectively carry out these provisions due to various political obstacles.[138] Dutch refusal to turn the German Kaiser over to the Allies for trial, followed by Dutch consent for the Kaiser to be tried in a German court applying German law, constituted the most notable obstacle.[139]

Despite States' unsuccessful attempts to assert claims against individuals directly after World War I, several States adopted the concept in the period between the two World Wars.[140] Though these cases were superficially domestic in nature,[141] international conventions and custom recognize individual liability for extreme violations of international law, thereby bringing these individuals within the purview of international jurisdiction.[142]

### *B. Evolution of Criminal Tribunals under the U.N. Regime: Yugoslavia and Rwanda*

Despite the absence of international criminal tribunals to remedy severe violations of international human rights during the latter half of the twentieth century,[143] the U.N. Security Council revived the practice to deal with the multitude of crimes occurring in both Rwanda and the Former Republic of Yugoslavia ("FRY").[144] The two current tribunals rekindle the possibility for international criminal justice.[145] The tribunals also provide a testing ground for procedures implemented in the creation of an effective, independent, fair, and impartial International Criminal Court. The two ad hoc tribunals, created

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[135] *Id.* at 28-29.

[136] Leila Sadat Wexler, *Interpretation of the Nuremberg Principles By the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994).

[137] *Id.*; *see also* WOETZEL, *supra* note 1, at 30.

[138] WOETZEL, *supra* note 1, at 31-32.

[139] *Id.* at 31.

[140] *Id.* at 36-38.

[141] *Id.*

[142] *Id.*

[143] *See* FALK, *supra* note 47, at 4. This absence of multilateral adjudication is due to the practical geopolitical realities created by the Cold War. The schism between the United States and its allies and the U.S.S.R. and its allies prevented joint action by the U.N. Security Council or appreciable action by the U.N. General Assembly toward the creation of a court to adjudicate gross violations of human rights. *See id.*

[144] Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 367 (1999).

[145] Bassiouni, *supra* note 8, at 420.

by the U.N. to end the cycle of violence between groups, attempt to remove the ethnic overtones of the warring factions by prosecuting individuals using a multilateral tribunal.[146]

The International War Crimes Tribunals for Rwanda ("ICTR") and the Former Yugoslavia ("ICTY") were created pursuant to U.N. Security Council powers described in Chapter VII of the U.N. Charter.[147] The ICTY came into existence through Security Council Resolution 827, on May 25, 1993, and the ICTR followed on November 8, 1994 through resolution 955.[148] The tribunals' jurisdiction, defined in articles 2 through 5 of the Statute of the Tribunal, includes the crimes stated in the Statute of the ICC, including genocide, crimes against humanity, war crimes and the crime of aggression.[149] Article 2 outlines violations of the Geneva Conventions of 1949.[150] Article 3 establishes criminal liability for violations of the 1907 Hague Convention IV, Regarding Respecting the Laws and Customs of War on Land and its annexed Regulations.[151] Article 4, based on the 1948 Genocide Convention, creates criminal liability for acts of Genocide.[152] Crimes against humanity are prohibited under article 5.[153]

The trial of Dusko Tadic, the first individual prosecuted by the Tribunal as a war criminal, best illustrates the operation of the Tribunal's legal apparatus.[154] The tribunal found that because Tadic's violations of the Geneva Conventions did not take place against individuals "in the hands of a Party to

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[146] Zic, *supra* note 116, at 511 ("[A]ccording to the Tribunal's former Chief Prosecutor Judge Richard Goldstone, a central purpose of the International Tribunal is to shift responsibility from ethnic groups to individuals so as to give the victims a sense of vindication, thereby preventing further bloodshed and making cohabitation possible again.").

[147] U.N. CHARTER. art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or acts of aggression and shall make recommendations . . . to maintain or restore international peace and security.").

[148] S.C. Res. 827, U.N. SCOR, 48th Session 3217th mtg, ¶2, U.N. Doc. S/RES/827, (1993), *reprinted in* INTERNATIONAL LAW, SELECTED DOCUMENTS 917 (Barry Carter & Phillip Trimble eds., 1999-2000 ed. 1999); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), *reprinted in* INTERNATIONAL LAW, SELECTED DOCUMENTS 919 (Barry Carter & Phillip Trimble eds., 1999-2000 ed. 1999).

[149] Rome Statute, *supra* note 6, art. 5. The statute provides "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression." *Id.*

[150] Zic, *supra* note 116, at 515.

[151] *Id.*

[152] *Id.* Genocide is defined as acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Rome Statute, *supra* note 6, art. 6.

[153] Rome Statute, *supra* note 6, art. 5; *see also* Zic, *supra* note 116, at 515-16.

[154] Zic, *supra* note 116, at 517.

the conflict or Occupying Power of which they are not nationals[,]" Tadic could not be prosecuted under article 2.[155] The Tribunal also determined that the conflict in which Tadic committed his actions was not of an international nature because the assistance provided by the FRY to Tadic's rebel forces in Bosnia was insufficient to link FRY's actions to the rebels.[156] Despite a strong dissent by Judge McDonald that a "dependency and control" test[157] should be used instead of the "effective control" test[158] used by the majority, and that FRY's actions sufficiently met this test to create a violation, the lack of diversity of nationality made article 2 claims inapplicable.[159] Although Tadic escaped a guilty finding under article 2, the tribunal found that Tadic violated articles 3 and 5, where sufficient evidence existed.[160]

Although the application of these rules of law has gained respect over time, procedural problems regarding primacy of the Tribunals and their effects on the population linger.[161] Issues such as restoring the trust in the nation's government and judiciary,[162] logistical problems in gathering evidence and maintaining resources continue to hinder the effective and efficient operation of the Tribunals.[163]

## IV. LEGALITY OF ICC JURISDICTION OVER NATIONALS OF NON-PARTY STATES

The main obstacle to United States accession to the Rome Treaty is the perceived ability for the ICC to exercise its jurisdiction over nationals of non-party states.[164] Article 12 permits the Court to assert jurisdiction over nationals of non-party states when the crime is referred to the Prosecutor or the Prosecutor has independently initiated an investigation, and the territorial state,

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[155] *See* Red Cross, *supra* note 96, art. 4. *See* Zic, *supra* note 116, at 518.

[156] Zic, *supra* note 116, at 520.

[157] *Id.* at 520-22. Judge McDonald's dissent described a test that ignored the nominal changes of Tadic's organization and focused on the fact that the legal fiction still contained the same personnel, equipment, and infrastructure. *Id.*

[158] *Id.* The majority in the Tadic case described the situation as international in nature before May 1992, and non-international afterwards. This non-international character demanded a finding of "effective control" by the Former Republic of Yugoslavia over Tadic's organization. *Id.*

[159] *Id.* at 520-21.

[160] *Id.* at 529.

[161] *See id.* at 530; *see also* Alvarez, *supra* note 144, at 402.

[162] *See* Alvarez, *supra* note 144, at 402-03.

[163] *See* Zic, *supra* note 117, at 530.

[164] *See generally* Wedgewood, *supra* note 16. *See* David, *supra* note 16, at 369; Sailer, *supra* note 16, at 339-40.

or the state of which the person accused is a national, agrees.[165] The United States has expressed concern that this places an undue burden on its military and peacekeeping forces that frequently participate in humanitarian actions around the world.[166] U.S. claims are based on the theoretical policy implication that the ICC's authority would threaten U.S. personnel by exposing these individuals to frivolous claims,[167] and deny American citizens due process rights guaranteed by the United States Constitution.[168]

### *A. United States Arguments Against Non-Party State Jurisdiction*

Despite past support for the establishment of an ICC,[169] the United States argues that the current jurisdictional principles of the ICC would circumvent the traditional rules regarding state sovereignty and permit state obligation without state consent.[170] Considering the extensive use of U.S. forces in maintaining U.S. security missions and assistance in peacekeeping, the United States risks greater potential for being brought before the ICC.[171] United States Supreme Court cases also emphasize that the United States must maintain its obligations to its citizens by requiring the government to respect the Constitutional rights of each U.S. citizen, regardless of whether the individual is located inside or outside of U.S. territory.[172]

The U.S. Ambassador-at-Large for War Crimes Issues, David Scheffer, denies any legal basis for the Court's exercise of its limited form of universal jurisdiction. The Ambassador stated three reasons for the lack of jurisdictional legality. First, universal jurisdiction is inapplicable because the treaty does not

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[165] Rome Statute, *supra* note 6, art. 12.

Article 12 Preconditions to the Exercise of Jurisdiction

1. A State that becomes a Party to this Statute thereby accepts jurisdiction of the Court with respect to the crimes referred to in art. 5.

2. In the case of [referrals to the Prosecutor by a State Party or initiated by the Prosecutor], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The *State on the territory of which the conduct in question occurred* or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The *State of which the person accused of the crime is a national.*

*Id.* (emphasis added).

[166] Scheffer, *supra* note 18, at 18.

[167] David, *supra* note 16, at 357.

[168] Brown, *supra* note 11, at 887-88; *see also* Reid v. Covert, 354 U.S. 1, 5-6 (1957).

[169] King & Theofrastous, *supra* note 5, at 70.

[170] Brown, *supra* note 11, at 886-87.

[171] *See* David, *supra* note 16, at 357.

[172] *See, e.g., Reid*, 354 U.S. at 6; *see also* Brown, *supra* note 11, at 888.

permit state consent as a factor to bind a state's nationals.[173] Second, some of the crimes listed as the subject matter of the court, such as the crime of aggression, do not constitute customary international law that would accord universal jurisdiction due to the lack of formal definition.[174] Finally, the Ambassador stated that universal jurisdiction cannot be granted through a treaty-based organization.[175]

The basis of the U.S. objections to the court's jurisdiction rest on the traditional positivist view of state sovereignty.[176] This principle is manifested in the Vienna Convention on the Law of Treaties, article 34, which states that "[a] treaty does not create either obligations or rights for a third State without its consent."[177] The United States asserts a principle similar to that of diplomatic protection[178] and claims that, because its nationals are being subject to an authority to which the United States has not agreed, any prosecution of U.S. nationals without U.S. consent would exceed the bounds of international law.[179]

### *B. Arguments for Extending Jurisdiction to Nationals of Non-state Parties*

Although the United States insists that universal jurisdiction cannot be applied to create an obligation for non-party states, several states and international law scholars assert that past criminal tribunals and the nature of the crimes being prosecuted create a clear basis for jurisdiction over nationals of State parties and non-state parties alike.[180] The continuously expanding realm of international powers currently protects human rights, even at the limitation of state sovereignty.[181] Critics of U.S. opposition to jurisdiction over non-party states point to precedents which include the International Military Tribunals at Nuremberg and Tokyo, U.N. ad hoc Criminal Tribunals,

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[173] *See* Scheffer, *supra* note 18, at 21. The Statute requires the consent of the state to which the perpetrator is a national, or the state in which the action occurred. Rome Statute, *supra* note 6, art. 12.

[174] *See* Scheffer, *supra* note 18, at 21; Scharf, *supra* note 13, at 4.

[175] Ambassador Scheffer also posits that territorial jurisdiction does not create a basis for international court adjudication without the consent of the state of nationality. Scharf, *supra* note 13, at 4.

[176] *See* Brown, *supra* note 11, at 868-70.

[177] VCLT, *supra* note 77, art. 34; *see also* Scheffer, *supra* note 18, at 18.

[178] Under the doctrine of diplomatic protection, only the state of nationality has the right to represent the claims of the individual. *See Barcelona Traction*, *supra* note 67, at 37-41. The United States attempts to draw an analogy between the right to represent a national and an obligation for the liability of a national. *See* Brown, *supra* note 11, at 868-70.

[179] Brown, *supra* note 11, at 868-70.

[180] *See* Bassiouni, *supra* note 8, at 420; *see* Scharf, *supra* note 13, at 4.

[181] Bassiouni, *supra* note 8, at 420.

the universal nature of the crimes under the ICC subject matter jurisdiction, and prosecutions of those crimes in national courts and international courts.[182] Supporters of the legality of ICC jurisdiction also point to precedent set by United States-led efforts for an international criminal tribunal.[183]

Setting aside the temptation to apply "victor's justice" through summary execution, the Nuremberg tribunal utilized a multilateral tribunal exercising due process of law to achieve justice for the victims of the crimes.[184] The International Military Tribunal at Nuremberg was a multilateral body that exerted jurisdiction over the nationals of a non-party state.[185] The Allies established the international nature of the tribunal through an international declaration of the need to prosecute war criminals through organized justice,[186] followed by an expression of the Allied intent to prosecute German war criminals.[187] The Tribunal placed primacy on the responsibility of individuals not to violate international standards for human rights over the obligation of the individual to the state.[188] Supporters of the ICC cite the Nuremberg trials as precedent for elevating recognized international human rights above the sovereignty of the state. These changes mark the beginning of a change in international law that has culminated in the ICC's ability to exercise power over individual nationals of non- party states.[189]

Supporters of the ICC also point to the establishment of the ICTY and the ICTR as additional precedent for the prosecution of nationals of non-party

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[182] *See generally* Scharf, *supra* note 13 (briefly addressing the prior precedents of international criminal tribunals utilizing universal jurisdiction to prosecute international crimes); *see also supra* section III. A-B.

[183] *See* Scharf, *supra* note 13, at 38-53.

[184] *See* King & Theofrastous, *supra* note 5, at 52-53.

[185] *See generally* WOETZEL, *supra* note 1 (discussing the international nature of the crimes brought before the IMT at Nuremberg). "The London Agreement...[was] signed by the United States, Great Britain, the Soviet Union, France and adhered to by the other Allied Countries (Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay, and Paraguay."). Scharf, *supra* note 13, at 45.

[186] "On January 13, 1942, the representatives of nine occupied countries in Europe formally declared that 'international solidarity [is] necessary in order to avoid repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civili[z]ed world.'" Wexler, *supra* note 136, at 301-02 (discussing the St. James Declaration). The U.N. War Crimes Commission followed the St. James Declaration with a denunciation of the actions of Germans against the civilian Jewish population in occupied states. *Id.*

[187] The Moscow Declaration of 1 November, 1943. *See* Wexler, *supra* note 136, at 302-03.

[188] *See* Scharf, *supra* note 13, at 45.

[189] *See generally* Bassiouni, *supra* note 8, at 420; Brown, *supra* note 11, at 868-70; Scharf, *supra* note 13, at 45.

states.[190] These Tribunals, established through U.N. resolutions, highlight the irrelevance of nationality in determining jurisdiction for prosecution of international crimes by a court representing the will of the international community.[191]

In addition to the precedent of previous criminal tribunals, critics of the United States' position argue that the universal nature of the prohibition of the listed crimes constitute *jus cogens* principles that establish *erga omnes* obligations to all States regardless of their status under the treaty.[192] The most widely recognized of the crimes in the Statute, genocide, was banned by international convention in 1949,[193] in response to the systematic annihilation of Jews in Germany during World War II.[194] Although it was not brought as a specific claim against the Germans standing trial at Nuremberg, the overwhelming amount of post-war international and domestic law outlawing genocide elevates it to the level of a *jus cogens* principle.[195]

In the prosecutions before the Tribunal at Nuremberg, and the codification of its principles afterwards, crimes against humanity also achieved the level of *jus cogens* principle.[196] The International Criminal Court includes eleven specific acts and a wider category that serves as a catchall to allow for judicial discretion in prosecution.[197] Many scholars argue expansion of the definition of 'crimes against humanity' conforms to the goal of human rights established in the Nuremberg proceedings.[198]

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[190] *See* Scharf, *supra* note 13, at 51-52.

[191] *See* Scharf, *supra* note 13, at 45. "[T]he ICTY has indicted several officials of one country – Serbia – that the United States and its NATO allies maintain is not a party to the U.N. Charter by virtue of [U.N. resolutions]." *Id.*

[192] *See* Brown, *supra* note 11, at 874. *See generally* Scharf, *supra* note 13, at 12-38.

[193] LAWRENCE G. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 1 (1991). The Convention came into effect on Jan. 12, 1951, and, currently, has over 100 parties. *See* Convention on the Prevention and Punishment of Genocide, 78 U.N.T.S. 277. The United States did not become a party until 1986, and included two reservations, five understandings, and a declaration essentially requiring the treaty to be non-self executing. *Id.*

[194] *See* LEBLANC, *supra* note 193.

[195] *See* Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia v. Yugoslavia) 1993 I.C.J. 325, 440 (Sept.13) (separate opinion of J. ad hoc Lauterpacht). *See Barcelona Traction*, *supra* note 67, at 32. Sindermann de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985). "U.N. Committee of Experts reporting on the situation in Rwanda noted that the crime of genocide had achieved the status of *jus cogens* and binds all members of the international community." Scharf, *supra* note 13, at n.97.

[196] *See, e.g.*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW 221-225 (1992); *see also* Scharf, *supra* note 13, at 26.

[197] Scharf, *supra* note 13, at 26.

[198] *See* SUNGA, *supra* note 26, at 48-50; *see also* BASSIOUNI, *supra* note 196, at 288; Scharf, *supra* note 13, at 26-27.

War crimes are the oldest of the three crimes currently applicable under the Statute of the Court.[199] States have "uniformly recognized that war crimes are crimes of universal jurisdiction under customary international law."[200] The prohibition against violations of war crimes also meets the category of *jus cogens*, through long-standing treaty and custom.[201]

United States claims also fail to distinguish a clear obligation demanded from non-party states that would violate the Vienna Convention on the Law of Treaties.[202] The Chairman of the Rome Diplomatic Conference differentiated the obligations of parties from any new obligation of non-parties.[203] In response to U.S. claims of violation of the Vienna Convention, Michael Scharf points to U.S. participation in "numerous international conventions that empower States Parties to exercise jurisdiction over perpetrators of any nationality found within their territory irrespective of whether the State of nationality of the accused is also a party to the Treaty."[204]

Supporters further argue that even if the actions do not constitute recognized crimes under international law, states, including the United States, assert jurisdiction under the passive personality principle.[205] States primarily utilize the principle to assert jurisdiction over terrorists for crimes against nationals

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[199] *See* CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907 100 [hereinafter HAGUE CONVENTION]; *see also* Scharf, *supra* note 13, at 26-27.

[200] *See* Scharf, *supra* note 13, at 30.

[201] *See, e.g.*, HAGUE CONVENTION, *supra* note 199, at 100; GENEVA CONVENTIONS, *supra* note 96, at 19; Geneva Covention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, *compiled in* THE GENEVA CONVENTIONS OF AUGUST 12, 1949 23 (International Committee of the Red Cross, 1981); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85, *compiled in* THE GENEVA CONVENTIONS OF AUGUST 12, 1949 23 (International Committee of the Red Cross, 1981); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, *compiled in* THE GENEVA CONVENTIONS OF AUGUST 12, 1949 23 (International Committee of the Red Cross, 1981); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *compiled in* THE GENEVA CONVENTIONS OF AUGUST 12, 1949 23 (International Committee of the Red Cross, 1981).

[202] *See* Scharf, *supra* note 13, at 39.

[203] Philippe Kirsch, *The Rome Conference on the International Criminal Court: A Comment*, ASIL NEWSLETTER, 1 (1998). "[T]his does not bind parties to the Statute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal[] laws applicable in the territories to which they travel, including laws arising from treaty obligations." Scharf, *supra* note 13, at 39.

[204] Scharf, *supra* note 13, at 39-40.

[205] *See* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); *see also* SUNGA, *supra* note 26, at 102.

whose states may not otherwise be willing to surrender jurisdiction to a foreign court.[206]

### *C. Validity of Arguments Against Jurisdiction*

Although the claims of the United States against the validity of the ICC's jurisdiction arise from substantive political concerns,[207] the precedent of prior courts and customary international practices indicates that exercise of jurisdiction over the nationals of non-party states is legal.[208] Several principles sustain this legality. First, the ICC's concept of quasi-universal jurisdiction over individuals actually demands either territorial or nationality jurisdiction, two well-recognized bases for jurisdiction by international courts, before prosecution can commence.[209] Second, international conventions that utilize traditional jurisdictional principles demonstrate the legality of jurisdiction over nationals of non-parties.[210] Finally, although similar to jurisdiction over individuals who violate international law, jurisdiction of international bodies over states is distinct.[211]

By requiring the ICC to gain consent of either the territorial state where the alleged conduct occurred, or the state of which the accused is a national, the Rome Treaty provides a bulwark for universal jurisdiction in two other well-used forms of jurisdiction.[212] By grounding ICC jurisdiction in territorial jurisdiction and nationality jurisdiction, the statute maintains a connection to long-standing principles of international law.[213]

International law clearly recognizes the right of a state to consent to its responsibilities before being bound, but also sanctions the application of common jurisdictional principles to adjudicate violations by individuals for egregious crimes under international law.[214] The United States recognizes the

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[206] *See* Sailer, *supra* note 16, at 340; *see, e.g., Yunis*, 924 F.2d at 1086; Peter Trooboff, *Nonresident Alien on Foreign Soil*, 83 AM. J. INT'L L. 94 (1989); *see also* Scharf, *supra* note 13, at 43-44.

[207] *See* Brown, *supra* note 11, at 877.

[208] *See generally* Dicker, *supra* note 31; Diane F. Orentlicher, *Politics by Other Means: the Law of the International Criminal Court*, 32 CORNELL INT'L L.J. 489 (1999).

[209] Dicker, *supra* note 31, at 474; *see also* Orentlicher, *supra* note 208, at 493; Philippe Kirsch, *Keynote Address to the Symposium, The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression*, 32 CORNELL INT'L L.J. 437, 438 (1999).

[210] *See* Orentlicher, *supra* note 208, at 491-92.

[211] *See id.* at 490.

[212] *See* Dicker, *supra* note 31, at 474; *see also* Kirsch, *supra* note 209, at 438.

[213] *See* Dicker, *supra* note 31, at 474.

[214] *See generally* Scharf, *supra* note 13, at 47-51; *see also* Orentlicher, *supra* note 208, at 489.

exercise of universal jurisdiction over crimes committed by individual nationals of non-party states by treaty law to which it is already a party.[215] As a party to treaties such as the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention Against Torture) and the International Convention against the Taking of Hostages, the United States reveals its acceptance of the principle of universal jurisdiction over violations of *jus cogens*.[216] The treaty demands prosecution regardless of the nationality of the state.[217] In a similar fashion, the subject matter covered by the ICC's jurisdiction concentrates on the severity and international nature of the violation, not the nationality of the individual.[218]

Domestic courts of the United States also follow the international consensus approving of prosecution of individuals for violations of heinous international crimes.[219] The courts have stated that "[t]he underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations."[220]

Normally, sovereign states can pass their authority to prosecute these crimes against the international community to an international court.[221] The *erga omnes* obligations imputed from the nature of the subject matter as *jus cogens*[222] entitles prosecution of individuals by an international court, if the domestic court refuses to prosecute.[223]

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[215] *See* Orentlicher, *supra* note 208, at 491-92.

[216] Matthew Lippman, *Crimes Against Humanity*, 17 B.C. THIRD WORLD L.J. 171, 244 (1997); *see also* Jodi Horowitz, Regina v. Bartle *and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet: Universal Jurisdiction And Sovereign Immunity for Jus Cogens Violations*, 23 FORDHAM INT'L L.J. 489, 502 (1999); Charney, *supra* note 11, at n.29.

[217] Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts On the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 120 (1996) (stating "[t]he very existence of the [Convention Against Torture] . . . reinforces the argument that torture is an appropriate subject of international concern [extending beyond the ICCPR], however, in requiring parties to establish universal jurisdiction over torturers.").

[218] *See* Charney, *supra* note 11, at n.29.

[219] *See* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985). *Accord* Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (Jerusalem Dist. Ct. 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962); Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999).

[220] Lippman, *supra* note 216, at 243.

[221] *See* Shen, *supra* note 46, at 316.

[222] *See supra* section II.D.

[223] *See* Charney, *supra* note 11, at n.29. The International Criminal Court Statute requires ratification by sixty states parties before it can enter into force. Currently, twenty-one states have ratified the treaty. Rome Statute Signature and Ratification Chart, at http://www.ichrdd.ca/111/english/commdoc/publications/countdownICC.html (last visited Oct. 8, 2000).

Finally, an individual's responsibilities under international law differ from a state's obligations.[224] Chief Justice Robert Jackson, in his capacity as Chief Prosecutor for the International Military Tribunal at Nuremberg, stated,

> [t]he Charter . . . recognizes individual responsibility on the part of those who commit acts defined as crimes, or who incite others to do so, or who join a common plan with other persons, groups or organizations to bring about their commission. The principle of individual responsibility for piracy and brigandage, which have long been recognized as crimes punishable under International Law, is old and well established.[225]

Jackson's words echo in the actions of subsequent international tribunals and domestic courts that administer justice to both the international community and victims by adjudicating crimes committed by individuals, irrespective of the nationality of the accused.[226] "When proceeding on [the jurisdictional premise of the universality principle], neither the nationality of the accused or the victim(s), nor the location of the crime is significant."[227]

The acceptability of *erga omnes* obligations and the practice of states and international bodies exercising authority over nationals of non-party states disprove U.S. assertions of the ICC's lack of authority to assert jurisdiction. The history of prosecuting individuals both domestically and internationally creates a real custom of permitting jurisdiction for acts that violate the highest standards of the international community.

### *D. Possible Solutions to the Impasse*

The legal support for the jurisdictional requirements of the International Criminal Court rest on the strong weight of customary evidence of international practice. The precedent set by previous International Tribunals, the *jus cogens* principles adjudicated by the court, and the prior actions of the United States, taken both under treaty and in domestic courts support the jurisdiction of the ICC. This evidence, directly contradicts U.S. assertions' of traditional international principles protecting state sovereignty.

Because of this conflict, and U.S. reticence to participate, a major gap exists in the practical operational ability of the court.[228] The United States has been a major contributor to international humanitarian efforts and international

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[224] *See generally* Lippman, *supra* note 216.

[225] ROBERT JACKSON, THE NUREMBERG CASE 88 (1947).

[226] *See generally* Lippman, *supra* note 216 (discussing the process of developing crimes against humanity as a separate basis for rights); *see also* Horowitz, *supra* note 216 (describing domestic actions in support of prosecuting individuals for international crimes); Charney, *supra* note 11, at n.29.

[227] Demjanjuk v. Petrovsky, 776 F.2d 571, 582-83 (6th Cir. 1985).

[228] *See generally* Wedgewood, *supra* note 16.

adjudicative facilities in the past,[229] and has expressed at least some intention to continue to do so.[230] The contradiction caused by the collision of legal principles and practical policies, however, threatens the ability of the ICC to fulfill its purpose.

Because the United States can make no reservations to the Treaty creating the Statute of the Court,[231] its participation is an all or nothing proposition. This does not mean, however, that the existence of the ICC is incompatible with U.S. interests.[232]

The Preparatory Commission recently composed a set of interpretive principles that introduce the possibility of preventing usurpation of U.S. interests while continuing to uphold the goals of the ICC.[233] The Article 12 principle would use a sensible reading to prevent nonparty states from agreeing to ad hoc jurisdiction to exercise one time claims against states without the accusing state becoming subject to the ICC's jurisdiction. A "sensible reading of Article 12(3)" would require that each "State must be willing to have its own conduct scrutinized as well."[234] The principles would also allow Status of Forces Agreements to operate by barring local prosecution of U.S. personnel without U.S. government acquiescence.[235] The Preparatory Committee's proposed principles attempt to persuade the United States that its foreign policy interests and those of the court can coexist.[236]

## V. CONCLUSION

General principles of international law often create conflicting rights and obligations for the States that are bound by them. Legal evidence, including previous practice of states and expressed intent for a state to be bound, illustrates that the ICC's ability to prosecute takes precedence over the state's right to control its nationals when issues of severe criminal violations are at stake. This evidence makes possible the potential for United States nationals to be bound by the jurisdiction of the International Criminal Court.

Although U.S. policy interests prevent its formal participation in the ICC, U.S. nationals can be brought before it to face legitimate charges of violations

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[229] *Id.*

[230] *See* Scheffer, *supra* note 18, at 12.

[231] Rome Statute, *supra* note 6, art. 120. The Rome Statute expressly prohibits reservations to the statute of the ICC. *Id.*

[232] *See generally* Wedgewood, *supra* note 16 (addressing potential interpretations to increase acceptability of the Rome Statute by the United States).

[233] *See id.*

[234] Wedgewood, *supra* note 16, at 540.

[235] *See id.* at 541.

[236] *Id.*

of *jus cogens* principles. The *erga omnes* obligations, which the United States helped develop in the post-World War II Tribunals, ad hoc criminal tribunals and current law to prevent a violator's ability to escape justice are as binding upon U.S. nationals as upon the nationals of any other state. The rights of individuals and groups, traditionally denied by state sovereignty, have found support in initiatives in the recent past. Although the United States may disagree with the policy, it has no grounds to contest the legal principles supporting the ICC's jurisdiction. The evolution of international law remains a force to which even the United States is not immune.

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# Cruelty to Animals: Recognizing Violence Against Nonhuman Victims

## I. INTRODUCTION

Dillon was a six year-old boy, enjoying a summer picnic at home with his mother and several of her acquaintances, with whom Dillon was unfamiliar. When a guest invited Dillon to go for a ride, Dillon went along willingly, enticed by the idea of playing with the man's dog. The pair went to the man's home, where the man's pet pit bull was waiting for them. They then went out to a field near the man's house to "play."

When Dillon sensed danger, he cried to return to his mother. At this, the man became enraged, grabbed Dillon, and brutally sliced off Dillon's ears with a razor blade. Dillon screamed in pain, and the man responded by taping Dillon's mouth closed and tying him to a tree. Racked with pain, fear and confusion, Dillon watched and listened as the man commanded his pit bull to attack Dillon. After the dog's vicious attack, the man bludgeoned Dillon to death with a cinder block.

Dillon's body was visibly torn apart, and he incurred multiple broken bones, including his skull, jaw, and several ribs. Despite the copious evidence of violence, Dillon's attacker was only charged and convicted of several misdemeanors.

The foregoing example is based on actual events.[1] Although the actions of Dillon's attacker were shockingly violent, they constituted mere misdemeanors, based not upon the nature of those acts, but upon the status of the victim. The reason for this outrageous result is that the acts were committed, not against a boy named Dillon, but against a dog named Duke.[2] Accordingly, these actions were punishable only as cruelty to animals rather than as violent crimes.

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[1] The facts of the hypothetical are based on *Commonwealth v. Tapper*, 675 A.2d 740 (Pa. 1996) [hereinafter Duke]. "Duke" will serve as a model throughout this text. Although the actual case involved three defendants, for simplification, this discussion will consider only one. Further, the offender was also convicted of a single felony count for violating Pennsylvania's dog fighting statute. *Id.*; *see* PA. CONS. STAT. ANN. tit. 18 § 5511 (h.1) (West 2000) (providing in part that a "person commits a felony of the third degree if he . . . causes, allows or permits any animal to engage in animal fighting . . ."). Had he not enjoined his pit bull in the attack, however, the offender's violent acts would have amounted to no more than a collection of misdemeanors offenses.

[2] *Tapper*, 675 A.2d at 740. The fact of Duke's ownership is significant because the statute under which the offender was charged specifically prohibited the killing, maiming, or disfigurement of "any domestic animal *of another person*." PA. CONS. STAT. ANN. tit. 18 § 5511(a)(1)(i) (West 2000) (emphasis added).

Definitions of violence, however, focus on the violent act, not on the victim. In fact, the legal definition does not refer to a victim as a necessary element. Simply defined, "violence" is an "[u]njust or unwarranted use of force, usu[ally] accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm."[3]

The problem arising in cases like Duke's is that violence toward animals is not recognized as a violent crime. Animal cruelty penalties do not adequately address the gravity of the type of harm inflicted, or the fact that, regardless of the victim's status, such vicious attacks involve the same actions by the offender.

> [While] society has traditionally compartmentalized acts of violence – separating definitions of child abuse from domestic violence or street violence or cruelty to animals[,] [e]vidence is mounting that violent acts are not separate and distinct, but part of a cycle. The forces and influences that foster violence toward humans and animals spring from the same roots.[4]

In order to properly address violent animal cruelty, legislators must recognize that violent animal abuse involves the same actions that constitute other violent crimes. The law should define violence not by the victim, but by the intentional acts of the aggressor, which would effectuate the same suffering on the victim regardless of his species.

This comment demonstrates that violent cruelty to animals constitutes violent crime and should be punished accordingly. Part II provides background in the areas of state and federal animal protection legislation, reviews the history and impact of the legal status of animals as property, and the movement in contemporary legislation away from this classification. Part III discusses theories and goals of crime and punishment, analyzes the inadequacies of current anticruelty statutes, and provides rationales for change in this area of law. Part IV proposes solutions to the deficiencies in anticruelty laws, and demonstrates that certain acts of cruelty to animals are recognizable as violent crimes, often satisfying the criteria of assault and battery.

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[3] BLACK'S LAW DICTIONARY 1564 (7th ed. 1999).

[4] A. William Ritter, Jr., *The Cycle of Violence Often Begins with Violence Toward Animals* 30-FEB PROSECUTOR 31 (1996) (noting that, in a study of individuals incarcerated for violent crimes, twenty-five percent of male offenders and thirty-six percent of female offenders reported prior histories of animal cruelty). *Id.* (citations omitted). The author also reports a finding that "48 percent of convicted rapists and 30 percent of convicted child molesters" admitted to childhood animal abuse. *Id.* (citations omitted).

## II. HISTORICAL AND LEGAL UNDERPINNINGS OF LAWS OFFERING PROTECTION TO ANIMALS

### A. *Historical Overview of State Anticruelty Legislation*

#### *1. State law*

The concept of anticruelty has long been a part of our culture. Most Americans consider the humane treatment of animals as "one of the core values that defines a civilized society."[5] Anticruelty laws protect against social harm by upholding societal values.[6] Early anticruelty laws sought to protect animals from "deliberate, ferocious cruelty" which "harden[s] the heart against all the impulses of humanity,"[7] serving dual goals of protecting animals as victims, and societal virtue. As far back as 1641, the Massachusetts Bay Colony adopted a legal code, "The Body of Liberties," a section of which prohibited cruelty to animals.[8] Although this statutory restriction was unique for its time, cruelty to animals was punishable at common law in other jurisdictions.[9]

It was not until 1928, nearly two hundred years later, that New York legislated the second anticruelty statute.[10] The ensuing century, however, was more promising, and by 1921, all jurisdictions had enacted anticruelty legislation.[11] Common definitions of "cruelty" included:

1. The unnecessary or cruel torture, mutilation, beating or killing of an animal;

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[5] Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81 (1999).

[6] *See, e.g.*, Shari E. Clemens, *Foreword*, 16 PACE ENVTL. L. REV. 97, 98 (1998) (noting that, historically, courts have held that violation of an anticruelty statute is "'an offense against public morals'" (citing Commonwealth v. Turner, 14 N.E. 130, 132 (Mass. 1887)).

[7] Lord Thomas Erskine's Speech to the House of Lords (May 15, 1809), *in* COBBETT'S PARLIAMENTARY DEBATES 1804-1812, at col. 556, 565-66 (U.K.: Parliament 1809) [hereinafter Erskine].

[8] MARGARET C. JASPER, ANIMAL RIGHTS LAW 5 (1997); Debra Squires-Lee, Note, *In Defense of Floyd: Appropriately Valuing Companion Animals In Tort*, 70 N.Y.U. L. REV. 1059, 1071 (1995).

[9] JASPER, *supra* note 8, at 5. *But see* GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW 34 (1995) [hereinafter FRANCIONE: PROPERTY] (clarifying that the historical evolution of animal protection began with the protection of animals as property, so that when anticruelty statutes began to develop, they "did more to protect human ownership rights and economic interests than to protect the animal from abusive conduct").

[10] JASPER, *supra* note 8, at 5.

[11] *Id.*; Squires-Lee, *supra* note 8, at 1071.

2. The deprivation of necessary sustenance, *e.g.* food and water, to an impounded animal;
3. The use of an animal for fighting or baiting;
4. The carrying of an animal in or upon any vehicle in a cruel or inhumane manner;
5. The use of dogs for pulling carts, carriages, trucks or other vehicles, for business purposes, without license to do so[;]
6. Abandonment of a maimed, sick, infirmed or disabled animal.[12]

A review of current state laws reveals that most modern statutes apply substantially the same language as that contained in early definitions of cruelty.[13]

*2. Federal law*

In addition to individual states, the federal government has enacted animal welfare provisions, but not in a capacity which addresses the issue at hand.[14] The Animal Welfare Act,[15] for example, addresses commercial concerns, rather than individual acts, regulating animals and activities that "are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof[.]"[16] The Act provides guidance in establishing standards for the treatment of animals by "dealers, research facilities, and exhibitors."[17] Unless the abuse can somehow be tied to foreign or interstate commerce,

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[12] JASPER, *supra* note 8, at 5.

[13] In Hawai'i, for example, one violates the anticruelty statute when he: "(a) Overdrives, overloads, tortures, torments, cruelly beats or starves any animal, . . . or deprives a pet animal of necessary sustenance . . . ; (b) Mutilates, poisons, or kills without need any animal other than insects, vermin, or other pests; (c) Keeps, uses, or in any way is connected with . . . for the purpose of fighting or baiting any bull, bear, dog, cock, or other animal . . . ; (d) Carries or causes to be carried, in or upon any vehicle or other conveyance, any animal in a cruel or inhumane manner . . . ." HAW. REV. STAT. ANN. § 711-1109 (1) (Michie 1999).

[14] The federal government has enacted a variety of animal protection legislation, including, *e.g.*, the Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1999), and the Fish and Wildlife Act, 16 U.S.C. §§ 741-754a (1994), as well as numerous conservation measures. These provisions, however, are beyond the scope of this discussion on violent cruelty.

[15] Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (1999) (enacted "(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment; (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen"). *Id.* § 2131.

[16] *Id.* § 2131 (providing, in part, that "regulation of animals and activities as provided in this Act . . . is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce . . . ."). *Id.*

[17] *Id.* § 2143.

however, violent mistreatment of animals is not recognized as a federal crime.[18]

### *B. Current State of Anticruelty Laws*

#### *1. The impact of welfarism and property on anticruelty legislation*

Despite the large number of states with felony anticruelty statutes, only twenty-eight address deliberate cruelty;[19] the remaining twenty-two states still attribute mere misdemeanor status to these intentional, violent acts. Hawai'i law illustrates this discrepancy. Although Hawai'i has a felony provision within its anticruelty laws, the felony penalty applies to dog fighting alone, while another violent act such as mutilation carries only a misdemeanor charge.[20]

While state anticruelty statutes do not confer rights to animals, they serve as an animal's sole means of legal protection.[21] Due to the statutory basis in "animal welfarism," however, the protection is very limited.[22] Notwithstand-

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[18] Note that such commercial provisions are concerned with animals only insofar as they represent human property interests, but not as beings unto themselves. The impact of the property status of animals is discussed *infra* section II.B.1.

[19] Humane Soc'y U.S., *State Animal Protection Laws* §1 (1999) [hereinafter HSUS: State Laws 1999]. The felony states include Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Maine, Mississippi, Missouri, Montana, North Carolina, New Hampshire, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Vermont, Wisconsin, and Washington. Humane Soc'y U.S., *State Animal Anti-Cruelty Laws With Felony Provisions* (1999).

[20] HAW. REV. STAT. ANN. § 711-1109.3 (Michie 1999) (providing in part that "intentionally caus[ing] any dog to fight with another dog, or . . . to injure another dog . . ." is a class C felony); HAW. REV. STAT. ANN. § 711-1109 (Michie 1999) (providing, in part, that one who "intentionally, knowingly, or recklessly . . . tortures, torments, cruelly beats or starves any animal" commits only a misdemeanor offense). Duke's attacker would face similar treatment in Hawai'i as he faced under Pennsylvania law. *See* PA. CONS. STAT. ANN. tit. 18 § 5511(a)(2.1) (West 2000) (discussed *infra* section III.A.1.).

[21] Pamela D. Frasch et al., *State Animal Anti-cruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999).

[22] FRANCIONE: PROPERTY, *supra* note 9, at 4 (noting that "[t]he law does little, if anything, to protect animals, even if there is absolutely no justification for the exploitation other than human amusement."). Animal welfarism is a philosophy that seeks to determine the proper use and protection of animals by balancing the interests of animals against the interests of humans. *Id.* at 18.

> [T]he general moral theory of animal welfare, . . . in a very broad sense, is the view that it is morally acceptable, at least under some circumstances, to kill animals or subject them to suffering as long as precautions are taken to ensure that the animal is treated as 'humanely' as possible. That is, an animal welfare position generally holds that there is *no* animal interest that cannot be overridden if the consequences of the overriding are sufficiently 'beneficial' to human beings.

ing their protective purpose, by weighing the interests of human property owners against those of animals, many anticruelty statutes perpetuate the status of animals as property.[23]

Consider, for example, Iowa's "Animal abuse" code, which states in part:

> A person is guilty of animal abuse if the person intentionally injures, maims, disfigures, or destroys an animal *owned by another person*, in any manner, including intentionally poisoning the animal. A person guilty of animal abuse is guilty of an aggravated misdemeanor.[24]

This statute contains several infirmities, the first of which is its requirement of ownership. To fall within the protection of this law, an animal must be the *property* of a human being. While the law does prohibit intentional injury to animals, it does so not on the basis of pain or suffering of the victim, or on the violent nature of the offender's act, but solely on the basis of damage to the owner's property. Iowa's law suggests that an animal's *only* value lies in its status as property.

Furthermore, a person is apparently not "guilty of animal abuse" if he abuses his *own* animal, since the animal is not "an animal owned by another person." Other states, however, expand the statutory parameters to forbid acts committed by the owner as well. For example, Louisiana's anticruelty statute forbids a person from abusing "any living animal, whether belonging to himself or another."[25] Although this statute offers greater protection to animals, it does so only in the limited sense of expanding the class of potential offenders, rather than extending the category of protected victims.

The language adopted by the Pennsylvania legislature further demonstrates the "property provision" quandary.[26] This state law has a subsection dealing

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*Id.* at 6. The notion of animal welfarism is discussed in greater detail *infra* notes 127-44 and accompanying text.

[23] *Id.* at 10. Welfarism's balancing allows the interests of property owners to "trump" those of animals, even under the laws established specifically for the protection of animals. *Id.*

[24] IOWA CODE ANN. § 717B.2 (West 1999) (emphasis added).

[25] LA. REV. STAT. ANN. § 14:102.1 (West 1999); *see also* OKLA. STAT. ANN. tit. 21 § 1685 (West 1999) (employing identical terms).

[26] PA. CONS. STAT. ANN. tit. 18 § 5511 (a) (West 2000) provides, in part, as follows:

> (1) A person commits a misdemeanor of the second degree if he willfully and maliciously:
>
> (i) Kills, maims or disfigures any domestic animal *of another person* or any domestic fowl *of another person.*
>
> . . . .
>
> (2) A person commits a felony of the third degree if he willfully and maliciously:
>
> (i) Kills, maims or disfigures *any zoo animal in captivity.*
>
> . . . .
>
> (2.1) (i) A person commits a misdemeanor of the first degree if he willfully and maliciously:

specifically with "domestic animals or zoo animals."[27] In this particular provision, the law prohibits specified acts by an abuser against dogs or cats "whether belonging to himself or otherwise."[28] This designation creates a perplexing ambiguity, leaving an open question as to whether the animal must actually be owned by someone to receive protection under the statute.

One possible interpretation would protect only an animal that belongs to the offender or to someone else. In contrast, "or otherwise" may also mean that no ownership whatsoever is required, and that all dogs and cats are protected, whether owned by the attacker or by no one at all. Thus, the anticruelty protection is weakened not only by a property requirement, but it is further confounded by a possible constitutional infirmity. Potential defendants may argue that the statute provides insufficient notice as to which animals it protects.

While some current state laws continue to press the issue of ownership, courts have long recognized alternate goals in anticruelty statutes. As early as 1862, one court differentiated between offenses against property and cruelty to animals.[29] The court found that New Hampshire's anticruelty law was "founded upon a high moral principle, which denounces the wanton and unnecessary infliction of pain, even upon animals created for the use of man[.]"[30] Thus, reasoned the court, morality, not property value, dictates the humane treatment of animals. Another nineteenth-century court held similarly.[31] In an 1881 trial for "needlessly killing an animal," the court indicated that "[t]he misdemeanors attempted to be defined may be as well

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(A) Kills, maims, mutilates, tortures or disfigures *any dog or cat*, whether *belonging to himself or otherwise.*

*Id.* (emphases added.)

[27] PA. CONS. STAT. ANN. tit. 18 § 5511(a) (West 2000) (distinguishing "domestic animals or zoo animals," § 5511(a), from "any animal," § 5511(c)).

[28] *Id.* Compare the language "belonging to himself or otherwise" with Louisiana's "belonging to himself or another." *Id.*; LA. REV. STAT. ANN. § 14:102.1 (West 1999). Louisiana's language makes clear that the animal must be a person's property, while Pennsylvania's makes unclear whether, for example, a feral cat is protected as a "domestic animal." *Id.*; PA. CONS. STAT. ANN. tit. 18 §5511(a) (West 2000). Despite the inherent weakness in protecting animals only as property, Pennsylvania's poorly drafted language provides a further obstacle to achieving adequate protection.

[29] State v. Avery, 44 N.H. 392, 1862 WL 1540 (1862).

[30] *Id.* at *5. In this trial for the malicious beating of a horse, the court discussed "the beating and needless infliction of pain, which is dictated by a cruel disposition; by violent passions, a spirit of revenge, or reckless indifference to the *sufferings of others.*" *Id.* (emphasis added). Referring to animals as "others" has important significance in the possible application of certain violent crimes provisions, as discussed *infra* section IV.B.1.

[31] Grise v. State, 37 Ark. 456, 1881 WL 1522 (1881).

perpetrated upon a man's own property as another's, or upon creatures, the property of no one[.]"[32]

While these landmark rulings recognized that cruelty has no basis in property, many state legislatures have continued to base anticruelty statutes on ownership. Although lawmakers have been slow in combating the effects of welfarism, however, the current trend shows a changing tide.

*2. The trend toward ignoring ownership in anticruelty legislation*

Despite the ongoing property status of animals today, many states have amended their anticruelty statutes to include unowned animals, [33] finally aligning with the reasoning expounded by those enlightened courts well over a century ago. A review of laws among all fifty states reveals a progressive trend among the current majority, which no longer cites property status as a criterion for the protection of animals.[34]

Instead, more and more modern anticruelty statutes are moving toward protecting animals themselves, rather than the human interests in them.[35] California's "Cruelty to animals" statute, for example, makes several references to animals, none of which are dependent upon ownership.[36] The code section instead applies to "a living animal," "an animal," and "any animal."[37]

While laws now frequently protect "non-property" animals, this protection can still be limited by ownership. Many states have separate provisions allowing acts by an owner against his own property animal. A recent case, *State v. Hill*, dealt with an owner who stabbed her own six cats to death, and was convicted of "purposely or intentionally causing injury or suffering to an

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[32] *Id.* at *3.

[33] Ginny K. Mikita, *The Animal Law Section: An Advocate for Michigan's Animal Population*, 76 MICH. B. J. 422 (1997).

[34] *See, e.g.*, MICH. COMP. LAWS ANN. § 750.50b (West 1999); N.C. GEN. STAT. § 14-360 (2000).

[35] The concept of animals as property, however, still constitutes the main form of recovery for injury to animals in tort, which considers such injury under a cause of action for property damage. Squires-Lee, *supra* note 8, at 1061-62. Additionally, Rhode Island provides, upon criminal conviction for "Malicious injury to or killing of animals," triple damages to the owner of the victim animal in civil action. R.I. GEN. LAWS § 4-1-5 (1998).

[36] CAL. PENAL CODE § 597 (West 2000) (subjecting "every person who maliciously and intentionally maims, mutilates, tortures, or wounds *a living animal*, or maliciously and intentionally kills *an animal*" to a potential sentence of imprisonment or a fine of up to twenty thousand dollars, or both) (emphases added). These designations are commonly employed by other states. For additional examples, see MONT. CODE ANN. § 45-8-211 (1999); MICH. COMP. LAWS ANN. § 750.50b (West 1999).

[37] CAL. PENAL CODE § 597 (West 2000).

animal."[38] At issue was whether the defendant fit within the statutory provision which exempted the owner of an animal from being charged with "purposely 'killing'" her own animal.[39] The defendant argued for application of the statutory provision which excepts "[t]he killing of an animal by the owner thereof, the agent of such owner, or by a veterinarian at the request of the owner thereof . . ."[40] from the provisions of the animal abuse statute.[41]

The appellate court upheld Hill's conviction, interpreting Missouri's animal abuse statute as not prohibiting the "process of humanely killing an animal," but rather, "the purposeful and intentional infliction of injury and suffering. The statutory emphasis, and the crux of the offense, is the intent or desire to inflict injury and suffering."[42] The sheer "luck" that the cats had suffered enabled the court to convict the defendant under the statute. Had the defendant simply killed the animals without causing suffering, her ownership status would arguably have protected her from prosecution for the needless killing of six animals.

## III. SHORTCOMINGS OF ANIMAL PROTECTION LAWS AND THE NEED FOR CHANGE

### *A. Inadequacies of Current Laws*

Despite the current movement of anticruelty laws away from the basis in ownership, *Hill* demonstrates that animals' property status continues to defeat the protective measures. Accordingly, human property rights outweigh an animal's most fundamental interest, even absent a showing of the most trivial human need.[43] To correct the statutory inadequacies, legislatures must first recognize the weaknesses inherent in many anticruelty statutes.

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[38] 996 S.W.2d 544, 547 (Mo. 1999); MO. APP. ANN. STAT. § 578.012.2(1), (2) (2000).

[39] *Hill*, 996 S.W.2d at 546-47; MO. ANN. STAT. § 578.012 (providing in part that "1. A person is guilty of animal abuse when a person: (1) Intentionally or purposely kills an animal in any manner not allowed by or expressly exempted from the provisions of sections 578.005 to 578.023 . . . [or] (2) Purposely or intentionally causes injury or suffering to an animal . . . ."); MO. ANN. STAT. § 578.007(6) (2000) (prescribing that the "provisions of sections 578.005 to 578.023 shall not apply to . . . [t]he killing of an animal by the owner thereof").

[40] MO. ANN. STAT. § 578.007 (6) (2000).

[41] *Hill*, 996 S.W.2d at 546-47.

[42] *Id.* at 547.

[43] FRANCIONE: PROPERTY, *supra* note 9, at 18-19.

*1. Animal cruelty often warrants mere misdemeanor penalties*

Anticruelty laws are generally categorized under two types of cruelty: "neglect" and "abuse."[44] This categorization helps to determine the severity of the penalty assigned.[45] Abuse involves the offender's clear intent to harm the animal, while neglect does not necessarily involve such intent.[46] Generally, in states employing felony abuse statutes, "animal neglect is a misdemeanor and animal abuse is a felony."[47] Because state anticruelty laws vary considerably, the same offense in one state may receive a vastly different treatment in another.

Harsh felony penalties provide more incentive for prosecution. In nonfelony states, animal abuse is less likely to be prosecuted,[48] and thus offenders walk away not simply with a slight penalty for their actions, but with no punishment at all. Even though abuses against animals often involve violence, such vicious crimes are not as likely to be tried as are other types of violent crimes.[49] "This apparent reluctance to prosecute stems from many factors including: real or perceived limited resources; inexperienced staff; incomplete or botched investigations; pressure from the community to focus on other crimes; and personal or political bias against taking animal abuse seriously as a violent crime."[50]

Simply recognizing that animal abuse is a violent crime is the first step in addressing these deficiencies. As long as the legal system does not seriously consider animal cruelty as a violent crime, it follows that these cases will not receive sufficient resources, staff, and investigators.[51] As for community attention, consider the focused community response to Duke:

> They came by the hundreds . . . many leading their dogs by a leash. They came with their children. They came with protest signs. They came with anger. They came, a crowd of about 500, to express their outrage at the slaying of Duke, the Dalmatian, and to demand the alleged killers be prosecuted to the full extent of the law.[52]

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[44] HSUS: State Laws 1999, *supra* note 19, § 1.

[45] *Id.*

[46] *Id.* Although neglect may render serious harm upon an animal, as a nonviolent act or omission, it remains beyond the scope of this discussion.

[47] *Id.*

[48] Frasch et al., *supra* note 21, at 70.

[49] *Id.*

[50] *Id.*

[51] Humane Soc'y U.S., *Why Heinous Acts of Cruelty Should Be a Felony Offense* (May, 1998).

[52] Ritter, *supra* note 4, at 31.

In January of 1995, the period during which Duke's case was tried, only ten states recognized animal cruelty, other than dog fighting, as a felony.[53]

> Forty-two states [had] laws making dog fighting a felony, which was used in the case of Duke the Dalmatian. If the perpetrators had mutilated Duke, but not set a pit bull on him, the most the prosecutor could have sought would have been a misdemeanor with a maximum penalty of $5,000 and two years in jail. With a felony conviction for dog fighting, the penalty jumped to $15,000 and seven years.[54]

Although Pennsylvania, where the Duke case was tried, is a felony anticruelty jurisdiction, if the Duke defendants were tried again today without the dog fighting provisions, today's outcome would not likely differ from that of the original trial. The Pennsylvania statute under which the Duke defendant was charged provides, in part:

> (i) A person commits a *misdemeanor of the second degree* if he willfully and maliciously:
>
> (A) *Kills, maims, mutilates, tortures or disfigures any dog* or cat, whether belonging to himself or otherwise.
>
> . . . .
>
> (ii) Any person convicted of violating the provisions of this paragraph shall be sentenced to pay a fine of not less than $1,000 or to imprisonment for not more than two years, or both. *A subsequent conviction under this paragraph shall be a felony of the third degree.* This paragraph shall apply to dogs and cats only.[55]

This Pennsylvania law exemplifies another shortcoming of felony anticruelty statutes: the enhanced penalties do not necessarily address the problem. While Duke's offenders, should they repeat their crime, can now be convicted of a felony for Duke's torture and mutilation, this is only by virtue of the fact that it would constitute a *subsequent conviction*. By the letter of

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[53] *Id.* at 32.

[54] Ritter, *supra* note 4, at 32. Despite the public outcry and the maximum penalties as described, convicted defendant Tapper was sentenced only to one and one-half to three years imprisonment. Commonwealth v. Tapper, 675 A.2d. 740, 742 (Pa. 1996).

[55] PA. CONS. STAT. ANN. tit. 18 § 5511(a)(2.1) (West 2000) (emphases added). Note that this subsection is directed only at domestic and zoo animals. Subsection (c) of this statute, however, prohibits cruelty to animals generally, and does not have the ownership provision found in subsection (a). Also important to note is that legislation passed on October 18, 2000 amended subparagraph (i) to increase the offense from a misdemeanor of the second degree to that of a misdemeanor of the first degree. S.B. No. 1109, 184th Leg. (Pa. 2000). Despite the passage of this, the second post-Duke amendment to Pennsylvania's anticruelty provisions, a defendant convicted of committing the same acts under the new provisions will still receive only misdemeanor penalties.

the law, however, first-time offenders committing what can only be described as torture can only be slapped with misdemeanor charges.

Duke's case can illustrate the broad range of anticruelty treatment among states. If Duke's attacker had been charged under Michigan law, rather than Pennsylvania, the outcome would have been quite different, notwithstanding the dog fighting felony.[56] Tracking the plain language of the Michigan statute, Duke's attacker did "willfully, maliciously and without just cause or excuse kill[], torture[], mutilate[], maim[] [and] disfigure an animal . . . ."[57] While in Pennsylvania, this offense is a misdemeanor with minor penalties,[58] in Michigan, the offender would face up to four years imprisonment, and/or a fine of up to $5,000, and/or up to 500 hours of community service.[59] Michigan's harsher punishment clearly provides a greater deterrent effect as well as a higher incentive to prosecute these violent acts.

### 2. *Exemptions weaken anticruelty laws*

Inadequacies in anticruelty laws extend beyond insufficient penalties. Another common problem lies in exemptions to the laws. Certain special interest groups, such as agricultural and hunting organizations, lobby for exemptions for their common practices.[60] These exemptions weaken the state's capacity to address, for example, the torture of wild animals and livestock.[61] "Anti-cruelty statutes, however, are intended to protect animals from the kinds of behavior that no responsible hunter or farmer would defend."[62] Accord-

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[56] Under Pennsylvania law, Duke's attacker received a felony conviction solely for his participation in dog fighting, in violation of PA. CONS. STAT. ANN. tit. 18 § 5511 (h)(1). For the various acts of mutilation that he committed, however, he received only misdemeanor penalties. *Tapper*, 675 A.2d at 742; Ritter, *supra* note 4, at 32.

[57] MICH. COMP. LAWS ANN. 750.50b (2) (West 1999) (discussed *infra* notes 153-55 and accompanying text).

[58] 18 PA. CONS. STAT. ANN. tit. 18 § 5511(a)(1) (West 2000). The Pennsylvania statute employs terms similar to the Michigan language, yet imposes the slight penalty of "a fine of not less than *$500*." *Id.* (emphasis added). Contrastingly, for the same criminal acts, Michigan law imposes potentially thousands of dollars in fines plus possible imprisonment. MICH. COMP. LAWS ANN. 750.50b (West 1999).

[59] MICH. COMP. LAWS ANN. 750.50b (2) (West 1999).

[60] Frasch et al., *supra* note 21, at 75.

[61] *Id.* at 75-76.

[62] *Id.*

> As long as they obey the relevant laws of their state and society accepts practices such as hunting and slaughtering livestock, special interest groups have nothing to fear. Unless society deems these practices unacceptable, anti-cruelty laws will not prevent animals from being hunted, raised and killed for food, used in entertainment, or used in research laboratories.

*Id.* at 76.

ingly, these types of exemptions not only undermine the strength of the anticruelty laws, but are often unnecessary, as is demonstrated by the following case.

In *State v. Cleve*, a defendant was convicted of both unlawful hunting and cruelty to animals after snaring two deer, one of which died of strangulation, and the other of either stress-related fatigue, starvation, or dehydration.[63] The Supreme Court of New Mexico affirmed the unlawful hunting convictions but reversed the cruelty convictions, finding that the state game and fish laws preempted the anticruelty statute.[64] Otherwise, "the lawful hunting of deer would appear to subject [all] hunter[s] to potential prosecution for cruelty to animals."[65] The court further explained that "the Legislature, having dealt with the subject of the hunting of game animals more particularly in the game and fish laws, intended to create an exception from the cruelty-to-animals statute for hunting and fishing activity contemplated by game and fish laws."[66] Thus, where wildlife provisions are generally covered under fish and game statutes, further weakening anticruelty statutes with exemptions is unwarranted.

### *3. Poor drafting undermines anticruelty laws*

As is the case with any area of law, a statute is only as effective as its language. Clearly, laws must be properly written to achieve their goals. Although some states have satisfactory anticruelty laws and penalties, most do not. This is in large part due to the difficulty in drafting good laws. While certain state anticruelty laws are models of clear statutory language, too few states have followed these examples. This further underscores the widespread drafting inadequacies in state anticruelty statutes.

The same weaknesses do not seem to confound other violent crimes legislation. For example, the federal assault statute provides in relevant part that:

> Whoever, within the . . . jurisdiction of the United States, and with intent to torture . . . , maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables

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[63] 980 P.2d 23, 24-25 (N.M. 1999). Although the anticruelty charges in this case related to neglect rather than intentional abuse, the case nevertheless illustrates that exemptions in anticruelty statutes are unnecessary when the subject practices are regulated elsewhere under the law.

[64] *Id.* at 37.

[65] *Id.* at 36.

[66] *Id.* at 37.

> a limb or any member of another person . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.[67]

These enumerated acts, many of which were inflicted upon Duke, are obviously acts of intentional violence. Simply because the statute defines the victim as a *person* does not make these *acts* any less violent when committed against an animal.[68]

### *B. Rationales for Change*

#### *1. Protecting animals from violent abuse satisfies the goals of crime and punishment theories*

To fully appreciate the difficulty of equating the violent abuse of animals with other violent crimes, one must recognize that the two are ensconced in a historical dichotomy. Abuses against animals, no matter how violent the acts, have been traditionally categorized as "cruelty to animals," separate and distinct from other criminal acts of violence.[69] The vast majority of crimes, however, are classified by *acts*, not by the victims thereof.[70]

Criminal acts can be divided into crimes *mala in se*, and crimes *mala prohibita*.[71] The term "*mala in se*," refers to acts which are wrong in and of themselves, inherently evil, in contrast to acts "*mala prohibita*," which are wrong strictly because prohibited by law.[72] Crimes *mala in se* are those which

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[67] 18 U.S.C. § 114 (Supp. 2000).

[68] Violent action is not defined by the class of victim, but by "the effort to destroy or injure an object perceived as an actual or potential source of frustration or danger . . . ." Judd Marmor, *Psychosocial Roots of Violence*, *in* VIOLENCE AND RESPONSIBILITY: THE INDIVIDUAL, THE FAMILY AND SOCIETY 7 (Robert L. Sadoff, M.D. ed., 1978).

[69] Ritter, *supra* note 4, at 31.

[70] *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 195 (2d ed. 1986) (noting that "common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined."). In their discussion of "Aggravated Battery," the authors discuss that "[t]he Model Penal Code departed from prior statutory law in dispensing with the grading of batteries based upon the status of the victim. . . . Yet, status of the victim is very frequently recognized as an aggravating factor even in the modern [state penal] codes." *Id.* at 690 (footnote omitted); *see also* Charlotte A. Lacroix, *Another Weapon for Combating Family Violence: Prevention of Animal Abuse*, 4 ANIMAL L. 1, 3 (1998) (arguing that "the solution to a violent society does not lie in the characterization of the victim but in the characteristics of the offender").

[71] LAFAVE & SCOTT, *supra* note 70, at 32 (noting that "[c]rimes are divided for certain purposes into crimes *mala in se* . . . and crimes *mala prohibita* . . ."). *Id.* This means of classifying crimes distinguishes on the basis of moral turpitude. *See* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 15-16 (3d ed. 1982). Although this categorization has been criticized, it "has lost none of its validity" in regard to criminal intent. *Id.* at 16, 885.

[72] LAFAVE & SCOTT, *supra* note 70, at 32.

have criminal intent as a necessary element.[73] Crimes such as battery and malicious injury to property are traditionally considered to be crimes *mala in se* because the acts are inherently immoral.[74]

Punishing crimes is justifiable under a variety of theories. Most common, perhaps, is the rationale of retribution, commonly known as "an eye for an eye, a tooth for a tooth." The theory of retribution is rooted in the belief that punishment imparts revenge for the suffering caused by a criminal's actions,[75] and remedies the "disrupted balance between the offender and the victim."[76]

Deterrence is another leading theory of punishment and is comprised of two components.[77] First, the punishment deters a convicted criminal from committing further crimes in the future.[78] Additionally, punishing an offender may deter other potential criminals from committing similar crimes by demonstrating the likely consequences of such actions.[79]

Some believe that the dual purposes of penalizing criminal activity are rehabilitation and/or education.[80] Under the theory of rehabilitation, imprisonment is a remedial measure, which provides criminals with the opportunity to reform and ultimately to re-enter society in "good standing."[81] Alternatively, the education theory is directed at society, rather than at criminals or would-be offenders.[82] Education theory posits that punishment serves to educate society by publicizing crimes, especially those "not generally known, often misunderstood, or inconsistent with current morality."[83]

Regardless of the underlying philosophy of punishment, criminal law serves societal interests by protecting individuals from physical harm and protecting

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[73] *Id.* at 33. Modern criminal law continues to distinguish between the two, as is demonstrated by a comparison of manslaughter and battery. *Id.* at 34.

[74] *Id.* at 32-33. Generally, crimes which endanger life and limb are apt to fall into the category of *malum in se*. *Id.*

[75] *Id.* at 25-26. Although some critics argue against retribution as being merely retaliatory, others maintain that through retribution, criminals merely acquire their "just desserts." *Id.*

[76] SAM S. SOURYAL, ETHICS IN CRIMINAL JUSTICE 316 (1992). The restorative view of retribution justifies punishment from the victim's point of view. *Id.*

[77] LAFAVE & SCOTT, *supra* note 70, at 23-25.

[78] *Id.* The goal of *particular* deterrence is to deter the criminal himself, versus that of *general* deterrence, which aims to deter others from criminal conduct. *Id.*

[79] *Id.* at 24-25; SOURYAL, *supra* note 76, at 317.

[80] LAFAVE & SCOTT, *supra* note 70, at 24-25. Rehabilitation theory serves to rehabilitate the *criminal*, while education theory serves to educate *the public*. *Id.*

[81] SOURYAL, *supra* note 76, at 318. Arguably, however, rehabilitation is not necessarily *punishment*, since it ultimately aims to better the life of the offender. LAFAVE & SCOTT, *supra* note 70, at 24.

[82] LAFAVE & SCOTT, *supra* note 70, at 25.

[83] *Id.* This theory, then, is necessarily dependent upon the *publicity* of the subject crime and punishment in order to achieve the goal of educating society.

property from various forms of damage.[84] This reinforces the concept that criminal law serves to guard against social harm,[85] and to protect victims, be they persons, property, or society at large.

*2. The intentional infliction of pain and suffering is malum in se*

Although opinions differ in regard to the prohibition of animal cruelty, society generally accepts that these intentionally violent acts are inherently and morally wrong. Most would agree that animals deserve to be protected from the unnecessary infliction of pain.[86] In fact, a main rationale behind severely punishing violent cruelty to animals is that to intentionally cause pain and suffering to any being, human or otherwise, is inherently and morally evil, or *malum in se*.[87] Without prohibitory statutes, the acts would still be wrong. Therefore, anticruelty provisions are incomplete unless they adequately protect all creatures that suffer pain.[88]

Society cannot justify its refusal to recognize that animals are sentient beings, capable of experiencing pain.[89] The palpable similarities between human and nonhuman suffering demand that the ability to suffer be reflected in our anticruelty laws, regardless of the victim's species.[90] Thus, the inquiry must turn on the animal's sentience.[91]

One need only review common statutory language to understand that the goals of such legislation is to protect animals from violent, *malum in se* cruelty. Consider, for example, that the prevalent statutory language proscribes the malicious torture, mutilation, cruel beating, poisoning, and

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[84] *Id.* at 22. Criminal law protects these interests by prescribing punishment for undesirable conduct.

[85] *Id.* at 10 (stating that the "broad aim of the criminal law is, of course, to prevent harm to society . . . ." *Id.*; *see also* BLACK'S, *supra* note 3, at 377 (defining "crime" as any "*social harm* that the law makes punishable") (emphasis added).

[86] FRANCIONE: PROPERTY, *supra* note 9, at 3.

[87] *See* LES BROWN, CRUELTY TO ANIMALS: THE MORAL DEBT 117 (1988) (noting that a common objection to scientific experimentation on animals relies on the notion that the infliction of pain and suffering is evil); TOM REGAN, ALL THAT DWELL THEREIN: ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS, 8-10 (1982) (discussing the "intrinsic evil" of pain).

[88] As argued in support of an anticruelty bill before British Parliament as early as 1809, "[a]lmost every sense bestowed upon man is equally bestowed upon [animals]; seeing, hearing, feeling, thinking; the sense [sic] of pain and pleasure; the passions of love and anger; sensibility to kindness, and pangs from unkindness and neglect, are inseparable characteristics of their natures as much as of our own." Erskine, *supra* note 7, at col. 555.

[89] PETER SINGER, ANIMAL LIBERATION 8 (2d. ed. 1990).

[90] *Id.* (arguing that, regardless of "the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering . . . of any other being").

[91] *Id.* at 8-9 (employing the term "sentience" to denote "the capacity to suffer and/or experience enjoyment").

killing of any animal.[92] New York, for instance, defines that "'[t]orture' or 'cruelty' includes every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted."[93] Unquestionably, laws employing such broad prohibitions aim to prevent the infliction of pain and suffering on animals.

Arguably, an animal suffers to a comparable degree as his human counterpart.[94] No living creature should be made to suffer unnecessarily, whether human or nonhuman. "The question is not, [c]an they *reason*? nor [c]an they *talk*? but, [c]an they *suffer*?"[95]

### *3. Protecting "sentient" animals satisfies goals of animal protection and avoids a "slippery slope"*

If the goal in anticruelty legislation is to insulate animals from the infliction of pain, then the animals protected by the statute must include all those capable of suffering. A problem in drafting effective anticruelty laws is deciding and defining exactly which animals are to be protected. "Society . . . could not long tolerate a system of laws, which might drag to the criminal bar, every lady who might impale a butterfly."[96] Some opponents of animal welfare argue that this uncertainty can lead to a slippery slope.[97] Why, for example, should a bird be protected, but not an insect, and how can laws rationalize this discrepancy?

While the issue is certainly debatable, the answer may lie in behavioral observations and neurologic anatomy. Behavioral signs, such as struggling, crying, and attempting to escape are all indications of suffering.[98] Most would agree that birds and mammals feel pain, because everyone has, at one time or another, observed such an animal suffering from some sort of injury.

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[92] *See, e.g.*, N.C. GEN. STAT. § 14-360 (2000); MICH. COMP. LAWS ANN. § 750.50b (1999); N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1999).

[93] N.Y. AGRIC. & MKTS. LAW § 350 (McKinney 1999).

[94] REGAN, *supra* note 87, at 21.

[95] SINGER, *supra* note 89, at 7 (quoting Jeremy Bentham) (describing the ability to suffer as "the vital characteristic that gives a being the right to equal consideration" of interests).

[96] Grise v. State, 37 Ark. 456, 1881 WL 1522 (1881).

[97] Consider, for example, that the Hawai'i anticruelty law affords protection to "every living creature except a human being." HAW. REV. STAT. ANN. § 711-1100 (Michie 1999). If strictly applied, this law could bring conviction upon an "offender" for swatting a mosquito from his arm.

[98] SINGER, *supra* note 89, at 11 (analogizing these indicators of pain in humans to the like in animals).

Vertebrate animals have nervous systems similar to those of humans, which also indicates a similar capacity for pain and suffering.[99] Beyond the biology of animal suffering, one need only observe an animal and there is no question of his pain. There is no mistaking the sound of suffering, human or animal. Witnesses heard Duke's cries. [100] The whimpering was *doubtless* the sound of an animal in pain.[101]

Moreover, science tends to confirm that vertebrate animals do suffer from pain. Although scientists may suggest that animal suffering is "unknowable," they contradict themselves in this assertion by employing animals as subjects in researching human pain.[102] The practice of pain testing on animals supports the underlying presumption that human and animal pain correlate.[103] The point is well made that science would not use animals as models in pain studies if science did not accept the notion that animals do suffer from pain. This notion, however, is logically limited to vertebrate animals.[104] Insects do not have a central nervous system as in the case of vertebrate animals, and while some evidence suggests the possibility of insect pain responses, there is just as much evidence to the contrary.[105] Unlike mammals and birds, for example, there is no generally accepted consensus that insects and other

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[99] *Id.* "[T]hese animals have nervous systems very like ours, which respond physiologically as ours do when the animal is in circumstances in which we would feel pain . . . ." *Id.*

[100] Commonwealth v. Tapper, 675 A.2d 740, 741 (Pa. 1996).

[101] *See* SINGER, *supra* note 89, at 10-11 (noting that external signs, including "moaning, yelping or other forms of calling" lead to an inference of pain, much as one infers pain in another human being from observing such external indicators).

[102] BERNARD E. ROLLIN, THE UNHEEDED CRY: ANIMAL CONSCIOUSNESS, ANIMAL PAIN, AND SCIENCE, 114-18 (expanded ed. 1998) (discussing a variety of scientific tests designed to test animals' pain responses, such as the "writhing test," which attempts to measure pain in rodents by observing the animal writhing in response to painful stimulus, and counting the quantity of "writhes per minute."). Rollin also argues:

> [w]hen it is required to study pain mechanisms or analgesia in animals, it is taken for granted that animals feel pain. But when it is convenient or conscience-salving to ignore the painful consequences of one's research or teaching manipulations on animals, out comes the claim that one cannot really know what or even *that* animals experience.

*Id.* at 117. *Cf.* Derek W. St. Pierre, Note, *The Transition from Property to People: The Road to the Recognition of Rights for Non-human Animals*, 9 HASTINGS WOMEN'S L.J. 255, 261 (1998) (noting the contradiction between the presumption of genetic similarities in non-human versus human animals in scientific experimentation, and the denial of those similarities in the realm of ethical and legal considerations).

[103] ROLLIN, *supra* note 102, at 115.

[104] *See Animal Rights FAQ: #39 What about insects: Do they have rights too?, at* http://www.animal-rights.net/ar-faq (last visited Nov. 6, 2000) (noting both pro and con arguments to the issue of whether insects experience pain).

[105] *Id.* (noting, for example, that the head of wasp, severed from its body while feeding, may continue to eat, presumably in no distress).

"lower" animal life forms suffer (although this does not suggest that humans should be unnecessarily cruel to these animals).

If the goal of animal protection laws is the prevention of pain, the "slippery slope" can be avoided by limiting the protected category of animals to those that have a capacity for pain, namely vertebrates. Michigan's code provides an excellent model, defining "animal" as "any vertebrate other than a human being."[106] In contrast, other states are less effective, offering insufficient protection by creating limited definitions of the protected class.[107]

*4. The human/animal link to violence warrants parallel penalties*

More and more, violent animal abuse is being recognized not as a separate entity, but as part of the continuum of violence.[108] Violent cruelty to animals has gained widespread recognition as a possible predictor of violent behavior in general.[109] Perpetrators of violent animal abuse often have a propensity for violence against human beings as well.[110] Youth violence and its connection

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[106] MICH. COMP. LAWS ANN. § 750.50b (West 1999).

[107] Compare, for example, Mississippi, which provides separately for misdemeanor cruelty to "living creatures" and to "dogs," and yet another felony category for "livestock." MISS. CODE ANN. §§ 97-41-1, 97-41-16, 97-41-15 (2000). "Dogs" as a category is simply too narrow to offer adequate protection to the full class of sentient animals, while "living creatures" is overly broad, and invites constitutional challenge. Further, differentiating between these classes of animals does not address the fact that vertebrate animals, whether dogs, cows, or otherwise, should all be equally protected from the needless infliction of pain. The livestock provision carries the only felony penalty, presumably due to the higher market value of livestock than of dogs or other creatures.

[108] 142 CONG. REC. S4630-05 (daily ed. May 2, 1996) (statement of Sen. Cohen) [hereinafter Cohen].

> Violence is not an isolated event and animal abuse is often part of a larger cycle of violence. For this reason, violence toward animals must be taken much more seriously. Cruelty to animals can be a predictor of future violence and an indicator of the violence already in the perpetrator's life.

*Id.*

[109] *Id.* (noting studies, including those conducted by The National Research Council and the Federal Bureau of Investigation, which revealed that childhood cruelty to animals is a powerful indicator of violence elsewhere in the perpetrator's life, in which that offender may be both a victim and a perpetrator of violence). *See generally* Lacroix, *supra* note 70; Star Jorgensen & Lisa Maloney, *Animal Abuse and the Victims of Domestic Violence*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 143 (Frank R. Ascione & Phil Arkow, eds., 1999) (each discussing correlations between domestic violence and animal abuse).

[110] Cohen, *supra* note 108, at S4630-05 (relating also that university studies have shown a strong correlation between animal abuse and people abuse). "One study of 38 abuse victims at a crisis shelter found nearly 75 percent of women with pets reported their partner had threatened, hurt, or killed the animal. Researchers in child abuse cases found that in 88 percent of these family situations, the pet was also abused." *Id.*

to animal abuse currently receive a great deal of media attention.[111] Recent well publicized cases in Oregon and Colorado, for example, revealed that teens who shot and killed multiple victims also admitted to torturing and mutilating animals.[112] These cases are but the tip of the iceberg in this well-known connection between violence toward human and nonhuman victims.

"A history of practicing on animals before moving on to human victims is not limited to the nation's most notorious criminals."[113] Although most people are familiar with the connection between childhood animal abuse and extreme violent behavior later in life, most probably only recognize this link in the limited sense of highly publicized criminals, such as serial killers.[114] This connection, however, reaches far beyond the Jeffrey Dahmers and Ted Bundys of this world.

The human-animal link to violence has a much more common application. In recent years, a pattern has emerged that clearly links intentional animal abuse with various other forms of violent crimes.[115] This link suggests a need for a more equal allocation of resources devoted to the prevention and prosecution of violent conduct against both animals and humans.[116]

One commentator suggests a "multi-victim approach" to family violence which includes spouses, children and family pets.[117] She explains that the central point of this approach is the similarity between family violence and animal abuse, and that:

> (1) the abuse usually results from perpetrators' misuse of power and control over their victims;
> (2) the psychological and sociocultural factors that lead to the violence are often the same regardless of the type of victim; and

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[111] *See* Humane Soc'y U.S., *Youth Violence and Animal Cruelty*, *at* http://www.hsus.org/current/teen_cases.html (last visited Nov. 6, 2000) (recounting ten highly publicized cases of youths who perpetrated multiple murders and assaults on human victims, also having prior histories of committing violent animal abuse).

[112] *Id.* (referring to the April 20, 1999 case in Littleton, CO., and the May 21, 1998 incident in Springfield, OR., both of which involved multiple shootings in the attackers' high schools).

[113] Mitchell Fox, *Treating Serious Animal Abuse as a Serious Crime*, *in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 306 (Frank R. Ascione & Phil Arkow, eds., 1999).

[114] *See* Ritter, *supra* note 4, at 32 (recalling press accounts of infamous serial killers with known histories of animal abuse, including Jeffrey Dahmer, "Son of Sam," and the "Boston Strangler").

[115] Lockwood, *supra* note 5, at 81 (noting that the human/animal link to violence has long been a topic in popular culture, but has only recently become a subject for research).

[116] Lacroix, *supra* note 70, at 2-3.

[117] *Id.* at 4 (relaying the idea that society has traditionally viewed violence through a double standard, in which violence against a human is usually a felony, whereas it has historically been a misdemeanor if against an animal. The author advocates a uniform approach to all victims of family violence, including the abused family pet.).

(3) the psychological effects and symptoms experienced by victims of family violence are similar.[118]

In family violence situations, whether the victim is human or animal, recognizable similarities are evident in the victim's inability to defend herself against her attacker due to her inferior physical size and strength.[119] Moreover, in abusive relationships toward women, children and pets, the victims are "characterized by economic dependence, strong emotional bonds, and an enduring sense of loyalty."[120]

The widespread incidence of domestic violence illuminates, once again, the inefficiencies of the animal rights movements. Victims of child abuse and spousal abuse are human beings, endowed with the full scope of rights that animal rights activists would demand, yet their rights do not stop these abuses. Likewise, what accounts for the continuation of animal abuse is not that animals do not have rights. Instead, the abuse continues because the acts go unpunished. Merely affording rights to animals will not stop the mistreatment. To reduce the incidence of abuse, the acts must be prosecuted.

Although human and animal abuses have this prevalent link, animal abuse is as yet not considered a "serious crime in the criminal justice system."[121] There are reportedly four main factors contributing to the ambivalence among the legal community:

[1] Society in general attributes less value to animals than to people.
[2] Serious human issues eclipse other concerns and reduce perceptions concerning their prevalence and seriousness.
[3] Because only a small fraction of animal cruelty cases reach the courts or the press, it is easy to presume that animal abuse is rare.
[4] Incidents of animal abuse are viewed as isolated crimes having no relationship to human interpersonal violence.[122]

These factors can also be applied to the indifference of society in general. With these details in mind, it is even more unlikely that the traditional animals rights movements will promptly succeed. While society may deplore animal abuse, it has very little perception of its far-reaching effects. Accordingly,

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[118] *Id.* at 4-5.

[119] Phil Arkow, *The Evolution of Animal Welfare as a Human Concern, in* CHILD ABUSE, DOMESTIC VIOLENCE, AND ANIMAL ABUSE 19, 23 (Frank R. Ascione & Phil Arkow, eds., 1999).

[120] Lacroix, *supra* note 70, at 7 (noting also that "[c]ommon to women, children, and animals is their historical status under the law as property, which means their rights under the law have been superseded by the conflicting rights of their abusers"). *Id.* at 6.

[121] Arkow, *supra* note 119, at 27.

[122] *Id.* at 27-28.

enhancing the effectiveness of anticruelty statutes may continue to be a difficult task.[123]

*5. Moral and ethical arguments for change*

Even if the public is ready to accept heightened penalties for violent animal abuse,[124] the established belief that animals constitute property poses a formidable stumbling block. This obstacle stems from the fact that the American legal system has traditionally regarded animals as mere property.[125] As such, they possess no legal rights and have no standing to pursue any claims or interests.[126] The property status of animals places them in the same precarious position once occupied by slaves, such that essentially every interest held by animals can be forfeited if the sacrifice is deemed advantageous to their human masters.[127]

The notion of "trading" animal interests for human benefit is generally known as *legal welfarism*.[128] The balancing of these interests generally

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[123] As of September, 2000, eleven attempts to pass felony anticruelty provisions failed in nine states, including Iowa, Kansas, Maryland, Mississippi, Missouri, Rhode Island, South Carolina, Virginia, and West Virginia, in contrast to only three which have passed in Alabama, Delaware, and South Carolina. Humane Soc'y U.S. *State Legis. Lineup* (Sept., 2000). Furthermore, although more than half the states do carry felony penalties for animal abuse, not all of them address the individual acts of intentional violence at issue here.

[124] Note that the public response to the Duke case was not an isolated occurrence. The sentencing of a convicted cat-killer in Wisconsin in 1998 drew over 200 people and invited over 700 letters to the judge. J.C. Conklin, *Lobbying: Animal Abusers Face Jail Terms as States Crack Down*, WALL ST. J., Oct. 28, 1998 at B1. Another judge received 5,000 letters regarding the brutal killing of a dog in Kansas. *Id.* (noting that over half of the letters in each of these cases were form letters, evidencing the successful efforts of animal advocacy groups in activating the public in support of stronger punishments for these crimes); *see also* Lockwood, *supra* note 5, at 83 (stating that "[t]he public increasingly speaks out about the need to respond to intentional acts of animal cruelty"). The author refers to the "Noah's Ark Case" in which three men were convicted of animal abuse after bludgeoning to death twenty-three animals. "Media interest in this case rivaled that of many capital murder cases." *Id.*

[125] FRANCIONE: PROPERTY, *supra* note 9, at 4.

[126] Although animal owners can assert property rights on behalf of the animal, they may also decline to do so, thus diminishing even the lowly status that animals occupy in our legal system. Even if a guardian ad litem were to legally represent an animal's "claim," as must be done to represent the claims of minors, animals simply have no rights to assert. FRANCIONE: PROPERTY, *supra* note 9, at 67; St. Pierre, *supra* note 102, at 260; Steve Ann Chambers, *Animal Cruelty Legislation: The Pasado Law and Its Legacy*, 2 ANIMAL L. 193 (1996).

[127] GARY L. FRANCIONE: RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 127 (1996) [hereinafter Francione: Rain].

[128] St. Pierre, *supra* note 102, at 258-59 (defining legal welfarism as "embracing the reasonable and efficient, but 'humane' use of non-human animals" in fulfilling the needs of humans).

weighs in favor of humans, even where a substantial animal interest is to be sacrificed to seemingly insignificant human interests.[129] Consider, for example, that animals' "rights" to life are sacrificed daily toward the end of human consumption, be it for food, experimentation or entertainment. Although these human demands can be satisfied by other means, animals' interests often give way to the mere convenience of human use.

"Human interests are protected by rights in general and by the right to own property in particular.... As far as the law is concerned, [a conflict between human and animal interests] is identical to that between a person and her shoe."[130] In fact, the right to own property is held to be as fundamental as the rights to life and liberty.[131] Accordingly, the notion of animals as property is not one to be readily relinquished by society.

Perhaps even more controversial is the notion of relinquishing "rights" to animals. Despite the fact that over half the states afford felony penalties for the more vicious forms of animal abuse, none of them afford rights to animals. Americans are not, and may never be, ready to concede their property interests.[132] Even among those who champion animal rights, there lies a substantial variation in both degree and philosophy. Various movements may be categorized as "animal welfare," "strict animal rights," or "animal liberation."[133]

Under animal welfare considerations, the "rights" of animals must be balanced with competing human interests.[134] Animal welfarists differ from strict animal rights proponents in that welfarists seek to promote more humane treatment of animals, rather than to eliminate all use and exploitation of

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[129] FRANCIONE: RAIN, *supra* note 127, at 129. By viewing animals as mere objects, animal welfare laws, like property laws, allow owners to determine the "proper uses" of their animal property. *Id.*

[130] *Id.* at 127. The striking comparison between living creatures and inanimate objects illustrates, first, that animals are indeed no more than property at law, but also the extent to which they are exploited under that law, *i.e.*, that the inanimate objects are quite often manufactured from the very living creatures with which they are compared.

[131] *Id.* at 128-29; *see also* U.S. CONST. amend XIV, § 1.

[132] Although some would argue that Americans *have* relinquished property rights in other circumstances, for instance, in regard to slaves, women, and children, one must also remember that such "property rights" were egregiously misplaced in a country whose very bedrock guarantees equal rights to "all men." Animals, however, enjoy no such constitutional protection.

[133] JASPER, *supra* note 8, at 2.

[134] FRANCIONE: PROPERTY *supra* note 9, at 7, 18. This "balancing," however, begins with the scales tipped heavily in favor of humans. Where animals have no legal rights, even an interest so fundamental as animal *life* is outweighed by the property *rights* of human owners. *Id.* at 18-19.

them.[135] Strict animal rights activists, on the other hand, proffer that animals should "have the [absolute] right to be free from human cruelty and exploitation."[136] By contrast, animal liberationists proceed in a manner similar to traditional liberation movements, such as the civil rights and women's liberation movements,[137] fighting the "discrimination" and "prejudice" underlying the use and exploitation of animals.[138]

Various arguments underlie these diverse animal rights movements. For example, a morality argument proposes that animals possess the *moral* rights to life and to be free from human-imposed suffering.[139] An alternative theory suggests that animals have rights based on the fact that they are sentient beings who, like humans can think, feel, and suffer, and as such should be accorded the basic right to be free from human abuses.[140]

Affording rights to animals would pose a challenge to the traditional notion of American property rights. With this fundamental interest at stake, the animal rights movement clearly faces an uphill battle in securing rights for animals. One need only observe the difficulty over the last century in expanding rights to certain classes of human beings, namely African Americans and women, to realize that society is still quite far from recognizing "animal rights."[141] Regardless of society's general concern for animal welfare, most humans have greater concerns for their own rights and comforts.

Even anticruelty laws are rooted in the doctrine of legal welfarism, balancing animals' usefulness to humans against their interests in being free from maltreatment.[142] Anticruelty laws are based upon the underlying theory that cruelty to animals causes adverse effects upon human morality; the crux of requiring the humane treatment of animals lies not in justice, but in the

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[135] JASPER, *supra* note 8, at 2-3. Animal welfarists, while promoting the notion that animals have a "right" to be treated humanely, accept that animals may be exploited for human consumption so long as the animals are not subjected to unnecessary suffering. *Id.*

[136] *Id.* at 3.

[137] *Id.* at 4; SINGER, *supra* note 89, at iv. Traditional liberation movements fight discrimination based upon indiscriminate characteristics. Animal liberationists analogize "speciesism" to sexism and racism. *Id.* at 6.

[138] SINGER, *supra* note 89, at 6. Among the difficult obstacles to the animal liberation movement are that animals, as the victims of oppression, are unable to protest the exploitation, and that "almost all of the oppressing group are directly involved in, and . . . benefit[] from, the oppression." *Id.* at v.

[139] REGAN, *supra* note 87, at 1. Thus, although animals have no *legal* rights, *morality* provides a basis for recognizing at least these fundamental rights.

[140] HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 37-46 (1996); *see also* Mikita, *supra* note 33, at 422 (discussing the goals of the Animal Law Section of the State Bar of Michigan, the first organization of its type to be formed in the United States).

[141] *See generally* St. Pierre, *supra* note 102.

[142] *See* FRANCIONE: RAIN, *supra* note 127, at 133-34.

belief that cruelty to animals will beget cruelty to fellow human beings.[143] Moreover, while purportedly protecting animals, anticruelty statutes are simply another means of protecting an owner's property rights in an injured animal.[144]

*6. Animal rights arguments*

Whether or not society should recognize rights in animals is a hotly disputed topic. As mentioned, some feel that such rights are based on moral considerations or, alternatively, that certain natural rights are inherent in all sentient creatures, not just the human animal. Others, however, believe that only humans can have rights.[145] Consider, for example, the Bill of Rights, which refers to "persons," and to rights "of the people," and "of citizens," rather than, for example, to "living beings" or "creatures."[146]

Although traditional social mores prohibit the gratuitous infliction of pain and require humane treatment of animals, the goal of achieving animal rights is remote when humans continue to struggle amongst themselves to eradicate race, gender, class, and age-based discrimination.[147] In an era where the federal government must expressly prohibit violence against women and when "hate crimes" must be legislated to prevent violence motivated by various other prejudices, the controversy spawned by these laws suggests that if human beings do not want to protect the rights of other human beings, they are even less ready to convey rights to animals.

Anticruelty laws protect but do not recognize rights in animals. Although there is no legislation which purports to convey rights to animals, some activists argue that such laws create in animals the "right" to be free from the enumerated prohibited acts.[148] For example, one commentator states that "all fifty states have anticruelty statutes *which grant animals the right* to be free

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[143] *Id.*

[144] FRANCIONE: PROPERTY, *supra* note 9, at 4-5 (noting that anticruelty statutes are "interpreted in light of the legal status of animals as property, the importance of property in our culture, and the general tendency of legal doctrine to protect and to maximize the value of property"). *Id.*

[145] U.S. history, however, reveals a progressive recognition of rights. First, rights were accorded only to white men. Then, the abolitionist and women's suffrage movements, for example, were successful in expanding the acknowledgement of rights in all citizens. *See generally* Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657 (1996). Perhaps the concept of rights for non-human animals is the next logical step in this evolution of recognized rights.

[146] U.S. CONST. amend. I, II, IV, V, XV.

[147] FRANCIONE: PROPERTY, *supra* note 9, at 17.

[148] Squires-Lee, *supra* note 8, at 1071; *see also* JASPER, *supra* note 8, at 2-4 (discussing various factions of animal rights activists).

from unnecessary inhumane and cruel treatment."[149] This, however, is a more colloquial use of the word "right." Anticruelty statutes are prohibitory, not rights-granting in nature. They simply state what actions are prohibited without suggesting that any rights are being conveyed to the animals protected thereunder.

Despite the differences between animal rights and welfare theories, both philosophies share the broader goal of promoting the welfare of animals. Though their arguments differ, all animal activists seek to encourage the humane treatment of animals by protecting them from unjust or unnecessary suffering.[150] Regardless of the underlying rationale, legislators must address the fact that most current anticruelty legislation does not successfully prohibit or punish violent criminal acts against animals. One way that legislators can overcome this impediment is by turning the focal point of the debate from animal rights to "human wrongs."[151]

## IV. PROPOSALS FOR CHANGE

### *A. Promote Better Drafting*

As with the drafting of all laws, the specific language used is critical to the interpretation of that law. Many laws are written either too narrowly or too broadly to achieve their intended purposes. There are, however, some notable exceptions. The Humane Society of the United States, for instance, considers Michigan's anticruelty law among the best in the country, and suggests that states considering amendments to their current laws use it as a model.[152] It provides in relevant part:

> (1) As used in this section, "animal" means any vertebrate other than a human being.
> (2) A person who willfully, maliciously and without just cause or excuse kills, tortures, mutilates, maims, or disfigures an animal or who willfully and maliciously and without just cause or excuse administers poison to an animal, or exposes an animal to any poisonous substance, other than a substance that is used for therapeutic veterinary medical purposes, with the intent that the substance be taken or swallowed by the animal, is guilty of a felony, punishable by imprisonment for not more than 4 years, or by a fine of not more than

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[149] Squires-Lee, *supra* note 8, at 1071 (emphasis added).
[150] FRANCIONE: RAIN, *supra* note 127, at 1.
[151] REGAN, *supra* note 87, at 75.
[152] HSUS: State Laws 1999, *supra* note 19, §1.

> $5,000.00, or community service for not more than 500 hours or any combination of these penalties.[153]

Paragraph (1) provides a simple, yet effective definition for the animals covered under the statute. By including all vertebrates (except humans, of course), the statute embraces mammals, birds, reptiles, yet avoids the slippery slope question of insects, bacteria, etc. Note also that "*all* vertebrates" eliminates the consideration of ownership, granting protection to the animals themselves, not to human property interests.

Paragraph (2) defines the necessary intent: "willfully, maliciously and without just cause or excuse," thereby excluding the possibility of punishing an offender for neglect, or for unintentional or mistaken infliction of harm.[154] The intent requirement also belies the need for special interest exceptions.[155] The enumeration of acts, "kills, tortures, mutilates, maims, or disfigures an animal" protects against all types of imaginable abuses.

Even a less specific law, as that proposed by the Model Penal Code, would satisfactorily address violence toward animals with its simple prohibition of bodily injury. The Code defines that:

> A person is guilty of assault if he:
>
> (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
> (b) negligently causes bodily injury to another with a deadly weapon . . . .[156]

The Model Penal Code does not require a human victim for a charge of Simple Assault.[157] This example demonstrates that, to increase protective measures for animals, one solution is to look beyond the parameters of traditional anticruelty statutes and consider redrafting other violent crimes provisions, especially where those provisions already seek to prohibit the same violent actions. Assault and battery provides a striking example.

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[153] MICH. COMP. LAWS ANN. § 750.50b (West 1999). The excerpted portion is only that which is relevant to the discussion of violent cruelty.

[154] This is not to suggest, however, that neglect or unintentional harm should not warrant penalties, but simply that they do not fall under the category of violent abuse. The provisions in this statute, intent plus the resulting injuries, ring suspiciously of other crimes, *e.g.*, simple and aggravated assault and battery, and mayhem. *See* LAFAVE & SCOTT, *supra* note 70, at 684-85, 691-94, 697 (exemplifying the elements of these crimes).

[155] Although Michigan's code is considerably effective, its exemptions create its main point of weakness. "This section does not prohibit the lawful killing of livestock or . . . . the lawful killing of an animal pursuant to . . . [f]ishing[,] . . . . [h]unting, trapping, or wildlife control . . . ." MICH. COMP. LAWS ANN. § 750.50b (7), (8) (West 1999).

[156] MODEL PENAL CODE § 211.1 (1998).

[157] Although in its "Aggravated Assault" provisions, the Code requires "circumstances manifesting extreme indifference to the value of *human* life," it makes no such directive for a charge of "Simple Assault." *See id.* (emphasis added).

### B. Analogize Violent Animal Abuse to Criminal Assault and Battery

Assault and battery are punishable in all states, most commonly as misdemeanors.[158] Assault generally constitutes a felony, however, when committed under aggravated circumstances, which may involve the "'intent to kill' or 'to inflict great bodily harm,'" or may be committed with dangerous instrumentality.[159]

In general, regardless of how individual legislatures define the aggravated offense, intent is an essential element of the crime.[160] Generally, "[o]ne who, with intent to injure, does an act . . . which is the legal cause of an injury, is guilty of a criminal battery."[161] Similar elements are found in anticruelty statutes, which often define the requisite intent, enumerate the prohibited acts, and describe the required injuries to the victim animals.[162] These corresponding components imply that the law recognizes analogous traits among violence toward humans and violence toward animals.[163]

#### 1. Hawai'i's assault and battery statutes

While some states may define the assault and battery victim as a human, a person, or an individual, others may not specify beyond the term "victim." In defining the class of victim, Hawai'i's assault statutes contain a curious ambiguity which supports including animals as assault victims. The statutes provide, in relevant part:

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

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[158] LAFAVE & SCOTT, *supra* note 70, at 684. Assault and battery are often thought of as "twin crimes" which nearly always occur in concert. However, for the sake of conciseness, this discussion will refer to assault and battery as a singular crime. *Id.*

[159] *Id.* at 684, 688-89. Hawai'i has two grades of felony assault. Assault in the first degree, a "class B felony," involves "*serious* bodily injury," while assault in the second degree, a "class C felony" inflicts "*substantial* bodily injury." HAW. REV. STAT. ANN. §§ 707-710, 707-711 (Michie 1999) (emphases added).

[160] LAFAVE & SCOTT, *supra* note 70, at 688; *see also* MODEL PENAL CODE § 211.1(2) (1998) (indicating "purposely, knowingly or recklessly" as requisite intent levels of assault).

[161] LAFAVE & SCOTT, *supra* note 70, at 686 (discussing "Intent-to-Injure Battery").

[162] *See, e.g.*, HAW. REV. STAT. ANN. § 711-1109 (Michie 1999) (discussed *infra* section IV.B.1.).

[163] Further, a court has recently identified an attack *by* an animal as "assault and battery." Eritano v. Commonwealth, 690 A.2d 705, 708 (Pa. 1997) (citing Groner v. Hedrick, 169 A.2d 302, 303 (Pa. 1961)) (emphasis added). Surely a modern court would not intend to suggest that an animal may be a perpetrator, but not a victim of assault and battery.

(2) Assault in the first degree is a class B felony.[164]

Contrastingly,

(1) A person commits the offense of assault in the second degree if:
  (a) The person *intentionally or knowingly* causes *substantial* bodily injury to *another*;
  (b) The person *recklessly* causes *serious* bodily injury to *another person*;
  . . . .
(2) Assault in the second degree is a class C felony. [165]

Both statutes specify a requisite level of intent and injury. While the first degree offense requires the *intentional or knowing* infliction of *serious* bodily injury, a second degree offense applies either the same level of intent with a lesser degree of harm, or the *reckless* standard of intent with the same degree of harm. This demonstrates the magnitude of the offender's intent in determining the gravity of violence. Although a person may cause serious bodily harm, it is the level of his *intent* that determines the severity of the offense. Similarly, the Hawai'i anticruelty statute includes the same intent requirements as the assault statute, *i.e.*, "intentionally, knowingly, or recklessly," and the level of injury, including "mutilates, tortures, or kills,"[166] would certainly constitute the "substantial bodily injury" component of assault in the second degree.

More significant to the animal cruelty discussion, is that the first degree assault specifies a human victim, while the second degree offense does not, thereby indicating that the Hawai'i legislature intended that the act, and not the victim, should define an act of violence.[167] The second degree assault provision, as originally enacted in 1972, required the intentional or knowing infliction of "bodily injury to another *person with a dangerous instrument.*"[168]

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[164] HAW. REV. STAT. ANN. § 707-710 (Michie 1999) (emphases added).

[165] HAW. REV. STAT. ANN. § 707-711 (Michie 1999) (emphases added).

[166] HAW. REV. STAT. ANN. § 711-1109 (Michie 1999) (providing in part that one "commits the offense of cruelty to animals if the person intentionally, knowingly, or recklessly . . . overdrives, overloads, tortures, torments, cruelly beats or starves any animal" or "mutilates, poisons, or kills without need any animal . . .").

[167] Although the legislative history does not reveal the reasoning behind the modification from "another person" to "another," the mere fact of this change evidences a lower level of significance attributed to the victim's status where the subject bill was intended to achieve "a shift from the [former] approach of sentencing which emphasize[d] rehabilitation toward achieving the goal of just punishment." S. STAND. COMM. REP. No. 820-86, 13th Legis., *reprinted in* 1986 HAW. S.J. 1168, 1168-69.

[168] H.B. No. 20, 6th Leg., (Haw. 1972); Act 9, 1972, 6th Leg., 1972 Sess., 1972 Haw. Sess. Laws 87.

Its 1986 amendment, which changed that language to "*substantial* bodily injury to *another*," is still in effect today.[169]

The Hawai'i legislature enacted the 1986 amendment at the recommendation of the Committee on Penal Code Revision, whose report "focus[ed] on crimes against the person and against property," which the Committee considered to be the "areas where the general public [was] most directly and grievously affected by crime."[170] The changes were enacted to provide for sentencing "commensurate with the severity of the crime committed, particularly for violent, assaultive crimes."[171] Thus, including "animals" within the definition of "another" satisfies the goal of punishing crimes involving violent, assaultive acts.[172]

Although the report lacks discussion of the amendment's deletion of the "person" requirement, the change can be argued as indicative of the legislature's intent to expand the class of victims of assault. Construing the current first and second degree assault statutes together, along with the goals as stated in the legislative history of the 1986 amendment, it appears that in Hawai'i, a person who knowingly or intentionally causes substantial bodily injury to an animal might properly be charged with the offense of assault in the second degree.[173] However, despite the fact that an act of violent cruelty to an animal

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[169] H.B. No. 100, 13th Leg., (Haw. 1986); Act 314, 1986, 13th Leg., 1986 Sess., 1986 Haw. Sess. Laws 616 (codified as amended at HAW. REV. STAT. ANN. §707-711 (Michie 1999)).

[170] S. STAND. COMM. REP. No. 820-86, 13th Legis. Sess. 1168-69 (Haw. 1986).

[171] *Id.* at 1168.

[172] Recall, the court's designation of animal suffering as "sufferings of *others*" in *State v. Avery*, 44 N.H. 392, 1862 WL 1540 (1862) (emphasis added). *See supra* note 30.

[173] A cardinal rule of statutory construction directs that "[the court's] foremost obligation is to ascertain and give effect to *the intention of the legislature, which is to be ascertained from the language contained in the statute itself.*" State v. Valentine, 93 Haw. 199, 204, 998 P.2d 479, 484 (2000) (emphasis added). A comparison of the language of §§ 707-710 and 707-711 reveals that assault in the first degree takes "another person" as a victim, while assault in the second degree claims only "another," rather than a specific human victim. Thus, the plain statutory language of § 707-711 indicates that assault in the second degree does not require a human victim.

Although the deletion of "person" from § 707-711 may indicate a possible legislative intent to remove the status of personhood from the designated victims of the assault statute, its removal may also have been due to mere oversight by the legislature. In *Reefshare, Ltd. v. Nagata*, 70 Haw. 93, 762 P.2d 169 (1988), the Supreme Court of Hawai'i faced the task of determining whether the legislature's failure to delete certain language in a statutory amendment was intentional or whether that language was retained by an oversight. The court therein advised that "courts will not presume an oversight on the part of the legislature where such a presumption is avoidable." *Id.* at 98, 762 P.2d at 173 (citation omitted). By extension, therefore, the omission of "person" from § 707-711 should not be interpreted as legislative oversight.

Lastly, the court has directed that "where there is no ambiguity in the language of a statute, and the literal application of the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the *purposes*

could satisfy the elements of this felony statute, Hawai'i's misdemeanor anticruelty law continues to defeat the application of the assault statute to animal victims in the state.[174]

### 2. *Other assault and battery statutes*

Lawmakers in other states, however, are finally beginning to recognize that animals are, in fact, potential victims of assault and battery.[175] The Delaware Code, for example, currently specifies both misdemeanor and felony provisions for *assault* against law-enforcement animals.[176] Legislators in Virginia have introduced a bill, which, if enacted, will create the felony of "*assault and battery* upon . . . [an] animal owned, used or trained by a law-enforcement agency."[177] If successful, these laws may provide the needed catalyst for redefining acts of violence against animal victims.[178]

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*and policies* of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning." *Id.* at 99, 762 P.2d at 173 (citations omitted) (emphasis added). Punishing violent animal abusers under the second degree assault provisions would align with the *purposes and policies* of the Committee, whose aim was the achievement of just punishment for violent, assaultive crimes. S. STAND. COMM. REP. No. 820-86, 13th Legis., *reprinted in* 1986 HAW. S.J. 1168 (emphasis added).

[174] Although "another" could include animals as victims under HAW. REV. STAT. ANN. § 707-711, courts might be bound to exclude the interpretation based upon the existence of a law more specific to the circumstances, namely the anticruelty provisions under HAW. REV. STAT. ANN. § 707-1109. When construing conflicting statutes that deal with the same subject matter, the Hawai'i judiciary applies the settled rule of statutory construction, which directs that "where there is a 'plainly irreconcilable' conflict between a specific statute and a general statute concerning the same subject matter, the specific statute will be favored." State v. Spencer, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986) (citing State v. Pacariem, 67 Haw. 46, 48, 677 P.2d 463, 464 (1984), citing State v. Kuuku, 61 Haw.79, 82, 595 P.2d 291, 294 (1979)). *Kuuku*, however, directed that "[t]he mere fact that one statute creates a misdemeanor and the other a felony does not create [an irreconcilable] conflict[,]" as long as "the former statute may be violated without also violating the latter statute." *Kuuku*, 61 Haw. at 82, 595 P.2d at 294. There are a number of ways in which an offender could violate the anticruelty statute without necessarily violating the assault statute, for example, by overdriving, overloading, or tormenting an animal. *See* HAW. REV. STAT. ANN. § 711-1109(1) (Michie 1999). "Moreover, it is settled criminal law that where a single act violates more than one statute, *the State may elect to proceed against the accused under either statute.*" *Kukuu*, 61 Haw. at 83, 595 P.2d at 294 (emphasis added). Thus, it appears that the State may properly elect to prosecute an offender under § 707-711 for assault against an animal.

[175] *See* DEL. CODE ANN. tit. 11, § 1250 (b), (c) (1999) (prohibiting "*assault*" against a law-enforcement animal); H.B. No. 208, 140th Leg., (Del. 1999) (seeking to amend the existing statute); H.B. No. 672, Va. Gen. Assem., 2000 Sess. (introducing provisions for "*assault and battery*" against a police animal) (emphasis added).

[176] DEL. CODE ANN. tit. 11, § 1250 (b), (c) (1999) (emphasis added).

[177] H.B. No. 672, 2000 Va. Gen. Assem., 2000 Sess. (emphasis added).

[178] Despite the fact that these progressive laws currently protect only police animals, they demonstrate the potential for the comparable protection of all animals in the future.

A simple tweak of the language in either of these assault examples to expand the range of victims to include animals would correct the problems that remain unaddressed by many states' anticruelty laws.

Penalizing violent animal cruelty in this manner would provide a simple yet appropriate response to a long existing problem. Although enhancing anti-cruelty statutes to a felony level would likely expand the amount of attention and resources devoted to prosecuting these offenses,[179] including violent cruelty under the already cogent violent crimes provisions would offer a more direct and expedient solution. After all, when violence is intentional, why have separate provisions for the same act committed against different victims?[180]

## V. CONCLUSION

The law should punish violent criminals according to the acts that they perpetrate. Whether the victim is a human being or an animal, a violent crime is a crime against its intended victim as well as a crime against society and its morals. Punishing violent animal cruelty as a violent crime will best serve the enumerated goals of criminal punishment: to protect victims and society, to punish offenders, to deter crime, and to promote public morality.

The goal of preventing violent animal abuse can be well served by shifting the focus from *why* it should be prohibited to the general consensus that it *should* be prohibited. Nevertheless, activists continue to argue for acceptance of their theories as to *why* animals must be accorded humane treatment. These competing arguments for animal rights, however, steer the focus away from the mutual goal of protecting animals, whereas focusing on the common objective would strengthen the likelihood of success.

Society is more receptive to solutions that protect its interests than to proposals such as animal rights. Arguments for animal rights, while well-reasoned and well-intentioned, are not sufficient to address the problem of violent cruelty, mainly because the ideas are too controversial to become accepted by the majority. While most people are *against* animal cruelty, they

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[179] Fox, *supra* note 113, at 308. In his discussion of the vile killing of Pasado, a donkey, in Washington, in 1992, this commentator reveals that, despite the tremendous public outrage over the crime, the law enforcement community was unable to devote the amount of attention that the crime deserved, due in large part to the minimal sentence that the misdemeanor crime would have garnered. *Id.* at 306-08. The case "illustrated the shortcomings of [Washington's then-] existing laws, under which the brutal beating of a donkey and leaving him to strangle in a noose was a misdemeanor, equivalent with attempting to shoplift a pack of gum." *Id.* at 307-08. In response to the Pasado case and the support that it generated for animal protection, the Washington legislature enacted a felony anticruelty statute in 1994. *Id.* at 313.

[180] This suggestion is, of course, directed at the types of intentional, violent acts intended to cause serious or substantial bodily harm, as required by most felony assault statutes.

are *for* their own interests. With this property-based reality in mind, one must recognize that Americans are not soon likely to accept animal rights.

The fight for animal rights is certain to be a long and drawn out battle; to be sure, it is already a centuries-old debate. The goal of protecting animals from violent cruelty is perhaps stagnating within a worn-out mold of animal rights theories. Finding a more expedient solution will require a paradigm shift. To protect animals from violent crimes, the best solution may simply be to remove anticruelty statutes from the equation and recognize, finally, that violence toward animals is violence *per se*.

The present distinction between animals and human beings as victims serves only to weaken the case for animal protection. Absent this demarcation, however, laws could punish violent acts against animals according to the acts themselves, rather than according to the status of the victim. Since, as indicated, legislatures enact criminal statutes in the public interest, those statutes need not specify a particular individual victim. For instance, criminal animal anticruelty laws do not specify a human victim, yet they have been traditionally enacted to promote the moral welfare of the public. Under this civic-minded goal, it is easy to concede that the same reasoning would justify the redefinition of assault and battery statutes to bar the same type of acts toward animals as prohibited toward humans.

Further, the human/animal link to violence demonstrates that humans and animals alike are prone to victimization by the same violent offender. This relationship evinces a cogent fact: that animals are not the only victims harmed by weak anticruelty laws. These laws enable progressively violent offenders to threaten human victims as well.

While enhancing anticruelty laws to furnish felony-level penalties is certainly one solution, this approach has thus far been ineffective, as few felony anticruelty statutes appropriately address and penalize violent cruelty to animals. Violent animal abuse should be recognized and penalized as a violent crime. This treatment should be readily acceptable to all factions of society because it treads on no one's rights, yet affords animals the protection that a "humane society" demands. "Perhaps, one day, nonhuman animals will have legal rights also. Until then, if the goal of legislation is to protect the health and safety of humans and in the process it prevents cruelty to nonhuman animals, nonhuman animals will still reap the benefits."[181]

Beth Ann Madeline[182]

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[181] Clemens, *supra* note 6, at 101.

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# In the Best Interests of the Child: Juvenile Justice or Adult Retribution?

*Remember when the days were long*
*And rolled beneath a deep blue sky*
*Didn't have a care in the world*
*With mommy and daddy standin' by . . .*
*O' beautiful for spacious skies*
*But now those skies are threatening . . .*
*Offer up your best defense . . .*
*This is the end of the innocence.*

*The End of the Innocence* [1]

## I. INTRODUCTION

The juvenile justice system just celebrated its 100th anniversary.[2] The original juvenile court functioned as a safe haven for juveniles. Judges geared individualized treatment decisions toward rehabilitation.[3] Those principles are threatened as more than forty states have enacted tougher sanctions on children in juvenile courts[4] and have created a world where children as young as ten can be tried as adults.[5] Legislators and prosecutors rather than judges decide which children are tried in adult court.[6] Guidelines to assist judges in making their determination of which youth are appropriate for transfer to the adult correctional system were established by the Supreme Court in *Kent v. United States*,[7] taking into consideration such factors as: (1) the seriousness of the offense; (2) the maturity of the offender; (3) the juvenile's previous record; and (4) amenability to treatment in the juvenile system.[8] These guidelines are

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[1] DON HENLEY, *The End of the Innocence, on* THE END OF THE INNOCENCE (The David Geffen Co. 1989).

[2] Illinois passed the Juvenile Court Act of 1899, which established the nation's first juvenile court. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE JUSTICE: A CENTURY OF CHANGE 2 (1999).

[3] *Id.*

[4] *Id.* at 3.

[5] *Id.* at 15. Society has recognized four purposes for the criminal justice system: (1) incapacitation of the offender, (2) deterrence of others, (3) rehabilitation of the offender, and (4) satisfaction of the community's need for retribution. *See generally* NIGEL WALKER, WHY PUNISH? (1991). From 1992-1997, legislatures in forty seven states enacted laws that made their juvenile justice system more punitive. SNYDER & SICKMUND, *supra* note 2, at 5.

[6] SNYDER & SICKMUND, *supra* note 2, at 16.

[7] Kent v. United States, 383 U.S. 541 (1966).

[8] *Id.* at 566-67.

now set aside in favor of automatic waiver. Under legislative and prosecutorial waiver, the offense rather than the offender determines who is transferred to adult court and the flexibility to deal with the offender as an individual is lost.[9]

As the juvenile justice system celebrates its centennial year, policy makers and academics debate whether the system has outgrown its usefulness. Some authors contend that our youths are better served by abolishing the juvenile justice system, believing that the adult correctional system provides greater procedural safeguards.[10] The original juvenile court system, however, correctly recognized that youths are different from adults and they often make choices that reflect their immaturity. The goals of the juvenile justice system--prevention, individualized treatment and rehabilitation--are still preferable to adult incarceration for this age group.[11] Although the juvenile justice system should be maintained, stronger legislation is needed to deal with the problems of drugs and guns as these are a primary admission ticket for juveniles entering the adult correctional system.[12]

Part II of this comment discusses the evolution of the juvenile justice system. What began as a rehabilitative movement has become more retributive. This section examines the legislative changes that facilitate the waiver of juveniles to adult courts. Part III looks at the current system and suggests ways to improve it. Differences between adolescents and adults are explored in terms of their capacity to stand trial, their culpability, and the nature of their decision making. The effectiveness of the new retributive approach to juvenile crime is examined and contrasted with alternative approaches that have shown greater success in dealing with the multidimensional problem of juvenile crime. Part IV concludes by reflecting upon the direction the juvenile justice system is heading and what that might mean for society 100 years from now.

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[9] HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 103 (1999).

[10] *See* Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997).

[11] *See* discussion *infra* section III.A-B. Because adolescents are not yet fully developed biologically, psychologically and socially, there is a window of opportunity to help them make positive changes before they become adults who are set in their ways.

[12] Waiver in drug cases rose from 1.6% in 1987 to 4.1% in 1991 due in part to the introduction of crack cocaine and the subsequent "war on drugs." SNYDER & SICKMUND, *supra* note 9, at 171. Waiver requests were approved in 87% of cases involving youth who used weapons and seriously injured one or more victims. SNYDER & SICKMUND, *supra* note 9, at 182.

## II. EVOLUTION OF THE JUVENILE JUSTICE SYSTEM

### *A. The Origins of the Juvenile Justice System: The Rehabilitative Model*

In the early 1800's, all criminals were treated the same under a unified system of justice, with the exception of those under the age of seven who were presumed to be incapable of forming the requisite criminal intent.[13] The initiation of the 19th-century reform movement to treat juveniles differently from adults is credited to an English nobleman, Sir John Eardley-Wilmot.[14] He proposed a separate tribunal to deal with delinquent children in order "to eliminate 'send[ing] the offender to undergo the stigma and contamination of public prison, the publicity of trial, and all those evils which infallibly result from early imprisonment.'"[15]

In the United States, a similar reform movement advocating for the separation of juvenile and adult offenders was initiated by the Society for the Prevention of Juvenile Delinquency.[16] Privately operated "prisons" for youth were established in most major cities until states began taking on this responsibility.[17] The State of Illinois established the first juvenile court in 1899.[18] Under the principle of *parens patriae*, "the State as parent" had authority and responsibility for intervening on the child's behalf when the natural parents were not providing appropriate care or supervision.[19] The focus of the State's intervention was on the welfare of the child.[20] By 1910, all but two states had established juvenile courts and/or probation services focused on turning juvenile offenders into productive citizens through rehabilitation and treatment.[21] According to Thomas Grisso, the rehabilitative mode of this period of time was characterized by a belief that:

> [C]riminal acts of youthful offenders reflected their immaturity; thus, juveniles were not criminally responsible and should not be subject to the same punishment as adults. . . . [T]he belief was that the delinquent youth was on a

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[13] SNYDER & SICKMUND *supra* note 9, at 86.

[14] Candace Zierdt, *The Little Engine that Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 403 (1999).

[15] *Id.* at 404 (quoting WILEY B. SANDERS, JUVENILE OFFENDERS FOR A THOUSAND YEARS 126 (1970)).

[16] SNYDER & SICKMUND, *supra* note 9, at 86.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

> path to a criminal career, from which he could be diverted, through rehabilitation, or toward which he would proceed without appropriate intervention.[22]

The juvenile court was created in part to address problems created by the Industrial Revolution and the unprecedented influx of immigrants.[23] The need for labor in factories shifted America from a rural agrarian society into an urban industrial society.[24] The separation of work from home brought with it changes to the family social structure in terms of the number and spacing of children and a modernization of family life, with subsequent changes to the roles of women and children.[25] "Child-centered reforms such as the juvenile court, child labor laws, social welfare legislation, and compulsory school attendance both reflected and advanced the changing imagery of childhood."[26]

The end of the nineteenth century and the beginning of the twentieth century were characterized by an influx of immigrants who were poor, uneducated, unable to speak English, and "in the view of many reformers, lacked the necessary moral base for appropriate behavior."[27] Progressive reformers viewed this deficiency as an obvious contributory factor to the growing juvenile crime problem and set about to create a system in which a delinquent child could be "treated" by providing the necessary moral and educational structure which had previously been lacking.[28] Hence, the rehabilitative function of the juvenile justice system was created based on the view that an individual child was only criminal because he lacked the resources available to the non-criminal child.[29]

According to Barry Feld, who has written extensively on the history of the juvenile court system, the movement to achieve the rehabilitative ideal is responsible for creating a dichotomy and for the resulting confusion we are experiencing in defining the juvenile court system today. Dr. Feld argues:

> [T]he juvenile court [system is] situated on a number of cultural, legal, and criminological fault-lines. [The Progressives] created several binary conceptions for the respective juvenile and criminal justice systems: either child or adult; either determinism or freewill; either dependent or responsible; either treatment

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[22] Elizabeth S. Scott & Thomas Grisso, Symposium, *The Evolution of Adolescence: A Developmental Perspective On Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 143-44 (1997).

[23] Barry C. Feld, *The Transformation of the Juvenile Court--Part II: Race and the "Crackdown" on Youth Crime*, 84 MINN. L. REV. 327, 330 (1999).

[24] *Id.* at 332.

[25] *Id.*

[26] *Id.* at 335.

[27] Adam D. Kamenstein, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2110 (1997).

[28] *Id.* at 2110-11.

[29] *Id.* at 2111-13.

> or punishment; either welfare or deserts; either procedural informality or formality; either discretion or the rule of law. The past three decades have witnessed a tectonic shift from the former to the latter of each [of these] pairs . . . .[30]

The early juvenile court dealt not only with criminal conduct, but also with other behavior that was considered the precursor of criminal conduct. These behaviors included such activities as patronizing pool halls, running away from home, not attending school, or being left home without adequate care.[31] "The juvenile court was conceived as an all-encompassing institution for children's problems"[32] and was based on a non-adversarial clinical-therapeutic model that determined what course of treatment was necessary to rehabilitate the juvenile.[33] The overall focus was on treatment rather than punishment.

### *B. A Shift in the Juvenile Justice System: Disillusionment with the Rehabilitative Model*

The 1950's to 1970's reflected a disillusionment with the rehabilitation movement. Treatments available to rehabilitate young offenders never reached the desired level of effectiveness.[34] Due process abuses heralded the need for Supreme Court intervention.[35] Beginning with *In re Gault*,[36] the Court added due process safeguards to the juvenile justice system, recognizing that "the appearance as well as the actuality of fairness, impartiality and orderliness--in

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[30] Feld, *supra* note 23, at 339-40.

[31] Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 377-78 (1996).

[32] *Id.* at 378. "Instead of a judge sitting behind a judicial bench, the father-judge, the friend-probation officer, and the juvenile and his or her parents sat around a conference table or around the judge's desk in chambers to consider what would be in the best interest of the child." *Id.* at 379.

[33] *Id.*

[34] SNYDER & SICKMUND, *supra* note 9, at 87.

[35] Melli, *supra* note 31, at 385. According to the author:

> [t]he ideal of the juvenile court had envisioned an adequately funded, fully staffed court where the judge would act not as a judicial figure but as a parent treating the juvenile offender as his or her own child. However, the reality was quite different. The juvenile court was and has always been underfunded. Crowded court conditions and racial, cultural and class distinctions have sometimes resulted in father judges who were not concerned parents but who were high handed and capricious--or what is perhaps worse--uninterested. Significant decisions about the lives of juveniles were sometimes made without adequate fact finding and sometimes without a clear indication of what law, if any, the juvenile had violated. Informality and departures from established principles of due process resulted not in enlightened procedures but in arbitrariness.

*Id.* at 384.

[36] 387 U.S. 1 (1967).

short, the essentials of due process--may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[37] The due process reforms were patterned after the criminal justice system, a punitive, adversarial model. The addition of due process safeguards initiated a transformation by which the juvenile court system resembled the appearance of the criminal court system thereby making it easier for some juveniles to be tried and sentenced as adults.[38]

The 1999 National Report on Juvenile Offenders and Victims summarizes the procedural changes:

> *Kent v. United States*, 383 U.S. 541 (1966) -Courts must provide the "essentials of due process" in transferring juveniles to the adult system.
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> *In re Gault*, 387 U.S. 1 (1967) -In hearings that could result in commitment to an institution, juveniles have the right to notice and counsel, questioning of witnesses, and to protection against self incrimination.
>
> *In re Winship*, 397 U.S. 358 (1970) -In delinquency matters, the State must prove its case beyond a reasonable doubt.
>
> *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) -Jury trials are not constitutionally required in juvenile hearings.
>
> *Breed v. Jones*, 421 U.S. 519 (1975) -Waiver of a juvenile to criminal court following adjudication in juvenile court constitutes double jeopardy.
>
> *Smith v. Daily Mail*, 443 U.S. 97 (1979) -The press may report juvenile court proceedings under certain circumstances.[39]

These Supreme Court decisions added more of the safeguards originally reserved for the adult criminal system but drew the line at allowing juveniles a jury trial.[40] The view of the juvenile offender shifted from the previous child-protective stance to a perspective that regarded them as young adults. Under this new view, juveniles were held responsible for criminal acts because they had sufficient maturity to be culpable but deserved less punishment because of factors unique to their age. "[Juveniles] were assumed to be more impulsive, to have less capacity for self control, to lack experience, and to be more inclined to focus on immediate rather than long-term consequences of their choices."[41]

The real impetus for change, however, was public concern over the dramatic increase in violent juvenile crime and the perception that the juvenile court

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[37] *Id.* at 26.

[38] Melli, *supra* note 31, at 390.

[39] SNYDER & SICKMUND, *supra* note 9, at 91.

[40] Melli, *supra* note 31, at 387.

[41] Scott & Grisso, *supra* note 22, at 147.

system was inadequate to address it.[42] Juvenile crime, particularly violent crime, rose dramatically from the mid-1980s to the mid-1990s.[43] In the 1990's, a large majority of states enacted provisions that made it easier to subject juveniles to the jurisdiction of adult criminal courts.[44] According to the Bureau of Justice Statistics, 21,000 youths younger than eighteen were prosecuted and convicted as adults for felonies in state courts in 1994.[45] In removing juveniles to adult criminal court, the focus shifted from rehabilitation to retribution.

### *C. The Current Juvenile Justice System: The Retributive Model*

In recent years, the presumption of adolescent immaturity is being questioned as references to youthful offenders escalate from "delinquent" to "super-predators."[46] From 1985 to 1994 adolescent homicides in general increased 100%, while homicides committed by adolescents using guns also increased 100%.[47] Since its peak in 1994, juvenile violence has declined, but total arrests remained higher than the 1980's rates.[48] In response to the increase in violent juvenile crime, the public demanded a "get tough" response from their law makers. As part of the "get tough" approach,

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[42] Julianne P. Sheffer, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 485-86 (1995). *See* SNYDER & SICKMUND, *supra* note 9, at 144 (stating juvenile courts handled 1600 more cases per day in 1996 than in 1987); *see also* PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE 1 (Sara Pula ed., 1998) (citing media reports of violent crime as fueling the "get tough" response of governors and legislatures).

[43] PATRICIA TORBET & LINDA SZYMANSKI, U.S. DEP'T OF JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE 2 (Sara Pula ed., 1998).

[44] *Id.* (stating that from 1992-1995 all but ten states modified their statutes to make it easier to prosecute juveniles in criminal court).

[45] SNYDER & SICKMUND, *supra* note 9, at 176. The report adds a technical note explaining "[b]ecause the number of transfers is small relative to the volume of cases handled in criminal court, and because the handling of such cases varies significantly from State to State, developing national information on this population is extremely difficult." *Id.* at 175.

[46] *See generally* Lara A. Bazelon, *Exploding The Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. Rev. 159 (2000). (A "superpredator" is a "radically impulsive, brutally remorseless individual driven to commit acts of ruthless violence with full awareness of and indifference to the wrongfulness and consequences of such behavior.") *Id.* at 165.

[47] Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 403 (1999).

[48] *Id.*

prosecutorial waiver and statutory waiver were added to facilitate case transfer from juvenile to criminal court.[49]

*1. Prosecutorial waiver*

A recent trend in the overhaul of the juvenile justice system is to allow joint concurrent jurisdiction between juvenile and criminal courts. The prosecutor is given the power to choose which court to bring the case in, diminishing the power of the juvenile court judge to make an individual determination based on the criteria in *Kent*.[50] At the end of the 1997 legislative session, fifteen states had concurrent jurisdiction statutes allowing the prosecutor discretion to file in either juvenile or criminal court.[51] Prosecutorial waiver is attractive as a one-step process without the hearing requirements of the typical juvenile transfer. It has inherent in it the risk of giving too much power to one person to decide the fate of an individual, especially in circumstances where political pressures may outweigh the concern for the needs of the juvenile.

*2. Statutory waiver*

Statutes specifically excluding certain cases from juvenile court jurisdiction are responsible for the greatest number of juveniles being tried as adults.[52] Legislatures, through these statutes, "transfer" large numbers of juvenile offenders who have committed certain offenses to criminal court automatically based on the offense. In twenty-three states, there is no minimum age at which a juvenile can be transferred. Of those twenty-three states, only five have other statutory provisions addressing the capacity of the youngest offenders to commit crimes.[53] Because transfer is automatic, no consideration is given to the juvenile's environmental circumstances, the potential for rehabilitation, or whether it is the juvenile's first criminal act. From 1992 through 1997, forty-two states adopted or modified laws making it easier to prosecute juveniles in adult criminal court.[54] Nearly every state has lowered the age and expanded

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[49] TORBET & SZYMANSKI, *supra* note 43, at 2. (stating that from 1996-97, twenty five states made changes to their transfer statutes taking authority away from juvenile court judges and giving prosecutors more of an expanded role). *Id.*

[50] Kent v. United States, 383 U.S. 541, 566-67 (1966).

[51] SNYDER & SICKMUND, *supra* note 9, at 105.

[52] *Id.* at 106.

[53] *Id.* (providing a graph detailing the provisions of each State).

[54] SNYDER & SICKMUND, *supra* note 9, at 89.

the number of offenses for which juveniles can be transferred into criminal court.[55]

American society has altered its views of juvenile crime as well as its views of what constitutes the appropriate response. A separate and autonomous juvenile justice system depends on the belief that a child is inherently different from an adult, thus requiring a different criminal process and a lesser degree of culpability. This belief has come into question as society's notion of what constitutes "child" and "adult" has blurred.[56]

> Children, separated from adults throughout most of American history, in dress, in leisure activities, in social predilections and sophistication, and in spheres of knowledge, are increasingly privy to the secrets of adult life, and are increasingly indistinguishable from adults in the clothes they wear, the games they play, and the entertainment they prefer.[57]

We have come full circle: from rescuing children from a unified system of justice to once again trying and sentencing them as adults.

## III. FLAWS IN THE CURRENT JUVENILE JUSTICE SYSTEM

While the violent crime arrest rate for youths under age thirteen nearly doubled between 1980 and 1994, the absolute arrest rate for this group still remains rather small (eight percent of all Juvenile Violent Crime Index arrests).[58] The largest group of juvenile offenders threatened with transfer to the adult criminal system are those thirteen to eighteen years of age. The majority of transferred youth are accused of drug and property crimes.[59] Youth in this age range are subject to a number of internal and external stressors which have the potential for directly affecting their capacity and culpability for crime.[60] Additionally, fifty four percent of males and seventy three percent of females who enter the juvenile justice system for the first time never return on a new referral, suggesting that a majority of youthful offenders are not on the path of becoming career criminals.[61] There are two areas of

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[55] *See generally* PATRICK GRIFFIN et al., U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS (1998); *see also* SNYDER & SICKMUND, *supra* note 9, at 104.

[56] Janet E. Ainsworth, *Re-Imaging Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1112 (1991).

[57] Janet L. Dolgin, *The Age of Autonomy: Legal Reconceptualizations of Childhood*, 18 QLR 421, 429-30 (1999) (citing NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD 99 (1982)).

[58] SNYDER & SICKMUND, *supra* note 9, at 121.

[59] Cauffman, *supra* note 47, at 404.

[60] *See infra* section III.A-B.

[61] SNYDER & SICKMUND, *supra* note 9, at 80.

adolescent judgment that are particularly important when considering whether to try a young offender as a juvenile or an adult: adjudicative competence and culpability.

### *A. Juveniles Lack Adjudicative Competence*

"Adjudicative competence," refers to the ability of a defendant to stand trial having "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."[62] Under the early rehabilitative model of the juvenile court, competency to stand trial was conceptually irrelevant for juvenile court proceedings because the goals of the court were beneficent, thus rendering a "defense" unnecessary.[63] Competency becomes an issue in the context of new laws providing for waiver of juveniles to criminal court who may be incompetent due to immaturity. Virginia is the only state requiring that the question of a juvenile's competency to stand trial be decided before allowing waiver to criminal court.[64]

Research suggests that by age thirteen or fourteen, the average youth has a basic understanding of the roles people play in the trial process and that they can be charged and punished.[65] However, adolescents seem to have more difficulty appreciating the subtle distinctions regarding rights as "entitlements," which "belong" to them and which can be asserted or waived.[66] In a government-funded study investigating juveniles' capacity to understand *Miranda* rights, responses from 400 delinquent youths in juvenile detention facilities were compared to responses from 200 criminal adults.[67] At ages fourteen to sixteen, one-fourth of delinquent youths, as compared to one-half of adults, described a right as an entitlement.[68] The youths made statements such as, "You can be silent unless you are told to talk," suggesting that youths see rights as something which authorities can give but can also take away.[69] Other studies have demonstrated that preadolescents are less capable of foreseeing the consequences of their decisions, especially as they relate to

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[62] Dusky v. United States, 362 U.S. 402, 402 (1960).

[63] Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in an Era of Punitive Reform*, ABA Juvenile Justice Center 3, *at* http.//www.abanet.org/crimjust/juvjus/12-3gris.html(Jan. 19, 2000).

[64] *Id.* at 4.

[65] *Id.* at 5.

[66] *Id.* at 6.

[67] *Id.*

[68] *Id.*

[69] *Id.*

pleading decisions.[70] When tests designed to assess adult competency were administered to youths, only one-fifth under the age of thirteen and only one-half of thirteen year olds were found competent.[71] Another study, involving twelve to seventeen year olds, revealed that the entire group scored worse on competency exams when compared to adult scores.[72]

Current standards for adult incompetency to stand trial are based on mental illness or mental retardation.[73] Studies such as those cited above tend to suggest that adolescent incompetency is more a function of developmental immaturity, learning disability or emotional disturbance, all of which delay cognitive and social development.

### *B. Juveniles Lack Legal Culpability*

Two concepts in our legal system address the issue of culpability, *mens rea* and legal responsibility. The *mens rea* inquiry focuses on the specific state of mind, at the time the act is committed, required to consider an act blameworthy.[74] Legal responsibility is a fundamental prerequisite to *mens rea* that looks at the individual's capacity to make judgments that comply with the law.[75] The Supreme Court in *Eddings v. Oklahoma*[76] recognized the special mitigating circumstance of youth:

> [A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.[77]

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[70] *Id.* at 8 ("preadolescents are significantly less capable of imagining risky consequences of decisions and are more likely to consider a constricted number and range of consequences."). *Id.* Also citing Michele Peterson-Badali & Rona Abramovitch, *Grade Related Changes in Young People's Reasoning About Plea Bargains*, 17 LAW & HUM. BEHAV. 537 (1993) (preadolescents are less likely than older adolescents to think strategically about pleading decisions).

[71] *Id.* at 9.

[72] Cauffman, *supra* note 47, at 413-14 (citing Jeffrey C. Savitsky & Deborah Karras, *Competency to Stand Trial Among Adolescents*, 19 ADOLESCENCE 349 (1984)).

[73] Grisso, *supra* note 63, at 9.

[74] Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 537 (1984).

[75] *Id.* at 537-38.

[76] 455 U.S. 104 (1982).

[77] *Id.* at 116 n.11 (internal citation omitted).

Culpability concerns the degree to which a defendant can be held accountable for his or her actions.[78] The Supreme Court in *Thompson v. Oklahoma*[79] noted, "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[80] Even proponents of abolishing the juvenile court system argue that minors are less culpable because of a lack of sound judgment, impulsivity and reduced capacity to appreciate the consequences of their acts.[81] Arguably, adolescents are "a work in progress" and should be able to learn to make responsible decisions without bearing the full brunt of their mistakes. Some of the psychosocial factors which affect teen's decision making are: (1) peer influence; (2) attitudes toward risk; and (3) temporal perspective.[82]

Social conformity to peers, most important to teens around age fourteen, may influence teens to adapt their own behavior to peer role models (good and bad), in an attempt to win approval and a sense of belonging to the group.[83] Studies have shown that "most adolescent crime takes place in a group context, and having delinquent friends precedes an adolescent's own criminal involvement."[84] Adolescents living in crime-ridden, inner city neighborhoods may be more predisposed to violence and crime because of the "normative" effects of living in that environment.[85] Of the estimated 31,000 gangs operating in the United States in 1995, half of the members were under eighteen.[86] Crimes that are designated "gang related" tend to be overwhelmingly violent. "In ninety-three cities that kept data on gang-related criminal activity in 1992, homicides and other violent crimes accounted for more than half of the recorded gang crimes."[87]

Studies of teens indicate that adolescents differ from adults in their attitudes toward risk, their perception of risk, and the amount of risk they are willing to take in regard to their health and safety.[88] Adolescents tend to live for today and not worry about tomorrow. This tendency to discount the future and emphasize immediate gain leads to risk-taking behavior such as unprotected

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[78] Walkover, *supra* note 74, at 537.

[79] 487 U.S. 815 (1988).

[80] *Id.* at 835.

[81] Feld, *supra* note 23, at 386.

[82] Scott & Grisso, *supra* note 22, at 160-61.

[83] *Id.* at 162.

[84] Feld, *supra* note 23, at 386.

[85] Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 516-20 (1995).

[86] SNYDER & SICKMUND, *supra* note 9, at 77.

[87] *Id.* at 78.

[88] Scott & Grisso, *supra* note 22, at 163.

sex, drunk driving and criminal conduct.[89] Environmental deficiencies may contribute to the despair of youth living in disadvantaged urban neighborhoods causing them to ignore the risks and consequences of criminal behavior.[90] Prison has become an attractive alternative to a life of no hope, no safety, no jobs, and no future outside prison walls.[91]

Increased risk-taking may be due to the influence of hormonal or maturational changes on the brains of adolescents.[92] A recent research study done by Dr. Deborah Yurgelun-Todd at the McLean Hospital Brain Imaging Center may help to explain the physiological basis for emotional and cognitive development during adolescence.[93] In this study, scientists used functional Magnetic Resonance Imaging ("MRI") scans to compare the emotional processing of healthy eleven to seventeen year olds with that of normal adults.[94] The researchers focused on the level of brain activity in the amygdala, a region that guides instinct or "gut" reactions, and the frontal lobe, the seat of rationalization and reasoning.[95] They found that when young adolescents process emotion, the level of brain activity in the amygdala is higher than activity in the frontal lobe.[96] However, as adolescents progress into adulthood, there is an age-related shift: activation in the amygdala decreases while activity in the frontal lobe increases.[97] According to Dr. Yurgelun-Todd, these results suggest that adolescents are more prone to react with "gut instinct" when they process emotions, but as they mature into early adulthood, they are able to temper their instinctive "gut reaction" response with rational reasoned responses.[98]

Dr. Allan Mirsky, from the National Institute of Mental Health, has identified a number of factors, including neglect and exposure to lead, that can

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[89] *Id.* (citing Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-making Perspective*, 12 DEV. REV. 1, 11-18 (1992)).

[90] "There appears to be a correlation between juvenile delinquency and such factors as poverty, physical and emotional abuse, neglect, family dysfunction and educational deficiencies." Kathleen A. Strottman, Note, *Creating a Downward Spiral: Transfer Statutes and Rebuttable Presumptions as Answers to Juvenile Delinquency*, 19 WHITTIER L. REV. 707, 751 (1998).

[91] Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L. J. 1885, 1908 (1994).

[92] National Public Radio, *Gray Matters: The Teenage Brain* (Feb. 9, 2000) (featuring Dr. Deborah Yurgelun-Todd, PhD, Director of Neuropsychology and Cognitive Neuroimaging at McLean Brain Imaging Center) transcript *available at* http://www.dana.org/dabi/transcripts/gm_1298.html.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

damage developing brains and promote violent behavior.[99] Dr. Mirsky also found that aggressive teenagers often displayed an inability to focus on tasks as children. He believes this inability to focus, complicated the learning process which in turn led to more aggressive methods of dealing with frustration.[100]

Other research conducted by Dr. Marvin Zuckerman at the University of Delaware shows that adolescents are far more interested in novel experiences that produce a thrill than children and adults, suggesting that teens may seek experiences that stimulate the brain's dopamine system.[101] Other research shows that another neurotransmitter in the brain, seratonin, declines during the teen years, making them more prone to impulsivity.[102] Increases in testosterone, in both sexes, cause the amygdala in the brain to swell, generating feelings of fear and anger.[103]

In light of the fact that an adolescent's culpability is less than an adult's, automatic transfer to the adult criminal system imposes an excessive penalty on the juvenile. Transfer is the greatest penalty the juvenile system can impose and should only be done after individual determination has been made that the minor is mature enough to be treated as an adult.

### *C. The Retributive Model Is Ineffective*

What can be learned from the experience of juveniles who have been tried and sentenced as adults? The "new" retributive approach to serious juvenile crime does not seem to achieve better results than the old approach and only compounds the problem of our already over-crowded prisons.[104] Juveniles convicted by adult criminal courts do not receive reduced sentences because of their age. In fact the opposite is true. Adult criminal courts sentenced juvenile transfers convicted of murder to longer prison terms than other convicted murderers. Juveniles convicted of murder in 1994 were given sentences that were two years and five months longer than adults age eighteen or older.[105]

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[99] OLR Research Report, *Differences in Adult and Adolescent Brain Activity, at* http://www.cga.state.ct.us/ps99/rpt/olr/html (Sept. 15,1999)(citing Dr. Allan Mirsky, JOURNAL OF CLINICAL AND EXPERIMENTAL NEUROPSYCHOLOGY, 17(4): 481-98 (1995)).

[100] *Id.*

[101] *Inside the Teen Brain: Young Minds Are Still Taking Shape*, U.S. NEWS & WORLD REP., Aug. 9, 1999, *available at* http://www.usnews.com/usnews/issue/990809/nycu/teenbrain.html.

[102] *Id.*

[103] *Id.*

[104] Zierdt, *supra* note 14, at 422.

[105] SNYDER & SICKMUND, *supra* note 9, at 178.

A Florida study conducted by Bishop and Frazier suggests that transferring juveniles to adult court seems to lead to increased recidivism.[106] Bishop and Frazier followed 3000 juveniles who were transferred to criminal court in Florida in 1987 and a control group of delinquents who remained in the juvenile system.[107] The two groups were matched for offense category, prior offenses, age, sex and race.[108] A one year follow up found transfers had higher rates of rearrest, more serious rearrest offenses, and a shorter time to rearrest.[109] Six years later, the transferred juveniles continued to out pace the comparison group in terms of number and frequency of rearrests.[110]

This study seems to support the fear that young offenders given adult time will prove to be a greater menace to society when released after having learned the criminal ropes from older, tougher inmates. According to Jeffrey Fagan, Director of the Center for Violence Research and Prevention at Columbia University in New York City, "[t]hey're prisonized. Developmentally, their identities are very firmly and concretely molded as criminal offenders. And what they don't learn because they're locked up are the skills needed to become a family member, husband, neighbor or worker."[111]

The cost to society is also enormous. Using figures estimated in a 1998 study by Mark Cohen, the *1999 National Report: Juvenile Offenders and Victims*[112] has concluded that allowing one youth to leave high school for a life of crime and drug abuse costs society $1.7-$2.3 million.[113] Investing dollars in prevention and rehabilitation efforts is not only good for the individual child in question but economically good for society as a whole.

## IV. A NEW MODEL FOR THE JUVENILE JUSTICE SYSTEM

Unless the criminal justice system intends to sentence every child who enters its system to life imprisonment, it must acknowledge that these children will ultimately reenter society. Society must come to grips with the social problems of drug abuse and the proliferation of guns instead of leaving it up to the courts to deal with the aftermath. Changes required to lower the juvenile crime rate and rehabilitate those who do get into trouble are best left to the legislature.

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[106] *Id.* at 182.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Lisa Stansky, *Age of Innocence*, 82-NOV. A.B.A. J. 60, 62 (1982).
[112] SNYDER & SICKMUND, *supra* note 9.
[113] *Id.* at 82.

State legislatures can have an impact on the juvenile crime rate and on the lives of juveniles in trouble by (1) abolishing automatic waiver, returning to individual screening based on the criteria determined in *Kent*,[114] (2) reducing access to guns, and (3) providing better access to programs dealing with drug abuse.

### *A. Abolishing Automatic Waiver*

Automatic transfer for first-time violent offenders targets many juveniles "who are not likely to offend again, many who themselves have been victims or otherwise are vulnerable, and many whose choices were the consequence of immature judgment rather than antisocial character."[115] While it is true that the more serious the offense the more likely the adolescent will be transferred, it is not true that all serious offenders become repeat offenders.[116] A better predictor of recidivism is the cumulative seriousness of all offenses.[117] A small number of repeat offenders are responsible for most of the offenses committed by juveniles.[118] Juveniles having five or more contacts with the juvenile justice system accounted for sixty-one percent of all juvenile offenses.[119] On the other hand, "fifty-four percent of males and seventy-three percent of females who enter the juvenile justice system never return on a new referral."[120]

The constitutionality of automatic transfer has been challenged on the grounds that it violates the separation of powers doctrine and that it results in the denial of equal protection and due process to juveniles, but these efforts have been largely unsuccessful.[121] The argument that the separation of powers doctrine is violated when the legislature delegates power to the prosecutor which should be reserved for the judiciary was rejected under the reasoning that since the juvenile court system was originally a creation of the legislative system, the legislature is free to modify it in any way it sees fit.[122] Equal

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[114] Kent v. United States, 383 U.S. 541 (1966).

[115] Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 734 (1997) (citing Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 LAW & HUM. BEHAV. 229, 240 (1996)).

[116] *Id.* at 733.

[117] *Id.*

[118] *Id.* at 734.

[119] *Id.*

[120] SNYDER & SICKMUND, *supra* note 9, at 80.

[121] *See* Robert E. Shepherd, Jr., *Challenging Change: Legal Attacks on Juvenile Transfer Reform*, ABA JUVENILE JUSTICE CENTER, *at* http://www.abanet.org/crimjust/juvjus/12-3shep.html (Jan. 9, 2000).

[122] *Id.*

protection claims have had only partial success. In *Hughes v. State*,[123] the Delaware Supreme Court struck down a revision of a juvenile transfer statute which eliminated judicial review for some juveniles but not for other classes of juveniles.[124] Similarly, the Utah Supreme Court in *State v. Mohi*[125] struck down a statute that gave prosecutors unlimited discretion in choosing which juveniles could be waived. The court stated, "choosing which court to file charges in has significant consequences for the offender, and the statute does not indicate what characteristics of the offender mandate that choice."[126] These are the only two cases which have found transfer statutes unconstitutional on equal protection grounds. Many more statutes have been upheld on the grounds that prosecutorial discretion has been a traditional and widely accepted part of the judicial system.[127]

Attacks on juvenile transfer statutes based on due process claims have also been unsuccessful, with courts again finding that legislatively-created juvenile courts do not confer the same rights to juveniles that are accorded to adults.[128] It is not that the courts are insensitive to the problems inherent in automatic transfer. As noted by the court in *State v. Jose C.*,[129] "the 'automatic' transfer of juveniles to adult court has a societal cost in that the traditional resources of the juvenile justice system are not available to the child. . . . By making the transfer automatic, the legislature has chosen not to allow courts the discretion to consider such claims."[130]

Because the courts are not able to effectuate change, it is up to the legislature to draft a solution. There is a need to return to a case-by-case determination using the criteria set out in *Kent v. United States*,[131] considering such factors as: (1) the seriousness of the alleged offense; (2) the maturity of the offender; (3) the juvenile's previous record; and (4) amenability to treatment in the juvenile system.[132] Judicial waiver statutes that incorporate

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[123] 653 A.2d 241 (Del. 1994).

[124] *Id.* at 253.

[125] 901 P.2d 991 (Utah 1995).

[126] *Id.* at 1003.

[127] Shepherd, *supra* note 107, at 2 (citing cases which have upheld prosecutorial waiver as Constitutional: United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972); Woodward v. Wainwright, 556 F.2d 781 (5th Cir. 1977); People v. Thorpe, 641 P.2d 935 (Colo. 1982); State v. Berard, 401 A.2d 448 (R.I. 1979); Hansen v. State, 904 P.2d 811 (Wyo. 1995); Jahnke v. State, 692 P.2d 911 (Wyo. 1984); Bishop v. State, 462 S.E.2d 716 (Ga. 1995)).

[128] *Id.* at 3.

[129] State v. Jose C., No. CR6-421185, 1996 Conn. Super. LEXIS 754 (Conn. Super. Ct. Mar. 21, 1996).

[130] *Id.* at 763.

[131] *Kent*, 383 U.S. at 541.

[132] *Id.* at 566-67.

clear guidelines for assessing the juvenile's situation before transfer can result in a better determination of who is amenable to treatment.

### *B. Increasing Legislation Related to Guns and Drugs*

It is estimated that there are over 200 million guns in America, with a gun in forty-three percent of households with children.[133] There is a direct correlation between crime, guns and youth. "In 1996, the Bureau of Alcohol, Tobacco and Firearms established the Youth Crime Gun Interdiction Initiative to trace crime guns."[134] Of the 76,000 crime guns traced from twenty-seven cities during a one-year period, forty-four percent of crime guns were recovered from persons under twenty five; eleven percent were recovered from youth age seventeen or younger.[135] In the years 1984-1994, the number of juveniles arrested for homicides involving a firearm increased fourfold.[136] Juveniles who committed homicide knew sixty-nine percent of their victims, only thirty-one percent were strangers.[137] Guns and drugs must be recognized for their effects on all types of crime. Guns and drugs correlate not only to the increase in juvenile crime but also to an increase in adult crime. Juvenile arrests for violent crime increased by forty-five percent between 1982 and 1992, while adult arrests for violent crime increased forty-one percent during the same period.[138] Experts attribute the increase in the murder rate overall and the increase in murders by adolescents in particular, to the proliferation of the drug trade and resulting gun violence.[139] Other countries, such as England, Japan, Jamaica, and Switzerland, have banned or severely reduced access to firearms, dramatically decreasing homicide and crime.[140]

There is also a connection between drugs, juveniles and crime. According to the Department of Justice, during the years 1991-1995, drug offense cases increased by 145%.[141] Each year from 1986 through 1995, about six in ten

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[133] MSNBC News, *Youth Crime: Who is Responsible?*, *at* http://www.msnbc.com/news/376692.asp (Mar. 4, 2000).

[134] SNYDER & SICKMUND, *supra* note 9, at 69. "Crime guns" are defined as "any firearm illegally possessed, used in a crime, or suspected to have been used in a crime. *Id.*

[135] *Id.*

[136] Vincent Schiraldi, *Making Sense of Juvenile Homicides in America*, *at* http://www.abanet.org/crimjust/juvjus/13-2msj.html (Jan. 19, 2000).

[137] SNYDER & SICKMUND, *supra* note 9, at 54.

[138] Laureen D'Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders Is Not a Panacea*, 2 ROGER WILLIAMS U. L. REV. 277, 282 (1997).

[139] *See id.* at 283.

[140] *See* DAVID KOPEL, THE SAMURAI, THE MOUNTIE AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES (199d).

[141] These only included cases in which a drug offense was the most serious charge, not cases involving juveniles charged with drug offenses in addition to more serious crimes. ANNE L.

drug cases involved juveniles age sixteen or older.[142] In 1995, these older juveniles accounted for fifty-eight percent of the drug caseload.[143] Overall, drug offenses accounted for thirteen percent of the delinquency cases judicially waived to criminal court in 1995.[144] Under the "three strikes" rule adopted by many states, repeat drug offenders have an increased likelihood of spending a considerable amount of time incarcerated.

The "war on drugs" has had a disproportionate impact on African-Americans, Latinos, and women.[145] Drug offenders make up sixty-one percent of the federal prison population.[146] State prisons have shown an increase in the incarceration of drug offenders from six percent to twenty-two percent from 1979 to 1991.[147] Drug treatment is more cost-effective than imprisonment for reducing the overall drug problem in this country.[148] A study of the Dade County Drug Court treatment program, a successful program widely regarded as a national model, demonstrated that "it costs Florida only $2,000 to put a drug offender through a drug treatment program as compared to $17,000 per drug offender for incarceration."[149] Treating drug abusers has also been shown to reduce future criminal activity. The National Treatment Improvement Evaluation Study, a large national survey, found that "forty-eight percent of treatment participants reported arrests in the year preceding treatment, but only seventeen percent were arrested in the year following treatment."[150] Offenders who are coerced into drug treatment as a result of court intervention have as successful a recovery rate as do those who enter voluntarily.[151] Drug abuse is a serious problem for incarcerated juveniles. "Sixty percent of the 18,000 juveniles held in long-term state youth correctional institutions throughout the nation, indicated that they regularly used drugs."[152] As many as 50% said

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STAHL, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION FACT SHEET, DRUG OFFENSE CASES IN JUVENILE COURT, 1986-1995 (June 1998) at 1.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 2.

[145] James R. Brown, Note, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 73 (1997).

[146] Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 365 (1995).

[147] *Id.*

[148] *Id.* at 377.

[149] *Id.*

[150] Arthur J. Lurigio & James A. Swartz, *The Nexus Between Drugs and Crime: Theory, Research, and Practice*, 63-JUN FED. PROBATION 67, 70 (1999).

[151] *Id.*

[152] Marcia Johnson, *Juveniles and the Juvenile Justice System*, 17 WHITTIER L. REV. 713, 796 (1996).

"they were under the influence of drugs or alcohol at the time of the offense that resulted in their incarceration.[153]

These studies indicate there is a close connection between crime and drug problems. In formulating a response to the drug and crime problems of juveniles, society should advocate for a solution that is cost-effective, addresses the problem, and has been shown to decrease crime. Drug treatment, not incarceration, is the answer.

## V. CONCLUSION

What will we be saying about the juvenile justice system when it celebrates its 200th birthday? Some scholars have advocated for getting rid of it entirely so that juveniles can enjoy the same due process rights adults currently have.[154] Now that youth crime has finally received national attention, the time is ripe for change. When change occurs it often moves from one extreme to the other, from being too soft on juvenile crime to being too hard. Something in the middle is what is called for. Abandoning the rehabilitative model for the retributive model does little to address the complex problems of juvenile crime.[155] The solution is not tougher punishment but greater efforts to address the root problems of juvenile crime by reducing easy access to guns, offering treatment for drug addiction, and creating options which allow us to assist those juveniles who are amenable to rehabilitation.

Automatic waiver must be replaced by individualized determination. In society's rush to protect itself from all types of crime we have literally thrown the baby out with the bath water. "The legal emphasis has shifted from protecting and reforming children to protecting society from young people prematurely deemed incapable of rehabilitation."[156] If the rehabilitative model is not working as well as it could, perhaps more resources and more effective treatment approaches are needed. The juvenile justice system, or the adult justice system for that matter, cannot be expected to bear the burden of the burgeoning drug and gun problem that should be addressed by society as a whole. It is too easy, and simply not effective, to deal with the problem of juvenile crime by simply lowering the age of adulthood. "Mend it, don't end it."[157] The juvenile court system is the one place where troubled youth will invariably capture the attention of concerned adults. At that critical point,

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[153] *Id.*

[154] *See generally* Feld, *supra* note 10.

[155] *See supra*, section III.C.

[156] Charles J. Aron & Michele S. C. Hurley, *Juvenile Justice at the Crossroads*, 22-JUN Champion 10, 10 (1998).

[157] Strottman, *supra* note 90, at 711 (citing Dave Lesher, *Affirmative Action Fades as GOP Issue in California*, L.A. TIMES, June 13, 1996, at A1).

society has a choice to make. Do we turn them over to the adult criminal system and throw away the key or do we take the time to make an individualized intervention recognizing that one day that youth will once again be part of our society? Our children are our future. If we do not attempt to save the ones we can, we will have far more to fear from the institutionalized "super criminal" than the juvenile "super predator."

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# Matters of Trust: Unanswered Questions After *Rice v. Cayetano*

## I. INTRODUCTION

In *Rice v. Cayetano*,[1] the United States Supreme Court held that the State of Hawai'i's refusal to allow a citizen to vote in elections for the State's Office of Hawaiian Affairs ("OHA") was race-based, and therefore violated the United States Constitution.[2] The case involved a challenge to a voting scheme[3] that limited OHA voting rights to citizens statutorily defined as "Hawaiian."[4] Although the plaintiff brought the challenge under both the Fifteenth Amendment[5] and the Equal Protection Clause of the Fourteenth Amendment,[6] the Court decided the case on the plain language of the Fifteenth Amendment alone.[7] In doing so, the Court ignored the argument that the State of Hawai'i had a right to confer special voting benefits on Hawaiians pursuant to a trust relationship analogous to that of the federal government to the Indian tribes.[8]

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[1] 528 U.S. 495 (2000).

[2] *Id.* at 499.

[3] The Hawai'i Constitution, Article XII, requires that members of the OHA board of trustees be "elected by qualified voters who are Hawaiians, as provided by law." HAW. CONST. art. XII, § 5. At the time of the suit, Hawai'i Revised Statute § 13D-3(b) stated: "No person shall be eligible to register as a voter for the election of [OHA] board members unless the person . . . is Hawaiian . . . ." HAW. REV. STAT. §13D-3(b) (amended April 2000).

[4] Section 10-2 of the Hawai'i Revised Statutes defines "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HAW. REV. STAT. § 10-2 (1999). That statute defines "Native Hawaiian" as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920 . . . ." *Id.*

[5] Section 1 of the Fifteenth Amendment to the U.S. Constitution states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[6] Section 1 of the Fourteenth Amendment to the U.S. Constitution states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[7] *Rice*, 528 U.S. at 499, 522.

[8] *See* Respondent's Brief at 1-2, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

This note argues that the Court's failure to resolve the trust relationship argument leaves many federal and state programs for Hawaiians and native Hawaiians under a Constitutional cloud, and that the majority opinion has rendered these programs more vulnerable to equal protection challenges. The trust question is key because absent a federal or state trust relationship, there is no basis for officially recognizing Hawaiians as a distinct political group. Without such recognition, a court would likely find the statutory definitions racial rather than political in nature, requiring the court to subject legislation preferential to Hawaiians and native Hawaiians to strict scrutiny–the highest level of judicial review. At stake are a host of federal and state laws designed to benefit native Hawaiians and Hawaiians through, for example, education[9] and health care programs,[10] and by providing homesteads[11] and small business loans.[12] In the wake of *Rice*, these programs are already under attack.

Section II of this note provides an historic context for the case and highlights some of the more significant programs at risk. Section II also identifies cases setting forth the standard of review applicable in equal protection challenges to legislation found to be race-based. In addition, Section II discusses the key case establishing a lower standard of review for legislation benefiting members of Indian tribes. Section III examines the *Rice* opinions, and Section IV discusses the implications of the Court's failure in *Rice* to apply an equal protection analysis. Section V concludes that uncertainties resulting from *Rice* may be resolved by proposed federal legislation or through direct equal protection challenges to legislation preferential to Hawaiians.

## II. BACKGROUND

### *A. History of the Hawaiian People*

The first settlers of the Hawaiian Islands may have been a group of Polynesians who arrived about a thousand years ago from Tahiti.[13] Subsequently, about six to eight hundred years ago, Polynesian navigators traversed a well-known route between Tahiti and the Hawaiian Islands.[14] After

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[9] *See* OFFICE OF HAWAIIAN AFFAIRS FISCAL ANNUAL REPORT 1999 11-13.

[10] *Id.* at 16-17.

[11] *Id.* at 17-18.

[12] *Id.* at 9-11.

[13] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854 3 (1938); *see also* LAWRENCE H. FUCHS, HAWAI'I PONO: A SOCIAL HISTORY 4 (1961).

[14] KUYKENDALL, *supra* note 13, at 3.

that period, outside contact ceased and the inhabitants of the Hawaiian Islands lived in virtual isolation until the arrival of Captain James Cook in 1778.[15]

Regular European visits began in 1786 with the arrival of two English and two French ships.[16] The activities and possessions of the foreigners, and the effectiveness of Western ships and firearms compared to the more primitive Hawaiian canoes and weapons,[17] had a profound effect upon the Hawaiian people.[18] The same time period also saw the arrival of whalers and missionaries, each bringing its own disruptive influence.[19]

The land tenure system was not immune from the wave of change, and controversies over this system were the genesis of considerable tension between foreigners and native Hawaiians.[20] The traditional feudal system of land control did not allow private ownership,[21] and by the 1830s, disputes over

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[15] *Id.* at 3, 12-13.

[16] *Id.* at 20. Ships engaged in the growing fur trade in the American northwest and the increasing trade between the Americas and Asia found the Hawaiian islands to be a convenient port of call and wintering place. *Id.* at 20-21. Contact with foreigners increased as American, English and Russian traders came to appreciate the resources and convenient location of Hawai'i. *Id.* at 55.

[17] *Id.* at 4. The manufacture of weapons and tools was limited by the lack of metals in the islands. *Id.*

[18] FUCHS, *supra* note 13, at 8-9; *see also* MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, A CALL FOR HAWAIIAN SOVEREIGNTY 3 (Centennial Commemoration ed. 1993).

[19] KUYKENDALL, *supra* note 13, at 70. The American Board of Commissioners for Foreign Missions sent the first missionaries from New England to the Islands in 1819; they arrived in 1820. *Id.* at 102. The first whaling ships arrived in 1819; by 1822 there were reported to be at least 60 ships making periodic visits each year. *Id.* at 93. These visitors introduced new diseases to which the native population had no natural resistance. The effects of war and famine, furthered by venereal disease, pneumonia, and what was likely a cholera epidemic in 1805, cut in half the native population between Cook's arrival and the arrival of the first missionaries. FUCHS, *supra* note 13, at 13.

[20] FUCHS, *supra* note 13, at 16; *see also* DUDLEY, *supra* note 18, at 5-7.

[21] *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715, 718-19 (1864). The court stated:

> When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his own hands to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again after (often) passing through the hands of four, five or six persons from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them, the proportions of which rights were not clearly defined, although universally acknowledged. . . . The same rights which the King possessed over the superior landlords and all under them, the several grades of landlords possessed over their inferiors, so that there was a joint ownership of the land, the King really owning the allodium, and the person in whose hands he placed the land, holding it in trust.

foreigners' use and transfer of land were common.[22] Concerns over land rights increased further as the economic potential of Hawaiian land, which was suitable for sugar cane, became apparent in the mid-1830s.[23] In 1841 King Kamehameha III issued a proclamation allowing foreigners to lease land, but foreigners wanted the certainty of fee-simple title.[24] Pressure for private ownership of land culminated in a restructuring of the land tenure system to allow for private ownership of land by the King's subjects.[25] This restructuring, called the Great Mahele,[26] began in 1847.[27] In the Mahele, the King relinquished ownership of all lands except those retained by the kingdom as crown lands, and permitted the chiefs to apply at the newly-created Board of Land Commissioners for fee-simple title to the lands they had held in fief.[28] Although the Mahele did not provide for ownership by foreigners, a law passed soon after, in 1850, gave alien residents the right to fee-simple ownership of land.[29]

Concurrent with changes in the land system was a new demand for agricultural products brought about by the rapid settlement of Oregon and

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*Id.* (quoting "Principles adopted by the Board of Commissioners to quiet Land Titles" (vol. 2 Statute Laws, page 81)); *see also* KUYKENDALL, *supra* note 13, at 52. When King Kamehameha I completed his conquest of the neighboring kingdoms and unified the islands in 1810, he continued an essentially feudal system of land control. *Id.* at 44-51; *see also* FUCHS, *supra* note 13, at 6-7.

[22] KUYKENDALL, *supra* note 13, at 138.

[23] *Id.* at 180-81. Foreigners originally were permitted to use land under land grants awarded in return for services, FUCHS, *supra* note 13, at 14, but the chiefs were reluctant to grant land for agricultural purposes. KUYKENDALL, *supra* note 13, at 174. Moreover, grantees, like commoners, could be dispossessed of the land at any time. *Id.* at 271.

[24] FUCHS, *supra* note 13, at 14-15; KUYKENDALL, *supra* note 13, at 275-76.

[25] KUYKENDALL, *supra* note 13, at 277-78. Concern over the condition of commoners, who paid often oppressive feudal dues in kind and in service and could be dispossessed of their lands and homes at any time, was cited as another reason for the restructuring. *Id.* at 269-70 (quoting in part Letter from William Richards to Lieutenant Charles Wilkes of March 15, 1841); *see also* DUDLEY, *supra* note 18, at 7.

[26] FUCHS, *supra* note 13, at 14 ("Probably no single event so drastically changed the social system of Hawai'i as the Great Mahele . . . ."); *see also* DUDLEY, *supra* note 18, at 13 ("Despite the good intentions of the king, the Mahele was one of the greatest disasters ever suffered by the Hawaiian people.").

[27] *In re* Estate of His Majesty Kamehameha, 2 Haw. 715, 719 (1864) ("It was the imperative necessity of separating and defining the rights of the several parties interested in the lands, which led to the institution of the Board of Land Commissioners, and to the division made by the King himself, with the assistance of his Privy Council.") *Id.* at 719; *see also* KUYKENDALL, *supra* note 13, at 287.

[28] GAVAN DAWS, SHOAL OF TIME 126 (1968). With the Mahele, commoners had the right to purchase lots in fee simple. *Id.*

[29] DUDLEY, *supra* note 18, at 14; KUYKENDALL, *supra* note 13, at 297.

California,[30] stimulating an interest in sugar production.[31] The increase in sugar production in turn created a demand for laborers, and between 1852 and 1930, more than 400,000 men, women and children were brought from many parts of the globe, particularly China, Japan, Portugal and the Philippines,[32] to work in the cane fields and mills.[33] Concurrently, new diseases devastated the already declining native Hawaiian population.[34]

Tensions between the native Hawaiians and foreigners, defined along racial lines, developed into a struggle for power which erupted in disputes over voting qualifications, the growing government debt and political appointments.[35] In 1887, outraged over what they perceived as a wasteful and corrupt monarchy,[36] a group of Americans and Europeans[37] imposed upon the King a revised constitution under threat of revolution.[38] This constitution stripped the King of the greater part of his power.[39]

In 1893, the newly enthroned Queen Liliuokalani attempted to establish a new constitution to restore power to the monarchy.[40] In response, a group calling itself the Committee of Safety[41] resolved to form a provisional government.[42] At the request of this group, the United States Minister ordered

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[30] KUYKENDALL, *supra* note 13, at 319.

[31] *Id.* at 323.

[32] FUCHS, *supra* note 13, at 25; DAWS, *supra* note 28, at 305.

[33] FUCHS, *supra* note 13, at 24.

[34] KUYKENDALL, *supra* note 13, at 386; *see also* DAWS, *supra* note 28, at 168. Hawaiians were particularly vulnerable in the smallpox epidemic of 1853, KUYKENDALL, *supra* note 13, at 356, and during the same period, hundreds of Hawaiians contracted leprosy. DAWS, *supra* note 28, at 209-10. The native population, estimated at 250,000 in 1800, plummeted to less than 60,000 by the early 1870s. *Id.* at 168. Other estimates are similar; Fuchs gives an estimate of 300,000 in 1778, reduced to 57,000 in 1866. FUCHS, *supra* note 13, at 13.

[35] FUCHS, *supra* note 13, at 25-28.

[36] *Id.* at 28.

[37] DAWS, *supra* note 28, at 244. This group called itself the Hawaiian League. *Id.* at 243.

[38] DUDLEY, *supra* note 18, at 18; DAWS, *supra* note 28, at 245-47. After a scandal arose over a rice-planter's payment of $71,000 to the King for a license which the King then did not issue, the Hawaiian League held a public meeting and threatened revolution unless their demands were met. The King acceded to the demands of the protesters. *Id.* at 245-47. The constitution has thus been dubbed the "Bayonet Constitution." DUDLEY, *supra* note 18, at 18.

[39] FUCHS, *supra* note 13, at 29; DAWS, *supra* note 28, at 251-53. The new constitution gave the elected House of Nobles the power to override, by two-thirds majority, the King's veto. The constitution also allowed non-subjects to vote in elections for the House of Nobles, and added a property ownership requirement. FUCHS, *supra* note 13, at 29.

[40] DUDLEY, *supra* note 18, at 21; DAWS, *supra* note 28, at 271.

[41] DAWS, *supra* note 28, at 272. Most members of this group were also members of the "Annexation Club"–a group of men who sought Hawai'i's annexation to the United States. *Id.* at 266, 272.

[42] *Id.* at 264-72.

a contingent of the U.S. military troops ashore,[43] and the Queen surrendered under protest.[44] The provisional government seized power and actively sought annexation.[45]

In 1898, the newly elected U.S. President McKinley signed a joint resolution annexing Hawai'i to the United States.[46] Under this Annexation Act, the Republic of Hawai'i was deemed to have ceded all crown and public lands to the United States.[47] The Act required that revenues from public lands be used "solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[48] With annexation, Hawai'i had largely been "remade in the image of the West,"[49] to the dismay of native Hawaiians.[50]

### *B. Hawaiian Programs*

In 1921, recognizing that the population of native Hawaiians was diminishing and that many were in poverty,[51] Congress passed the Hawaiian Homes Commission Act ("HHCA"), which provided more than 200,000 acres of ceded public land for the rehabilitation of native Hawaiian people.[52] With admission to the Union in 1959, the new State of Hawai'i adopted the HHCA as part of its own constitution. The United States granted the State of Hawai'i the approximately 200,000 acres set aside under the HHCA, plus another 1.2 million acres of ceded land for, among other purposes, the "betterment of the conditions of native Hawaiians, as defined in the [HHCA] . . . ."[53] More recent

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[43] *Id.* at 274.

[44] *Id.* at 276.

[45] *Id.* at 277. After a scathing report by the former chairman of the House Committee on Foreign Affairs, President Grover Cleveland wrote a message to Congress condemning the action and referring the matter to Congress' discretion. DUDLEY, *supra* note 18, at 22-46. The United States Senate investigated the overthrow, but ultimately took no action on it. *Id.* at 47.

[46] Act of July 7, 1898, 30 Stat. 750. This act was also known as the Newlands Resolution. *See* DUDLEY, *supra* note 18, at 63.

[47] Act of July 7, 1898, 30 Stat. 750.

[48] *Id.*

[49] FUCHS, *supra* note 13, at 36.

[50] DUDLEY, *supra* note 18, at 62-64.

[51] Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982) (citing the testimony of Ex-Secretary of the Interior Franklin L. Lane before the House Committee on the Territories, H.R. REP. NO. 839, 66th Cong., 2d Sess. 4 (1920)).

[52] Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921).

[53] Admission Act of March 18, 1959 § 5(f), Pub. L. No. 86-3, 73 Stat. 4. The Admission Act also provided for support of education, development of farm and home ownership, public improvements and land for public use. *Id.* The Department of Hawaiian Home Lands (DHHL) now administers the approximately 200,000 acres originally set aside under the HHCA. HAW. REV. STAT. § 26-17 (2000).

federal legislation benefiting native Hawaiians typically has been premised on explicit recognition of a "special relationship which exists between the United States and the Native Hawaiian people"[54] or a "trust responsibility for the betterment of the conditions of Native Hawaiians."[55]

Like Congress, the State of Hawai'i has enacted several programs, including those to promote health,[56] provide home loans,[57] provide training and technical assistance for small business development,[58] and to make grants to non-profit agencies,[59] to benefit native Hawaiians and Hawaiians. The Office of Hawaiian Affairs ("OHA") was established by state constitutional amendment in 1978 to administer these programs and to act as advocate for Hawaiians and native Hawaiians.[60] Specifically, OHA controls a 20 percent share of the income from the approximately 1.2 million acres set aside at the time Hawai'i was admitted as a state "for the betterment of the conditions of native Hawaiians,"[61] and administers other grants and donations for native Hawaiians and Hawaiians.[62]

The Hawai'i Constitution requires that the nine members of OHA's Board of Trustees be Hawaiian, and that the Board be "elected by qualified voters

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[54] Native Hawaiian Education Act, 20 U.S.C. § 7902(13), (14) (1995).

[55] Native Hawaiian Health Care Act, 42 U.S.C. § 11701(18) (1988).

[56] For example, OHA's Health and Human Services Division in 1999 fielded more than 285 calls for information and assistance. OHA participated in Wai'anae Diet, a joint effort to assist native Hawaiians to lose weight and lower blood cholesterol, and in the Moloka'i Heart Initiative, aimed at reducing high rates of cardiovascular disease among native Hawaiians. OFFICE OF HAWAIIAN AFFAIRS FISCAL ANNUAL REPORT 1999 16.

[57] OHA's Homestead Loan Program offers a three percent interest rate for twenty year terms. In fiscal year 1999, OHA's servicing agent for the loan program had made about $7 million in loan approvals and commitments. OFFICE OF HAWAIIAN AFFAIRS FISCAL ANNUAL REPORT 1999 17.

[58] OHA's Economic Development Division administers a federally-supported loan program and in fiscal year 1999 disbursed $450,000 in small business loans. The Division also provided training to more than a thousand individuals. OFFICE OF HAWAIIAN AFFAIRS FISCAL ANNUAL REPORT 1999 10.

[59] In fiscal year 1999, OHA approved more than $935,000 in grants to non-profit organizations offering educational opportunities or addressing such concerns as health care, housing or the preservation of Hawaiian culture, art and language. OFFICE OF HAWAIIAN AFFAIRS FISCAL ANNUAL REPORT 1999 15.

[60] HAW. REV. STAT. § 10-3 (1999).

[61] HAW. REV. STAT. § 10-13.5 (1999). For the fiscal year ending June 30, 1999, the 20 percent share of revenues from the public land trust equaled $15.1 million. OFFICE OF HAWAIIAN AFFAIRS, STATE OF HAWAII, FINANCIAL STATEMENTS FOR THE YEARS ENDED JUNE 30, 1999 AND 1998, SUPPLEMENTAL SCHEDULE FOR THE YEAR ENDED JUNE 30, 1999 AND INDEPENDENT AUDITOR'S REPORT 11 (1999). OHA's assets at that time totalled $363.8 million. *Id.* at 7.

[62] HAW. REV. STAT. § 10-3 (1999).

who are Hawaiians, as provided by law . . . ."[63] The term "Hawaiian" is statutorily defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawai'i."[64] Hawai'i law defines "native Hawaiian" as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian islands in 1778 and which peoples thereafter continued to reside in Hawaii."[65]

### *C. The Law on Racial Preferences*

Under U.S. law, any racial classification, regardless of its purpose, is presumed to be unconstitutional, and a court may uphold such a classification "only upon an extraordinary justification . . . such applies as well to a classification that is ostensibly neutral, but which is an obvious pretext for racial discrimination . . . ."[66] The U.S. Supreme Court established this rigorous standard in *Adarand Constructors, Inc. v. Pena*[67] and *City of Richmond v. J.A. Croson Co.*[68] These cases require that courts strictly scrutinize all racial classifications challenged on equal protection grounds, whether they appear in state or federal legislation and regardless of their purpose.[69]

After years of uncertainty over the level of judicial review required for remedial race-based legislation,[70] the Court in 1989 resolved the issue with

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[63] HAW. CONST. art. XII, § 5 (1999).

[64] HAW. REV. STAT. § 10-2 (1999).

[65] *Id.*

[66] 16B AM. JUR. 2D *Constitutional Law* § 848 (1998).

[67] 515 U.S. 200 (1995).

[68] 488 U.S. 469 (1989).

[69] *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 493.

[70] The decisions in *Adarand* and *Croson* came on the heels of a long line of inconsistent and internally controversial racial classification cases. These cases first upheld racial classifications, for example, to impose curfews only upon persons of Japanese ancestry, *Hirabayashi v. United States*, 320 U.S. 81 (1943), and to remove residents of Japanese ancestry from specific areas. Korematsu v. United States, 323 U.S. 214 (1944). Subsequently, and undoubtedly in response to increasing societal concern for race relations, the Court in some cases upheld the use of racial classifications, created in efforts to remedy past discrimination. *See, e.g.*, Sheet Metal Workers' Int'l Ass'n Local 28 v. EEOC, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987). It was in these latter cases involving minority set-asides and quotas and in which the goal was to hasten the end of racial discrimination that conflicts over the appropriate standard of review emerged. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Fullilove v. Klutznick, 448 U.S. 448 (1980); Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986). The

respect to state action in *Croson*.[71] There, the Court determined that strict scrutiny would apply to any racial classification: in order to justify race-based legislation in an equal protection challenge, a state actor must show a compelling governmental interest,[72] and that the legislation was narrowly tailored to further that interest.[73]

It was not until the *Adarand* decision in 1995 that the Court appeared conclusively to resolve the issue in the context of federal legislation as well, holding that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[74] The Court reaffirmed the two-pronged test used in *Croson*,[75] and justified adoption of a single standard based on three propositions, namely judicial skepticism, in that any race-based classification is inherently suspect; judicial consistency, in that the standard of review should not depend upon the race of the person being burdened; and judicial congruence, in that the Fifth Amendment and Fourteenth Amendment analyses should be the same.[76] Based on these principles, the Court found that "any person, of whatever race, has the

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Supreme Court justices seemed to hold polar views on the subject, and failed consistently to reach a consensus, as evidenced by the Court's failure to produce majority opinions in *Bakke*, *Fullilove* and *Wygant*. In *Fullilove*, for example, Justice Stevens, urging the use of strict scrutiny, reasoned that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting). In contrast, Justice Marshall argued for the lesser standard of intermediate scrutiny, stating that any governmental race-based classification created to "remedy[] the present effects of past racial discrimination" should be upheld if it is substantially related to the achievement of an important governmental objective. *Id.* at 518-19 (Marshall, J., concurring).

[71] *Croson* involved a challenge to Richmond, Virginia's set-aside program, which required that contractors working for the City subcontract 30 percent of their work to minority contractors. The City argued that the program's purpose was to remedy the effects of past discrimination. *Croson*, 488 U.S. at 498.

[72] *Id.* at 498-506.

[73] *Id.* at 507-08. In the majority opinion, Justice O'Connor found that, regardless of a state actor's purpose for a racial classification, without the application of strict scrutiny, there was no way to determine which classifications are benign or remedial, and which are motivated by racism or racial politics. *Id.* at 493. In fact, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant the use of a highly suspect tool." *Id.* In *Croson*, by failing to cite specific findings to prove that a certain condition requiring remedy existed, the City had failed to show the requisite compelling governmental interest. *Id.* at 498-99. Further, the City had not shown that its program was narrowly tailored to remedy the effects of past discrimination, as it had neither considered race-neutral remedies to any statistical disparity, nor had it carefully crafted the program to meet a specific goal. *Id.* at 507-08.

[74] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[75] *Id.* at 235.

[76] *Id.* at 223-24.

right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[77]

Both *Adarand* and *Croson* make it clear that in order to use a race-based classification, Congress or a state actor must have a strong evidentiary basis to support a conclusion that a race-based remedy to racial discrimination is necessary, thus serving a compelling governmental interest.[78] Further, the narrow tailoring requirement requires consideration of alternative race-neutral means, such as those based on economics, along with careful crafting to ensure the program is no broader than necessary to meet purposeful goals.[79]

### *D. The Exception for Indian Tribes*

Although *Adarand* appeared conclusively to require that all governmental racial classifications be subjected to strict scrutiny, the case did not specifically address the unique situation of Indian tribes, for whom the Supreme Court had constructed a different analysis in the 1974 case of *Morton v. Mancari*.[80] In *Mancari*, the Court announced a relaxed standard of review–rational basis–for preferential treatment of members of Indian tribes if a purpose of the preference is to further the government's trust obligation to the Indian tribes.[81] The reasoning is that because such preferences are not racial, but political in nature, they are "directed to participation by the governed in the governing agency."[82] Further, such preferences are political if they are not in favor of Indians "as a discrete racial group, but, rather, as members of quasi-sovereign

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[77] *Id.* at 224.

[78] *Adarand*, 515 U.S. at 229; *Croson*, 488 U.S. at 500-01, 510. "But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." *Croson*, 488 U.S. at 500.

[79] *See, e.g.*, *Croson*, 488 U.S. at 507-10.

[80] 417 U.S. 535 (1974). In *Mancari*, the Court determined that an employment preference for members of Indian tribes in the Bureau of Indian Affairs did not constitute invidious racial discrimination. *Id.* at 555. At issue was Indian Reorganization Act § 12, 25 U.S.C. § 472 (1934), which established an Indian employment preference within the Bureau of Indian Affairs. *Id.* at 537.

[81] *Mancari*, 417 U.S. at 555. The Court deferred to Congress' power to regulate Commerce with the Indian tribes, grounded in the United States Constitution, *id.* at 552 (citing U.S. CONST. art. I, § 8, cl. 3), and the President's power, with the advice and consent of the Senate, to make treaties, *id.* (interpreting U.S. CONST. art. II, § 2, cl. 2). The Court observed that through these powers, and in performance of its obligations under the treaties, Congress established programs to assist Indians, and later, to return to them a greater control over their destinies, such as through the employment preference at issue. *Id.* at 552-53.

[82] *Id.* at 554.

tribal entities . . . ."[83] Consequently, in *Mancari*, the Court determined that because the preference at issue was not based on race, it warranted application of the rational basis standard of review.[84] The Court held that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process."[85]

## III. RICE V. CAYETANO

### *A. Procedural and Factual Background*

In 1996, Harold Rice, a non-Hawaiian citizen of Hawai'i, filed an application to vote in an election of OHA trustees. The application was ultimately denied[86] because Rice's lineage did not qualify him as "Hawaiian" under the statutory definition,[87] prompting Rice to challenge the constitutionality of the voting scheme in federal district court.[88] Rice's suit specifically alleged that the laws restricting OHA voter eligibility to Hawaiians violated both the Fourteenth and Fifteenth Amendments to the United States Constitution.[89]

In granting summary judgment for the State, the district court determined that the voting preference for Hawaiians was reviewable under the rational basis, rather than the strict scrutiny, standard.[90] Under *Mancari*, the rational basis standard was applicable because of a special trust obligation "owed and directed by Congress and the State of Hawai'i" to native Hawaiians.[91] In the court's view, "it is the unique guardian-ward relationship that is paramount, not formal recognition . . . ."[92] Using the rational basis test, the court found the

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[83] *Id.* The Court noted that the employment preference applied only to members of federally-recognized tribes. *Id.* at 554 n.24.

[84] *Id.* at 554.

[85] *Id.* at 555.

[86] Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1997).

[87] *See supra* note 4. Rice traces his lineage to residents of Hawai'i prior to annexation, but is Caucasian. *Rice*, 963 F. Supp. at 1548.

[88] The defendant in the suit was Hawai'i Governor Benjamin Cayetano. *Rice*, 963 F. Supp. at 1548.

[89] *Id.* at 1548-49.

[90] *Id.* at 1554.

[91] *Id.*

[92] *Id.*

voting scheme did not violate the Equal Protection Clause, because it was rationally related to the State's responsibility under the Admission Act.[93]

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[94] The court found the HHCA and Congress' 1993 Joint Resolution,[95] which offers a formal apology for the United States' role in the overthrow of the Hawaiian Kingdom, as establishing a trust relationship.[96] While the court acknowledged differences between the case at hand and *Mancari*, the court interpreted *Mancari* as sufficient justification for finding no constitutional violation of either the Fourteenth or Fifteenth Amendments.[97] Based on the assumption that OHA's underlying trusts and related programs–which Mr. Rice had not challenged–were lawful, the court found the voting restriction to be legal or political in nature,[98] notwithstanding the finding of a clear racial classification on the face of Hawai'i's Constitution and the OHA voting statute.[99] Native Hawaiians and Hawaiians were the sole beneficiaries of the trust embodied in OHA assets, and were consequently the only group to whom the fiduciary duties of the trustees ran; it was then permissible that only they should be the ones to elect the trustees.[100] Further, the court reasoned that the elected trustees had no general governmental powers and their activities affected only a limited group; the elections were therefore analogous to special purpose elections for water districts, in which only affected landowners are eligible to vote.[101]

The United States Supreme Court granted certiorari.[102]

### *B. The Majority Opinion*

In a seven to two decision,[103] the Supreme Court reversed the lower court's decision, holding that the OHA voting scheme violated the Fifteenth Amendment. The court focused on the text of the Fifteenth Amendment prohibition of the States' denial of voting rights, and found that the Hawai'i

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[93] *Id.* at 1555.

[94] Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998).

[95] Joint Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution").

[96] *Rice*, 146 F.3d at 1080-81.

[97] *Id.* at 1081-82.

[98] *Id.* at 1079.

[99] *Id.* at 1079, 1081, 1082.

[100] *Id.* at 1079.

[101] *Id.* at 1080 (citing Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973); Ball v. James, 451 U.S. 355 (1981)).

[102] 526 U.S. 1016 (1999).

[103] Justice Kennedy's majority opinion was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia and Thomas. Rice v. Cayetano, 528 U.S. 495, 498 (2000). Justice Breyer filed a concurring opinion, which Justice Souter joined. *Id.* at 524.

Constitution had created a race-based voting scheme.[104] The Court analyzed the OHA voting scheme to determine if it met the definition of racial discrimination; that is, if it "singles out identifiable classes of persons solely because of their ancestry or ethnic characteristics."[105] The legislative history of the amendment to Hawai'i's constitution revealed that an original proposed definition of "Hawaiian" was "any descendant of the races inhabiting the Hawaiian Islands, previous to 1778."[106] More revealing was that, upon changing the definition to substitute "peoples" for "races," the drafters stressed explicitly that the changes were cosmetic, and that "'peoples' does mean 'races.'"[107] Further, the Hawai'i Revised Statutes retains the word "race" in its definition of "Native Hawaiian":

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . . provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.[108]

Thus, the statue itself demonstrates that "descendants of aboriginal peoples" means "descendants of the races."[109] The Court also rejected the State's argument that the classification was simply limited to people, regardless of race, whose ancestors were in Hawai'i at a point in time; the fact that part of a racial group may be excluded does not negate a racial classification.[110]

The Court also emphasized that the use of ancestry, rather than the explicit use of race, as a voting qualification did not render the statute race neutral; ancestry had been used unconstitutionally as a proxy for race in historic voting classifications.[111] The Court compared the OHA classification with those in prior voting discrimination cases, and declared the OHA voting classification "neither subtle nor indirect," noting that "[i]t is specific in granting the vote to persons of defined ancestry and to no others."[112] The Court concluded that likewise, in this case, ancestry was a proxy for race.[113] The inquiry into

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[104] *Id.* at 515-17.

[105] *Id.* at 515 (quoting in part Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987)) (internal quotation marks and ellipses omitted).

[106] *Id.*

[107] *Id.* at 516 (citing HAW. S. J., STANDING COMM. REP. NO. 784, at 1350, 1353-54; CONF. COMM. REP. NO. 77, at 998-99). The constitutional amendment ultimately did not include definitions. *Id.*

[108] *Id.* (quoting HAW. REV. STAT. § 10-2).

[109] *Id.* (ellipses omitted).

[110] *Id.* at 516-17.

[111] *Id.* at 512 (citing Guinn v. United States, 238 U.S. 347 (1915)).

[112] *Id.* at 514.

[113] *Id.*

ancestry necessarily goes to the heart of concerns over racial classifications: the basis for forbidding race as a voting classification is that it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[114] More fundamentally, the State's voting scheme was contrary to the purpose of the Fifteenth Amendment in that, at its essence was the "demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[115] The Court elaborated:

> Race cannot qualify some and disqualify others from full participation in our democracy. All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.... To accept the proposition advanced by the State would give rise to the same indignities, and the same resulting tensions and animosities, the Amendment was designed to eliminate.[116]

The Court rejected the argument that the voting scheme was constitutional by analogy to those permitted in special districts, such as water or irrigation districts, in which the "one person, one vote" rule were held inapplicable. Because those cases did not invoke the Fifteenth Amendment, but the Fourteenth Amendment's one-person, one-vote requirement, they were inapposite.[117] The Court also discarded the theory that the voting scheme, based on status rather than race, "does no more than ensure an alignment of interests between the fiduciaries and beneficiaries of a trust."[118] The Court found the State's argument terminally flawed by a misalignment of interests. For example, although many of the programs administered by OHA benefited only native Hawaiians, the voting scheme allowed both Hawaiians and native Hawaiians to vote in OHA elections.[119]

Similarly, the Court rejected the argument that the State could enact a racial voting scheme on the theory that Hawaiians were eligible for a voting preference such as those authorized for Indian tribes.[120] The Court distinguished cases in which groups of tribal Indians had been singled out in legislation and pointed out that in those cases, and particularly in *Morton v.*

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[114] *Id.* at 517.

[115] *Id.* at 523.

[116] *Id.* at 523-24.

[117] *Id.* at 522 ("Our special purpose district cases have not suggested that compliance with the one-person one-vote rule of the Fourteenth Amendment somehow excuses compliance with the Fifteenth Amendment." *Id.* Rather, a state's authority over boundaries of its political subdivisions "is met and overcome by the Fifteenth Amendment." *Id.* (quoting Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960))).

[118] *Id.* at 523.

[119] *Id.*

[120] *Id.* at 518-19.

*Mancari*,[121] legislation relating to Indian tribes was based not on the race of tribal members, but on the members' political affiliation with the tribe; such distinctions were related to tribal self-governance.[122] The Court, however, was unwilling to make the leap from *Mancari* to the premise that Congress can authorize a state to restrict voting for that state's public officials to a class of tribal Indians exclusively.[123] Although OHA has a "unique position under state law," it is nevertheless an arm of the State, and subject to Constitutional prohibitions against racial voting schemes.[124]

As to treatment of the Fourteenth Amendment implications, the Court only noted that the State's argument would require a series of presumptions: that Congress had conferred upon Hawaiians a status like that of Indian tribes; that Congress has the ability to delegate to the state the broad authority to preserve that status; and that it has, in fact, done so.[125] The Court noted that the presumptions "would raise questions of considerable moment and difficulty,"[126] and, with an almost audible sigh of relief,[127] quickly dismissed full consideration of those presumptions.

### *C. The Concurring Opinion*

In a concurring opinion,[128] Justice Breyer supported the outcome but suggested that it was better supported by explicitly rejecting the State's assertion that the voting scheme was justified by a trust relationship with Hawaiians analogous to Congress' relationship with Indian tribes. In Breyer's view, the alleged trust relationship failed to support an otherwise patent racial preference "because the record makes clear that (1) there is no 'trust' for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe."[129] With respect to the first point, Breyer

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[121] 417 U.S. 535 (1974). *See* discussion *supra* section II.D.

[122] *Rice*, 528 U.S. at 518-20. The Court noted that it had recognized in a number of cases that certain Indian tribes had retained "quasi-sovereign authority" even after cession of lands to the United States, and that this retained authority was related to self-governance. *Id.* at 518.

[123] *Id.* at 520.

[124] *Id.* at 521. Legislative history indicates that although OHA is intended to be "independent from the executive branch and all other branches of government[,] . . . it will assume the status of a state agency." *Id.* (quoting 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, STANDING COMM. REP. NO. 59, at 645.)

[125] *Rice*, 528 U.S. at 518.

[126] *Id.* The Court specifically recognized the depth of the dispute over whether Congress has the same relationship with Hawaiians as has been established with Indian tribes. *Id.* at 518-19.

[127] In regard to the Fourteenth Amendment issues, the Court stated, "We can stay far off that difficult terrain, however." *Id.* at 519.

[128] *Id.* at 524. Justice Souter joined Justice Breyer's concurring opinion. *Id.*

[129] *Id.* at 525 (Breyer, J., concurring).

emphasized that the 1.2 million acres of land granted in the Admission Act was for the benefit of all the people of Hawai'i, native and non-native alike.[130] Further, OHA funding comes not only from income from the 1.2 million acres of public land, but also from legislative appropriations and federal and other grants, all of which are authorized by ordinary state statutes.[131] Therefore, there could be no trust solely for certain identified citizens of Hawai'i.

Even assuming the existence of elements of a trust relationship, Breyer argued that Hawai'i law did not define the Hawaiian electorate in terms sufficient to create a tribal status to justify preference for those meeting the definition. By including the larger group of "Hawaiians," the OHA statute encompasses not only the 80,000 "native Hawaiians," but some 130,000 "Hawaiians" as well, theoretically including those with less than one five-hundredth native blood quantum.[132] This definition contrasted with the traditionally strict blood quantum requirements of native American tribes.[133] Moreover, in contrast to the self-imposed requirements for native American tribal membership, in the case of the Hawaiians, inclusion is the result of a state-created definition, and one far too broad to be reasonable.[134] Breyer concluded that the analogies drawn by the State were therefore far too tenuous to support the state's argument.[135]

### *D. Justice Stevens' Dissent*

In a dissenting opinion, Justice Stevens argued that a federally-recognized trust relationship between the state and native Hawaiians permitted the preferential voting scheme. As an initial matter, Stevens noted Congress' broad authority to establish trust relationships with native Americans.[136] In his view, these trust relationships with Indian tribes were grounded in the United States' course of dealing with the tribes, which left them economically

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[130] *Id.*

[131] *Id.*

[132] *Id.* at 526. In contrast to the definition of "native Hawaiian" which requires a fifty percent blood quantum, the definition of "Hawaiian" contains no blood quantum requirement, including anyone with at least one ancestor in Hawaiian 1778. *See supra* note 4. Justice Breyer noted that, assuming nine generations between 1778 and the present, this definition would theoretically include a person with less than one five-hundredth blood quantum. *Rice*, 528 U.S. at 526.

[133] *Rice*, 528 U.S. at 526.

[134] *Id.* at 527.

[135] *Id.*

[136] *Id.* at 529-30 (Stevens, J., dissenting). Justice Ginsberg joined Justice Stevens' dissenting opinion as to Part II, in which Justice Stevens argued that there exists a federal trust relationship with native Hawaiians. *Id.* at 527.

dependent and politically weak.[137] This condition gave rise to Congress' responsibility, and the concomitant power, to afford them "special care and protection."[138] As preferences for Indian tribes are based on this trust relationship alone, they are unrelated to the race of tribal members.[139] Further, the Court historically recognizes and defers to Congress' duty and its corresponding broad power to carry out trust obligations to Indian tribes, exercised in the creation of myriad federal programs to benefit them.[140]

Stevens then found an analogous historic trust relationship between the United States and the Hawaiian people, evidenced by "not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized 'guardian-ward' relationship" with the United States.[141] Further confirming a trust relationship were the Hawaiian Homes Commission Act, which set aside over 200,000 acres for use by native Hawaiians alone, the Admission Act, which conveyed 1.2 million acres to the State in part for the benefit of native Hawaiians, and the 1993 Joint Resolution, which apologized for the United States' actions in the overthrow of the monarchy.[142] In addition, Stevens noted that Congress has passed more than 150 laws benefiting Native Americans, specifically including native Hawaiians in that class.[143]

Stevens' position was premised on the contention that the OHA voting scheme was identical to programs benefiting Indian tribes which were upheld under Equal Protection challenges. Dismissing as irrelevant concern over whether Hawaiians could be considered a "tribe," Stevens emphasized that it was the trust relationship itself, rather than tribal status, that permitted special treatment of Indians in *Mancari* and its progeny.[144] Further, Stevens argued that the Federal Government has not limited special treatment of Indians only to members of Indian tribes.[145] Thus, Stevens concluded that in the context of such a trust relationship, *Mancari* requires identification of only a rational relationship between the preferential legislation and Congress' obligation.[146] In Stevens' view, the fact that the voting scheme was a creation of the State,

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[137] *Id.* at 530.

[138] *Id.* (citing in part United States v. Sandoval, 231 U.S. 28, 45 (1913); United States v. Kagama, 118 U.S. 375, 384-85 (1886) (internal quotation marks omitted)).

[139] *Id.* at 531.

[140] *Id.* at 529-32.

[141] *Id.* at 534. For a critical view of the Court majority's treatment of indigenous Hawaiian history, *see* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History and Social Justice*, 47 UCLA L. REV. 1747, 1772-77 (2000).

[142] *Rice*, 528 U.S. at 532-33 (Stevens, J., dissenting).

[143] *Id.* at 533.

[144] *Id.* at 535-37.

[145] *Id.* at 535 (construing United States v. John, 437 U.S. 634 (1978) and Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977)).

[146] *Id.* at 531-32.

not of the Federal Government, was also irrelevant. The State's establishment of OHA was permissible pursuant to federal obligations, based on the Court's recognition that federal power to carry out trust relationships with Indian tribes can be delegated to the states.[147] Specifically, in *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*,[148] the Court determined that if a state enacts a law affecting Indian tribes in response to a federal measure, the state law need only bear a rational relationship to the state's articulated purpose to pass constitutional muster.[149] The goal in the OHA voting scheme was to further Congress' own purpose in passing the HHCA, the provisions of which Congress compulsorily passed the burden of enforcing to the state via the Admission Act.[150] Since a goal of the Admission Act was to "better[] . . . the conditions of native Hawaiians,"[151] and because finding the voting scheme furthered that goal by promoting self-government, Stevens concluded the statute rationally furthered the state's articulated purpose.[152]

Stevens then examined the OHA voting requirement under the Fifteenth Amendment, concluding that the voter qualifications were based on ancestry and current residence, not on race, so "the terms of the Amendment itself do not here apply."[153] For example, the ability to trace a person's ancestry to a particular point in time might reveal no information related to that person's race.[154] Moreover, although ancestry can be a proxy for race, it is not always a proxy for race.[155] To illustrate, Stevens contrasted *Guinn v. United States*,[156] in which those whose ancestors were eligible to vote prior to the enactment of the Fifteenth Amendment were exempted from a literacy requirement:[157] "Cases such as these that 'strike down these voting systems . . . designed to exclude one racial class (at least) from voting,' have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people."[158]

Rather than being based on a demeaning classification likely to generate prejudice and hostility, Stevens argued, the OHA voting scheme was based on the premise that those eligible to vote in OHA elections have a "claim to

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[147] *Id.* at 536-37.

[148] 439 U.S. 463 (1979).

[149] *Rice*, 528 U.S. at 537 (Stevens, J., dissenting) (citing *Yakima Indian Nation*, 439 U.S. at 500).

[150] *Id.*

[151] *Id.* (quoting Admission Act, Pub. L. No. 86-3, § 5, 73 Stat. 4, 6 (1959)).

[152] *Id.*

[153] *Id.* at 539.

[154] *Id.*

[155] *Id.* at 539-40.

[156] 238 U.S. 347 (1915).

[157] *Rice*, 528 U.S. at 540 (Stevens, J., dissenting) (construing *Guinn*, 238 U.S. 347).

[158] *Id.* (citation omitted) (quoting in part the majority opinion, 528 U.S. at 513-14).

uncertainty over numerous programs directly benefiting Hawaiians and native Hawaiians.[169] Specifically, in grounding its decision solely on the Fifteenth Amendment, and thus avoiding the question of whether a trust relationship exists between native Hawaiians and the federal or state government, the Court left preferential laws, like those establishing the HHCA and the underlying OHA programs in general, vulnerable to equal protection challenges. Indeed, the Court's failure to acknowledge a trust relationship increases the likelihood that courts in the future will subject programs designed to benefit Hawaiians to strict scrutiny review.

The trust relationship question is critical because it appears to determine whether a classification is political rather than racial, which in turn determines the applicable standard of review for race-based preferences. Should a trust relationship be found, and should Hawaiians be found to constitute a discrete political entity, a court could apply rational basis review under *Mancari*.[170] Conversely, should a court find that no trust relationship exists, or that the State of Hawai'i has no authority to carry out federal trust responsibilities, *Mancari* will be irrelevant, as *Mancari* applies only to "special treatment . . . tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ."[171]

The Court has treated legislation involving such trust relationships with Indian tribes differently than other race-based legislation out of a traditional deference to Congress' power, based in the United States Constitution, to carry out its trust responsibilities[172] and to establish treaties[173] with Indian tribes. *Rice* left unanswered not only whether Congress' historic relationship with native Hawaiians constitutes a trust but, more fundamentally, whether Congress has the authority to establish such a trust relationship with entities other than Indian tribes.[174] The implication is that, absent Congress' Constitutional authority to establish such a relationship, the reduced level of

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[169] *See supra* notes 8-11.

[170] The suggestion has been made that the "rational basis" standard for Indian tribes under *Mancari* may no longer be good law after *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 n.44 (1996) (noting that "[i]t is possible, especially in light of [the *Adarand* line of cases] that, if the issue arises again, the Court will conclude that even political classifications based on tribal membership are subject to strict scrutiny.").

[171] Morton v. Mancari, 417 U.S. 535, 555 (1974).

[172] United States v. Antelope, 430 U.S. 641, 645 (1977) ("[C]lassifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.").

[173] McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 n.7 (1973) (citing U.S. CONST. art. I, § 8, cl. 3 and art. II, §2, cl. 2).

[174] Rice v. Cayetano, 528 U.S. at 495, 518 (2000).

scrutiny afforded in *Mancari* and its progeny cannot logically apply. The issue is further complicated by the fact that it was the State, not Congress, that claimed this trust relationship in *Rice*. It is uncertain whether, even if a trust relationship exists, Congress delegated to the State the authority to carry out any obligations under that trust.[175]

Also of arguable importance is whether native Hawaiians are sufficiently similar to an Indian tribe to recognize the former as a distinct polity, allowing preferential treatment of identifiable members as a political rather than a racial preference.[176] The special relationship recognized in such cases as *Mancari* is based on the existence of a "separate people possessing the power of regulating their internal and social relations."[177] Likewise, *Mancari* might be deemed applicable only if Hawaiians constitute a distinct polity, since the purpose of the *Mancari* holding was to defer, under rational basis review, to preferences "reasonable and rationally designed to further Indian self-government."[178]

Arguably, the Court's identification of a clear racial classification in the OHA voting scheme,[179] albeit under a Fifteenth Amendment review, make the

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[175] The leading case involving the authority of individual states to interact with Indian tribes is *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Remarkably, that case is at least sufficiently ambiguous to accommodate polar arguments. In *Rice*, the state cited *Yakima Indian Nation* for the proposition that states may carry out delegated trust obligations of the federal government: "states may act in the realm of Indian affairs pursuant to delegated federal authority." Respondent's Brief at 35, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818) (citing *Yakima Indian Nation*, 439 U.S. at 501). The petitioner cited the same case to argue that states have no such authority unless it is expressly delegated: "The unique legal status of Indian tribes under federal law permits the federal government to enact legislation singling out tribal Indians. States do not enjoy this same unique relationship with Indians." Petitioner's Brief at 41, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818) (quoting *Yakima Indian Nation*, 439 U.S. at 551-52 (citations, internal quotation marks and ellipses omitted)).

[176] Also unresolved is whether, if a trust relationship does exist, it is with native Hawaiians or with the larger and more inclusive group of Hawaiians. The Court in *Rice* addressed the dissymmetry of the groups only in the context of differentiating those eligible to vote for OHA board members from those who benefit. *Rice*, 528 U.S. at 523.

[177] United States v. Mazurie, 419 U.S. 544, 557 (1975) (citations and internal quotation marks omitted). *Mazurie* also defines the trust relationship as existing with entities retaining elements of sovereignty over their members and their territory. *Id.*; *see also* Worcester v. Georgia, 6 Pet. 515, 556-57 (1832). The federal government's recognition of tribal status in accordance with 25 C.F.R. § 83.2 formalizes the existence of this special relationship. 25 C.F.R. § 83.2 provides that status as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes. . . . Acknowledgement shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.2 (2000).

[178] *Mancari*, 417 U.S. at 555.

[179] *Rice*, 528 U.S. at 515.

Court's failure to address the trust issue even more significant. This is because, absent the deference accorded to trust relationships under *Mancari*, an equal protection challenge would likely result in strict scrutiny review under *Croson*,[180] which established a strict scrutiny standard of review for all state-created racial classifications, and *Adarand*,[181] which extended this standard of review to federal legislation. *Adarand* would require the state to show that the legislation at issue is "narrowly tailored" to further a "compelling governmental interest."[182] *Croson* would require specific, detailed findings to establish the interest[183] and a conservative and tightly structured plan to address the interest, including consideration of race-neutral means.[184] Thus, the failure to find a trust relationship is likely to result in a high Constitutional bar.

Notably, the Court had a clear opportunity, as well as the power, to address the trust relationship question. Most significantly, the State's primary argument was based on the assumption of such a trust relationship, and on the Court's approval of preferences for Indian tribes under *Mancari*.[185] The assumption of a trust relationship formed the basis of both the District Court and the Ninth Circuit opinions below, and the numerous amicus briefs to the Supreme Court, likewise, argued the trust issue.[186] Prior to the decision, commentators on both sides of the issue seemed to anticipate a respectively favorable resolution based upon a finding of the existence or absence of a special trust relationship.[187] Had it elected to analyze fully the trust issue, the Court could have found support for a decision in either direction.[188]

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[180] City of Richmond v. Croson, 488 U.S. 469, 498 (1989). *See* discussion *supra* section II.C.

[181] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). *See* discussion *supra* section II.C.

[182] *Adarand*, 515 U.S. at 235.

[183] *Croson*, 488 U.S. at 497-98.

[184] *Id.* at 507.

[185] *Rice*, 528 U.S. at 518.

[186] *See, e.g.*, Brief of Amici Curiae Office of Hawaiian Affairs, et. al. at 15-17, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818); Brief of Amici Curiae Campaign for a Color-Blind America et. al. at 19-25, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

[187] *Compare* Yvonne Y. Lee & Eric K. Yamamoto, *Special Rights for Native Hawaiians*, S.F. EXAMINER, Oct. 6, 1999, at A19 (asserting that Native Hawaiian claims are based not on race, but loss of sovereignty, and urging respect for Hawaiians' "historically rooted struggle for self-determination") *with* Brett M. Kavanaugh, *Are Hawaiians Indians? The Justice Department Thinks So*, WALL ST. J., Sept. 27, 1999, at A35 (finding analogy of Hawaiians to Indian tribes "seriously flawed both as a legal and historical matter").

[188] Strong and thoughtful arguments were made by the parties and their amici in favor of recognizing both that a federal trust obligation to native Hawaiians exists, and that it has been delegated by Congress to the State of Hawai'i. The Respondent's Brief to the Court, for example, cites language in federal legislation referring to a "trust relationship" and a "special

Particularly in light of the polarity of these expectations, the majority's decision has fueled uncertainty and frustration over potentially affected

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relationship" between the United States and the native Hawaiian people, noting "these are not phrases that Congress lightly weaves into federal law." Respondent's Brief at 27, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818). Rejecting the assertion that Congress lacks authority to establish a trust relationship with Hawaiians, the State argued that Congress specifically has found that its legislative authority with respect to indigenous peoples "includes authority to legislate in matters affecting the native peoples of Alaska and Hawaii." *Id.* at 28 (citing 42 U.S.C. § 11701(17)). The State cited *Morton v. Mancari*, 417 U.S. 535 (1974) for the proposition that it is not tribal status itself that can render legislation political and not racial; rather, it is the "unique legal status" of Indian tribes, which is based on the assumption of a guardian-ward relationship. Respondent's Brief at 30. Thus, Congress has the authority, grounded in the Indian Commerce Clause of the Constitution, *Id.* at 28-29, to establish such relationships, and it has done so with respect to native Hawaiians. *Id.* at 31. Further, the State asserted that in passing the Admissions Act, Congress expressly delegated to the State the obligation to administer the federal trust. *Id.* at 35.

Compelling arguments also produce the opposite conclusion. In his Reply Brief, Rice emphasized that the State had conceded that the United States had not formally recognized Hawaiians as Indian tribes, and never established treaties with indigenous Hawaiians. Reply Brief for Petitioner at 3, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818). Rice further pointed out that as recognized in *Mancari*, power to legislate on behalf of Indian tribes stems only from the Indian Commerce Clause and the Treaty Clause, and that the context of the Indian Commerce Clause demonstrates the framers' intent that Congress have power to deal with sovereign entities only. Moreover, the Treaty Clause by necessity requires that treaties be made only with defined, quasi-sovereign bodies. *Id.* at 5-6. Contrasting *Mancari*, Rice argued that the classification in that case was found to be political based on the requirement that beneficiaries be members in a "distinct quasi-sovereign polity," *Id.* at 6, and that in the instant case, the State had identified no entity serving as a governing body for Hawaiians. Petitioner's Brief, at 40-41, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818). In an amicus brief, the Center for Equal Opportunity argued that without official recognition, "a group of people united by race or ethnicity is not entitled to the same treatment as an American Indian tribe," because 25 C.F.R. § 83.2 requires official recognition. Brief of Amici Curiae Center for Equal Opportunity, et. al. at 29, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818) (citing 25 C.F.R. § 83.2). Further, the barriers to recognition as an Indian tribe are significant; in order to meet the requirements for tribal status, the tribe must establish that it is a group of Indians of the same or similar race, that the group is united in a community, that it inhabits a reasonably defined area, and that it is under a single leadership which is a successor to the historic sovereign entity that exercised government functions. *See* Rice v. Cayetano, 963 F. Supp 1547, 1553 (1997) (citing Montoya v. United States, 180 U.S. 261, 266, 359-60 (1901); Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992)). Further, permitting racial classifications beyond those of the tribal context of *Mancari* would not necessarily be limited to Hawai'i–absent federal recognition, there would appear to be no logical stopping point to the use of racial classifications. Brief of Amici Curiae Campaign for a Color-Blind America at 20-24 (arguing that a "special trust relationship" exception is inherently unreliable, as similar circumstances exist for the Tejanos people of Texas, the Californios of California, and the Acadians of Louisiana).

programs, both public and private.[189] The Court's limited treatment of the trust question, and the finding that the statutory definitions of "Hawaiian" and "native Hawaiian" were racial–at least for purposes of the Fifteenth Amendment–likewise intensifies uncertainty over the continued viability of programs benefiting Hawaiians.[190] For instance, two new lawsuits, filed in U.S. District Court for the District of Hawai'i, directly challenge OHA and the state constitution, as well as Hawaiian programs, as violations of the Fourteenth Amendment to the U.S. Constitution. In October 2000, John Goemans, an attorney of record for Harold Rice, filed a complaint in federal district court,[191] challenging Article XII of the Hawai'i Constitution under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. [192] John Carroll, a Hawai'i resident and a candidate for the United States Senate in 2000,[193] initiated a similar Fourteenth Amendment challenge against various state officers. [194] Carroll alleged that by funding OHA in accordance with the statutory requirement that twenty percent of revenues from public lands go to OHA,[195] the officers wrongfully discriminate against him on the basis of racial ethnicity and suspect class.[196]

The assets involved are significant; in addition to state legislative appropriations for OHA totaling about $5.5 million in the last two years, proceeds from public lands reached $30.2 million in the same time period.[197]

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[189] *See, e.g.*, Starr Wedemeyer, *Fallout from* Rice vs. Cayetano *Case Having Impact on Hawai'i*, U-WIRE, Oct. 23, 2000; Manu Boyd, Rice *Fallout: Reactions, No Resolution*, KA WAI OLA, May 2000, at 1; Ikaika Hussey, *An Independent Hawaii*, U-WIRE, February 24, 2000.

[190] *Id.*; *see also After* Rice, *Ka Leo Kaiaulu*, KA WAI OLA, May 2000, at 2.

[191] Barrett v. Hawai'i, Civ. No. 00645 (D. Haw. Oct. 3, 2000); *see also* Yasmin Anwar, *Lawsuit Takes on Hawaiian Rights*, THE HONOLULU ADVERTISER, October 2, 2000, at A1.

[192] Article XII, adopted by Hawai'i constitutional convention in 1978, created OHA as a receptacle for public land revenues, brought the HHCA under the purview of the Hawai'i Constitution, and reaffirmed "all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes." HAW. CONST. art. XII §§ 1, 5, 7. The Hawai'i Supreme Court has interpreted this Article to allow Hawaiians the right to enter private property for gathering and religious purposes, Public Access Shoreline Hawai'i v. Hawai'i Planning Commission, 79 Hawai'i 425, 903 P.2d 1246 (1995), generating controversy among property owners and developers. *See, e.g.*, David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003 (2000); Paul M. Sullivan, *Customary Revolutions: the Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99 (1999).

[193] *See* Kevin Dayton, *Carroll Hoping, But Odds Formidable*, HONOLULU ADVERTISER, Oct. 26, 2000 at A14.

[194] Carroll v. Nakatani, Civ. No. 00641 (D. Haw. Oct. 2, 2000).

[195] HAW. REV. STAT. § 10-13.5 (1999).

[196] Plaintiff's Complaint at 8, *Carroll*, Civ. No. 00641.

[197] OFFICE OF HAWAIIAN AFFAIRS, STATE OF HAWAII, FINANCIAL STATEMENTS FOR THE YEARS ENDED JUNE 30, 1999 AND 1998, SUPPLEMENTAL SCHEDULE FOR THE YEAR ENDED JUNE 30, 1999 AND INDEPENDENT AUDITOR'S REPORT 11, 12 (1999).

Federal programs targeted to benefit native Hawaiians are similarly vulnerable,[198] and observers speculate that the decision will spark challenges to ancestry-based programs for American Indians as well.[199] Also potentially at risk is the tax-exempt status for charitable trusts giving preference to Hawaiians and native Hawaiians. One example is Kamehameha Schools Bishop Estate, a charitable trust established by the will of Bernice Pauhahi Bishop, the great-granddaughter of King Kamehameha I.[200] The schools operated by the trust give preference in admission to "Hawaiians of pure or part aboriginal blood."[201] Yet the Supreme Court has determined that the Fourteenth Amendment prohibits the granting of tax-exempt status to private schools using racially discriminatory admission policies.[202] Thus, the implications of the trust question extend far beyond the OHA voting scheme.

## V. CONCLUSION

The interest in *Rice*, and its outcome, have generated renewed discussion about governmental interface with indigenous Hawaiians as a distinct people. Further, the challenge to the OHA voting scheme appears to have spurred a potential resolution of the status of indigenous Hawaiians in the form of a bill introduced "[t]o express the policy of the United States regarding the United States' relationship with Native Hawaiians, to provide a process for the reorganization of a Native Hawaiian government and the recognition by the United States of the Native Hawaiian government, and for other purposes."[203] Among other things, the bill recognizes that the United States "has a special

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[198] *See* Benjamin, *supra* note 167, at 595-596. *But see* Robert Deichert, *The Fifteenth Amendment at a Crossroads*, 32 CONN. L. REV. 1075, 1076 (2000).

[199] *See* Harvey Berkman & Marcia Coyle, *Still No End to RICO Uncertainty Also, Strong Decision to End Hawaiian Race-Based Vote*, THE NAT'L L. J., March 6, 2000, at A11 (comment attributed to Stuart Benjamin, Indian law specialist at the University of San Diego School of Law).

[200] Brief of Amici Curiae Kamehameha Schools/Bishop Estate at 1-2, Rice v. Cayetano, 528 U.S. 495, 120 S. Ct. 1044 (2000) (No. 98-818).

[201] *Id.* at 3 (quoting WILL OF BERNICE PAUAHI BISHOP, *reprinted in* WILLS AND DEEDS OF TRUST 17-19).

[202] Bob Jones Univ. v. United States, 461 U.S. 574 (1983). For a more detailed examination of this issue, *see* John Tehranian, *A New Segregation? Race,* Rice v. Cayetano, *and the Constitutionality of Hawaiian-Only Education and the Kamehameha Schools*, 23 U. HAW. L. REV. 109.

[203] S. 81, 107th Cong. (2001). The bill was introduced to the United States Senate by Senator Akaka of Hawai'i on January 22, 2000. The bill replaces S. 2899, a similar bill that failed passage in the 106th Congress. The bill has sparked hot debate. *See* Roger Clegg, *No Bill is an Island*, NAT'L REV. ONLINE (Oct. 3, 2000) *available at* http://nationalreview.com/comment100300c.shtml.

trust relationship to promote the welfare of Native Hawaiians,"[204] and that the "relationship is political in nature.[205] The bill also creates a structure to allow the development of Native Hawaiian self-determination,[206] including the right of a newly-created governing body, alone, to define who is eligible to be "Native Hawaiian."[207] On October 3, 2000, the Department of the Interior and the Department of Justice released their final report on the reconciliation process between the federal government and native Hawaiians, recommending that "the Native Hawaiian people should have self-determination over their own affairs within the federal framework of Federal law, as do Native American tribes."[208]

Nevertheless, the unanswered concerns looming over the status of native Hawaiians are numerous and important, calling into question the fundamental limits of Congressional power under the Constitution, as well as years of legislation singling out groups for beneficial programs. Despite the magnitude of these issues, the Supreme Court's decision in *Rice* did little to settle them. The largest question remains whether the source of resolution will be Congress or the courts; as of February, 2001, it is uncertain whether the legislation will be passed, if at all, before resolution of the pending cases.

Becky T. Chestnut[209]

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[204] S. 81, § 3(a)(2).

[205] S. 81, § 3(a)(1).

[206] S. 81, § 7.

[207] S. 81, § 2(7)(B).

[208] U.S. DEP'T OF THE INTERIOR & U.S. DEP'T OF JUSTICE, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS (October 2000) *available at* http://www.doi.gov/nativehawiians. The report discusses the *Rice* decision and states that the decision "highlights the importance of legislation to provide a statutory basis for a government-to-government relationship with Native Hawaiians as an indigenous, aboriginal people." *Id.* at 49.

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# The 2000 Legislative Session: Important Legislation for Practicing Attorneys

## I. INTRODUCTION

The Hawai'i Legislature passed important legislation into law this past 2000 session. Approximately 2,500 bills were introduced during the session, and about 2,000 were carried over from the previous 1999 session.[1] The 2000 legislative session was active with 338 bills being passed by the Legislature[2] and only forty two of those bills vetoed by the Governor.[3] In addition to the Legislature's regular January to May session, the Legislature called two special sessions.[4]

Many laws passed that might affect practicing attorneys in Hawai'i. These include matters ranging from changes in criminal law to estate planning. This legislative update highlights several bills that were passed during the 2000 session. The legislation covers the following areas: criminal law, education, employment, environment, health, wills & trusts, and other miscellaneous areas of law. While these were not the only bills passed that will affect attorneys, these bills require priority because of their relation to the legal profession.

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[1] Carolyn Fujioka, *Lethargic Response to Lawmakers to Revitalize Business Climate, at* http://www.cochawaii.com/sbc.htm (last visited Oct. 12, 2000).

[2] *See* Hawai'i State Legislature, *Bills Enrolled to the Governor, at* http://www.capitol.hawaii.gov/sessioncurrent/lists/enrolled.htm (last visited Oct. 13, 2000).

[3] *See* Hawai'i State Legislature, *Vetoed bills, at* http://www.capitol.hawaii.gov/sessioncurrent/vetoed/ (last visited Oct. 13, 2000).

[4] *See* Crystal Kua, *Special session to address unequal Senate terms, medical privacy bill*, HONOLULU STAR BULLETIN, Aug. 4, 2000, *available at* http://starbulletin.com/2000/08/04/news/story8.html (last visited Nov. 12, 2000). One session was called to address the medical privacy bill by extending the effective date of the legislation to have an opportunity to correct the ambiguity that was causing problems in hospitals statewide. *Id.*; *see also* Debra Barayuga, *Nothing but praise for a 'regular guy'*, HONOLULU STAR BULLETIN, Apr. 26, 2000, *available at* http://starbulletin.com/2000/04/26/news/story2.html. Another session was called to confirm the new Supreme Court Justice. *Id.*

## II. LEGISLATION

### A. Criminal Law

#### 1. Police given authority to seize firearms from unqualified gun owners

The 2000 Legislature gave broad power to the police in regulating firearms held by unqualified individuals.[5] Act 127 amended Hawai'i Revised Statutes (hereinafter "HRS") Section 134 by authorizing police officers to "seize all firearms and ammunition" when unqualified gun owners refuse to voluntarily surrender[6] or dispose[7] of their firearms.[8] Upon the police chief's request, a health care provider is required to provide information regarding an applicant's mental health history,[9] which may be used to evaluate an applicant's fitness to purchase or own a firearm.[10] In addition, courts are required to notify the chief of police when a defendant has been ordered to surrender firearms and ammunition.[11]

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[5] *See* Act 127, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 251, 251. An unqualified individual is a fugitive, a person indicted for or convicted of a felony, violent crime or drug crime, a person under drug treatment pursuant to Hawai'i Revised Statutes ("HRS") § 712-1240, a person who has been acquitted on the ground of mental disease pursuant to HRS § 704-411, a person diagnosed with a significant psychiatric problem pursuant to HRS § 134-7, a person under twenty five who has committed a felony and was adjudicated by family court, a minor under the above conditions or a person who has been restrained, pursuant to court order, because of abusing another person. HAW. REV. STAT. § 134-7 (1999).

[6] Act 127, § 1, *reprinted in* 2000 Haw. Sess. Laws 251, 251. Disqualified gun owners are required to "surrender" their firearms and ammunition by giving their firearms to the chief of police. *Id.*

[7] *Id.* Gun owners may "dispose" of their firearms and ammunition by selling the firearms to a licensed gun dealer. *Id.*

[8] *Id.* Act 127 states:

> Any person disqualified from ownership, possession, or control of firearms and ammunition under section 134-7 shall voluntarily surrender all firearms and ammunition to the chief of police where the person resides or dispose of all firearms and ammunition. If any person fails to voluntarily surrender or dispose of all firearms and ammunition within thirty days from the date of disqualification, the chief of police may seize all firearms and ammunition.

*Id.*

[9] Act 127, § 1, *reprinted in* 2000 Haw. Sess. Laws 251, 251-52. The medical disclosures may only be obtained if the following requirements are met: "1) the information shall be used only for the purposes of evaluating the individual's fitness to acquire or own a firearm; and 2) the individual [must sign] a waiver permitting release of the health information for that purpose." *Id.*

[10] Act 127, § 1, *reprinted in* 2000 Haw. Sess. Laws 251, 251.

[11] Act 127, § 1, *reprinted in* 2000 Haw. Sess. Laws 251, 252.

The Legislature, in amending the law, may have considered this year's recent multiple murders in passing this amendment.[12] The Legislature noted Hawai'i was ranked forty nine out of fifty states in total firearms deaths,[13] and the Legislature reiterated its commitment to keep firearms away from those individuals who do not qualify as gun owners. The Legislature desired to make "significant improvements" in its firearms law by setting up a multi-agency coalition to inter alia determine a process to evaluate the mental history of gun owners to further reduce violent firearm crime.[14] The purposes of this bill were to "require . . . mental health and criminal history inquiries on registered firearms owners," update the firearm registry, and make sure that firearms were surrendered by or confiscated from unqualified individuals.[15]

*2. Abuse of a family or household member extended to dating relationships*

The 2000 Legislature expanded protection against domestic violence to include those individuals in dating relationships.[16] The Legislature amended the definition in HRS Section 586-3 definition of "family or household members" to include "persons who have or have had a dating relationship."[17] In order to determine whether a dating relationship exists, a court may consider 3 factors: 1) relationship length; 2) nature of relationship; and 3) frequency of interaction.[18] Thus, if the court finds a "dating relationship," it may grant a protective order against either party.[19]

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[12] On November 2, 1999, a Hawai'i Xerox employee gunned down seven fellow employees. The Xerox employee was the registered owner of seventeen guns. Debra Barayuga, *Suspect Was Denied More Gun Permits*, HONOLULU STAR BULLETIN, Nov. 3, 1999, *available at* http://starbulletin.com/1999/11/03/news/storyla.html (last visited Nov. 12, 2000).

[13] CONF. COMM. REP. NO. 71, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 761.

[14] *Id.*

[15] *Id.*

[16] Act 186, § 2, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 380, 380.

[17] Act 186, § 4, *reprinted in* 2000 Haw. Sess. Laws 380, 381. "'Dating relationship' means a romantic, courtship, or engagement relationship, often but not necessarily characterized by actions of intimate or sexual nature, but does not include a casual acquaintanceship or ordinary fraternization between persons in a business or social context." Act 186, § 2, *reprinted in* 2000 Haw. Sess. Laws 380, 380.

[18] Act 186, § 4, *reprinted in* 2000 Haw. Sess. Laws 380, 380.

[19] *Id.* Act 186 states:

> Upon petition to a family court judge, an ex parte temporary restraining order may be granted without notice to restrain either or both parties from contacting, threatening, or physically abusing each other . . . . The order may be granted to any person who . . . is a family or household member as defined in section 586-1 . . . .

*Id.*

The purpose of this bill, though not specifically mentioned by the Legislature, is to continue to fight crimes concerning domestic violence, "a pervasive problem in Hawai'i that impacts not only victims, but family, friends, and others."[20] This bill will most likely affect younger victims of domestic violence. Previously this law protected only abused individuals who were married and/or lived with their abusive partners/spouses.[21] This did not include those abused individuals, many times younger victims, who were neither married nor living with their abusers. The class the Legislature most likely singled out to help is teenagers and young adults (although it can surely include older individuals).[22]

### *3. Police given power to cite roadside vendors not only for creating roadside hazards, but also for risks of creating hazards*

The 2000 Legislature gave the Honolulu Police Department broad discretionary authority to cite roadside vendors before a hazard is actually created.[23] HRS Section 264-101 previously allowed police officers to cite roadside vendors only after they created a hazard.[24] This is a preventive measure by the Legislature to help "forestall potential traffic hazards,"[25] "clarify where vending is prohibited,"[26] and "increase safety on and alongside state highways."[27] Police officers can now "remove vendors and charge them

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[20] Act 186, § 2, *reprinted in* 2000 Haw. Sess. Laws 380, 380.

[21] HAW. REV. STAT. § 586-1 (1999).

[22] *See* Terry Spanglet Duncan, *The Web of Dating Violence*, Advocacy in Action, Domestic Violence Clearinghouse and Legal Hotline, Feb. 2000, at 4. The Domestic Violence Clearinghouse and Legal Hotline (DVCLH) recognized violence in teen dating relationships in its Teen Dating Program. In a Hawai'i survey, 25% of those teens interviewed by DVCLH disclosed that they had been subjected to physical violence in their dating relationships. *Id.*

[23] *See* Act 23, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 32, 32. Act 23 states:

> No person shall park or place a vehicle or structure wholly or partly on any highway for the purpose of selling the vehicle or structure or of selling therefrom or therein any article, service, or thing, thereby creating a hazardous condition or a public nuisance or *in reckless disregard of the risk of creating a hazardous condition or public nuisance*. . . .

*Id.*

[24] *See* HAW. REV. STAT. § 264-101 (1999).

[25] STAND. COMM. REP. NO. 880-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 441. One of the hazards that the Legislature intended to prevent was the problem caused when "drivers . . . suddenly pull off the road upon spotting a vendor on the highway shoulder." STAND. COMM. REP. NO. 2628, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1078.

[26] STAND. COMM. REP. NO. 2111, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 867.

[27] STAND. COMM. REP. NO. 1305-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 522.

with highway vending before the hazardous condition" even before the vendors attract customers.[28] The Legislature noted that an officer would even have the power to cite a roadside vendor in the following situation: "In the rural areas where vending is common, a driver may need to swerve onto the shoulder to avoid hitting a cow, only to find the shoulder occupied by a vendor. Even if the cow is o.k., the vendor's presence was partly responsible for creating a hazardous condition."[29]

This bill has the potential of affecting all roadside vendors in Hawai'i. This bill changed the violation from a misdemeanor to a petty misdemeanor[30] with the intent to expedite these matters through the court system.[31] Previously, roadside vendors cited with a Section 264-101 violation were entitled to jury trials.[32] However, with the change in law, cited roadside vendors will be charged with a petty misdemeanor, thus denying them the right to a jury trial.[33]

### *B. Education*

#### *1. Constitutional Amendment on the ballot for University of Hawai'i autonomy*

The 2000 Legislature passed the University of Hawai'i autonomy proposed constitutional amendment bill.[34] In November, Hawai'i voters had the opportunity to answer the following question on the ballot: "Shall the University of Hawai'i have the authority and power of self-governance in matters involving only the internal structure, management, and operation of the university?"[35] Hawai'i voters chose to adopt this constitutional amendment, which gave the University of Hawai'i Board of Regents more internal power

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[28] STAND. COMM. REP. NO. 2628, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1078.

[29] *Id.*

[30] Act 23 § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 32.

[31] STAND. COMM. REP. NO. 2628, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1078; STAND. COMM. REP. NO. 880-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 441.

[32] *See* STAND. COMM. REP. NO. 2628, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1078.

[33] *See id.* The Legislature has the power to classify penalties for crimes by designating the penalty in the statute. HAW. REV. STAT. § 701-107 (2000).

[34] *See* S. 539, 20th Leg., Reg. Sess. (2000) (proposing an Amendment to the Hawai'i Constitution to give the University of Hawai'i autonomy).

[35] *Id.*

to make decisions about the University.[36] Previously, the Board of Regents was required to get authorization from the Legislature before making any policy decisions or exercising control over the University.[37] This amendment will remove the Legislature's required authorization and provide the Board of Regents with the power to make decisions about the "internal structure, management, and operation" of the University.[38] While this amendment will give the University the ability to make crucial decisions, this amendment also retains the Legislature's jurisdiction over matters of statewide concern.[39]

The Legislature, anticipating "future disputes and litigation, particularly when the Legislature enacts a statute that is perceived to adversely impact the University,"[40] added a provision that this amendment "shall not limit the power of the legislature to enact laws of statewide concern . . . [and] shall have the exclusive jurisdiction to identify laws of statewide concern."[41] The Legislature felt that retaining jurisdiction over matters of statewide concern would extinguish controversies that may arise relating to the University's autonomy.[42] Thus, the Legislature will still have the ability to make decisions regarding budgeting, restricting funds, new initiatives for the University, Title VII employment laws, and Hawaiian ceded land rights.[43]

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[36] Suzanne Tswei, *Legislators pledge no interference in UH affairs*, HONOLULU STAR BULLETIN, Nov. 8, 2000, *available at* http://starbulletin.com/2000/11/08/news/story9.html (last visited Nov. 27, 2000).

[37] *See* CONF. COMM. REP. NO. 112, 20th Cong., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 784.

[38] *Id.* The Legislature noted that:

> [t]he increasing complexity of public higher education requires the University to be responsive to the needs of the community on a timely basis, and only autonomy over its internal affairs will allow the University to accomplish this goal. This measure will also enable the University to be a major contributor to the economic development of the State.

*Id.*

[39] *Id.*

[40] *Id.*

[41] S. 539, 20th Leg., Reg. Sess. (2000).

[42] *See* CONF. COMM. REP. NO. 112, 20th Cong., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 784.

[43] *Id.* The Legislature stated:

> The University will remain, as it is in the current law, subject to laws of statewide concern, including, but not limited to: 1) the budgeting process of the Legislature; 2) the Governor's ability to restrict funds; 3) the Legislature's power to fund new initiatives concerning the University; 4) the state employment laws found in Title 7, Hawaii Revised Statutes, (Civil Service/Collective Bargaining); and 5) laws related to Hawaiian ceded land rights.

*Id.*

*2. Private and public schools given the ability to do criminal history checks on employees who have contact with children*

The 2000 Legislature's all-encompassing move to prevent disasters included Act 146, which requires the State Department of Health to conduct criminal history checks of "persons who are seeking employment, or seeking to serve as providers or subcontractors in positions that place them in direct contact with clients when providing non-witnessed direct mental health services on behalf of the child and adolescent mental health division of the department of health."[44] This bill also required that private schools develop procedures for checking into the criminal history of employees who will be working in close proximity to children.[45]

For both public and private schools, a person applying for employment will be required to provide the following: (1) A sworn statement indicating whether the person has been convicted of a crime in which the person could have been incarcerated; (2) Written consent to conduct the criminal history check; and (3) Permission to be fingerprinted for the purpose of a Federal Bureau of Investigation criminal history check.[46] However, this bill does not limit the Department of Health and private schools' ability to obtain information other than criminal history checks of applicants.[47] The Legislature also noted an important purpose was to "require the Board of Education to create and implement rules on conducting sex offender registration check[s] on individuals who volunteer with the schools."[48] Both the Department of Health and private schools, however, are not given authorization by this bill to conduct criminal history checks of employees that have been employed continuously on a salaried basis prior to July 1, 2000.[49]

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[44] Act 146, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 282, 282.

[45] Act 146, § 2, *reprinted in* 2000 Haw. Sess. Laws 282, 283. "Private schools *shall* develop procedures for obtaining verifiable information regarding the criminal history of persons who are employed or are seeking employment positions that place them in close proximity to children." *Id.*

[46] *Id.*

[47] *Id.* "These procedures shall include but not be limited to criminal history record checks." *Id.*

[48] CONF. COMM. REP. NO. 48, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 748.

[49] Act 146, § 2, *reprinted in* 2000 Haw. Sess. Laws 282, 284. Although the Legislature did not disclose why this bill would not apply retroactively to current salaried employees, one of the reasons might be that the Legislature intended to target the hiring process, not evaluation process, as a means for providing the schools with qualified individuals.

*3. Educational accountability system adopted for Hawai'i public schools*

The 2000 Legislature amended HRS Section 302A-1004,[50] to require implementation of an accountability system for students, teachers, principals, and other professional employees with the schools.[51] This system rewards schools that meet their goals and sanctions schools that do not.[52] A statewide student assessment program will provide annual data on student, school, and system performance at selected benchmark grade levels, as well as annual assessments by each school.[53] This bill also requires that teachers and administrators continue their professional growth and development to keep them up to date.[54] The purpose of this bill is to "motivate and support the improved performance of students and the education system."[55]

Under this bill, the superintendent of education is ultimately responsible for the development and accountability of the system.[56] However, the type of sanctions that a school might face will be determined by a group that includes parents, community members, and others that the superintendent deems appropriate.[57] This educational accountability system should not affect collective bargaining agreements, except that it may have an "impact on personnel arising from the superintendent's decision in implementing the educational accountability system."[58]

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[50] Act 238, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 623, 623. HRS § 302-1004 increased the accountability system to include: "student accountability; school or collective professional accountability; individual professional accountability for teachers, principals and other employees; and public accounting for other significant partners to the education process . . . ." *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* The Legislature wanted to ensure "currency with respect to disciplinary content, leadership skill, knowledge, or pedagogical skill, as appropriate to [certain positions]" by requiring evaluations that will "prescribe appropriate consequences" for lack of professional development. CONF. COMM. REP. NO. 55, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 752.

[54] Act 238, § 1, *reprinted in* 2000 Haw. Sess. Laws 623, 624.

[55] *Id.*

[56] Act 238, § 1, *reprinted in* 2000 Haw. Sess. Laws 623, 625.

[57] *Id.*

[58] *Id.*; *see also* CONF. COMM. REP. NO. 55, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 752.

### C. Employment

#### 1. Judiciary pay raised

The Legislature increased judicial salaries by 11% over a two-year period beginning July 1, 1999 (retroactively).[59] The Legislature desired to increase judicial salaries by 11%, not by the 4% increase that was granted in 1999.[60] The Legislature noted that before the 1999 judicial pay raise was granted, judicial salaries had not been increased since 1990.[61] The purpose of this bill is to provide the judges in Hawai'i with "adequate and equitable compensation . . . to attract and retain experienced and qualified attorneys to serve as justices and judges in state courts."[62]

#### 2. Civil service reformed

The 2000 Legislature reformed civil service law in a number of ways. The purpose of this civil service reform was to improve government in Hawai'i.[63] The Legislature addressed concerns from a variety of stakeholders, including public worker unions, managers and workers, legislators, beneficiaries of government services, and different state agencies.[64] Although the Legislature could not meet all of these parties' desires, the Legislature noted that this bill provided a "comprehensive, responsive body of law that will bring about a more efficient and effective means of providing government services to the people of Hawai'i."[65]

The Legislature replaced the seven-member statewide civil service commission with a three-member board.[66] This panel will sit as an appellate body on matters such as "recruitment and examination, classification and reclassification, initial pricing, and other employment actions taken against

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[59] Act 2, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 3, 3. For example, salaries for circuit court judges will increase to $96,326/year in 1999 and to $106, 922/year in 2000. Act 2, § 2, *reprinted in* 2000 Haw. Sess. Laws 3, 3.

[60] STAND. COMM. REP. NO. 1134, 20th Leg., Reg. Sess. (2000), *reprinted in* 1999 HAW SEN. J. 1435; *see also* Act 65, § 1, 20th Leg., Reg. Sess. (1999), *reprinted in* 1999 Haw. Sess. Laws 90, 90.

[61] STAND. COMM. REP. NO. 1134, 20th Leg., Reg. Sess. (2000), *reprinted in* 1999 HAW SEN. J. 1435.

[62] *Id.*

[63] *See generally* CONF. COMM. REP. NO. 115, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 787.

[64] *Id.*

[65] *Id.*

[66] Act 253, § 2, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 853, 853.

civil service employees who are excluded from collective bargaining . . . ."[67] All three members of the board are required to have experience with and knowledge of civil service laws, with at least one board member being a previous employee in an employee's organization and another board member being in management.[68] Members of the board will be appointed to four-year terms by the governor.[69]

The Legislature decentralized government. Instead of a statewide public employment system, there are nine separate jurisdictions.[70] Each jurisdiction is required to establish civil service systems based on the merit principle.[71] Each jurisdiction is given more flexibility in dealing with human resource matters, including dealings with private entities.[72] The purpose of this decentralization is to improve and streamline the employment and recruitment process in the state.[73] The Legislature, however, also added a safeguard that an inspection system be instituted and maintained by the director of human resources to make sure that this new authority given to the different jurisdictions is not abused.[74] In the case that the director finds abuse, the director is authorized to retract the delegation of authority given to that particular jurisdiction and can recommend that the entire decentralized system be terminated.[75]

The Legislature clarified public employment law relating to exempt positions.[76] Exempt positions were extended to include employees in the office of the lieutenant governor, positions that must be filled to comply with a court order (i.e. the Felix-Cayetano consent decree), and other Department

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[67] CONF. COMM. REP. NO. 115, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 787.

[68] Act 253, § 2, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 853.

[69] Act 253, § 2, *reprinted in* 2000 Haw. Sess. Laws 853, 853-54.

[70] *See generally* Act 253, § 5, *reprinted in* 2000 Haw. Sess. Laws 853, 854. These jurisdictions include: 1) state; 2) city and county of Honolulu; 3) county of Hawai'i; 4) county of Maui; 5) county of Kaua'i; 6) the judiciary; 7) the department of education; 8) the University of Hawai'i; and 9) the Hawai'i health systems corporation. Act 253, § 9, *reprinted in* 2000 Haw. Sess. Laws 853, 858.

[71] CONF. COMM. REP. NO. 115, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 787. The merit principle is "the selection of persons based on their fitness and ability for public employment and the retention of employees based on their demonstrated appropriate conduct and productive performance . . . ." *Id.*

[72] *Id.* This flexibility also includes "adjust[ing] wages, hours, benefits, and other terms and conditions of employment for excluded employees . . . ." *Id.*

[73] *Id.*

[74] Act 253, § 6, *reprinted in* 2000 Haw. Sess. Laws 853, 856.

[75] Act 253, § 6, *reprinted in* 2000 Haw. Sess. Laws 853, 856-57.

[76] Act 253, § 14, *reprinted in* 2000 Haw. Sess. Laws 853, 862-65. Exempt employees are those who are not covered by civil service laws, including this one. The list of exempt employees is too numerous to list in this footnote.

of Education positions.[77] This bill also defined procedures for conversion between an exempt position and a civil service position.[78]

The Legislature set out a performance appraisal system to evaluate work performance by employees.[79] This system will serve as the basis for demoting or firing employees.[80] An employee may be terminated if:

1. The employee is notified of this performance appraisal system.
2. The employee knows his/her job description and requirements.
3. The evaluation procedures are followed, including allowance of time for an employee to rebut the evaluation.
4. The evaluation was fair and objective.
5. The employee was provided feedback during the evaluation period and was offered in-service remedial training to improve performance requirements.
6. The evaluation was applied without discrimination.
7. The employee was considered for a demotion before termination.[81]

If the employee is terminated under these conditions, the employee has the right to file a grievance under a collective bargaining agreement or through departmental complaint procedures.[82]

The civil service reform bill also accomplishes the following: 1) it authorizes drug testing for prospective employees;[83] 2) establishes provisions

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[77] *Id.* These positions include teaching and educational assistants, bilingual and bicultural school-home assistants, schools psychologists and examiners, speech pathologists, athletic health care trainers, alternative school work study assistants, alternative school educational/supportive service specialists, and alternative school project coordinators. *Id.*

[78] *Id.* "The director may provide for an exemption from civil service recruitment procedures if the appointment to the position has a limitation date and it would be impracticable to recruit under civil service recruitment procedures because the required probation period . . . cannot be completed by the limitation date." Act 253, § 14, *reprinted in* 2000 Haw. Sess. Laws 853, 864. "If the director determines that a position should no longer be exempt from [civil service recruitment procedures and/or classification systems] the director shall consult with the appropriate appointing authority and its chief executive on removing the exemptions." Act 253, § 14, *reprinted in* 2000 Haw. Sess. Laws 853, 865.

[79] Act 253, § 23, *reprinted in* 2000 Haw. Sess. Laws 853, 869.

[80] Act 253, § 23, *reprinted in* 2000 Haw. Sess. Laws 853, 869-70.

[81] Act 253, § 23, *reprinted in* 2000 Haw. Sess. Laws 853, 870.

[82] *Id.*

[83] CONF. COMM. REP. NO. 115, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 787. Act 253 states:

> All prospective employees, regardless of the positions they will assume, shall demonstrate their suitability for public employment by: (1) Passing a pre-employment controlled substance drug test if required by the employing jurisdiction; and (2) Attesting that during the three-year period immediately preceding the date of application for employment, the

for office hours, leaves of absence, injured employees, and other human resource matters;[84] and 3) establishes a program for voluntary severance benefits and special retirement incentive benefits in the executive branch and allows the jurisdictions to offer this type of program.[85]

### *D. Environment*

#### *1. Shark finning limited*

The Legislature limited shark finning–the practice of catching sharks, removing their fins, and discarding the carcasses.[86] Act 277 limits rather than prohibits shark finning completely because the shark fins may be taken if the entire shark is landed as a whole and not discarded.[87] This new Act applies not only to vessels while inside the territorial waters of the State of Hawai'i, but also applies to vessels outside the territorial waters if: 1) the vessels hold fishing licenses or permits issued by the State of Hawai'i; 2) the owners or captains of the vessels hold licenses or permits from the State; 3) the vessels are registered under HRS Section 200-31[88]; or 4) the vessels list Hawai'i as a homeport.[89] This law includes a mens rea provision, requiring the person to "knowingly" shark fin.[90] The penalties imposed by this law include a fine of

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person was not convicted of any controlled substance-related offense.

Act 253, § 74, *reprinted in* 2000 Haw. Sess. Laws 853, 878.

[84] Act 253, § 74, *reprinted in* 2000 Haw. Sess. Laws 853, 879-80.

[85] Act 253, § 114-115, *reprinted in* 2000 Haw. Sess. Laws 853, 880.

[86] Act 277, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 948, 949.

[87] Act 277, § 2, *reprinted in* 2000 Haw. Sess. Laws 948, 949.

[88] HRS § 200-31 provides the following:

> Every undocumented vessel shall be registered and numbered before its use and operation on or in the waters of the State on an annual basis in accordance with the rules of the department except: (1) foreign vessels temporarily using the waters of this State; (2) public vessels of the United States; (3) ships' life boats; and (4) other vessels exempted by the department, if federal laws and requirements permit the department to exempt the vessels.

HAW. REV. STAT. § 200-31 (2000).

[89] Act 277, § 2, *reprinted in* 2000 Haw. Sess. Laws 948, 949; *see also* CONF. COMM. REP. NO. 4, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 722.

[90] Act 277, § 2, *reprinted in* 2000 Haw. Sess. Laws 948, 949. "Knowingly" is defined in HRS § 702-206(2) as: (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 that 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. *In re* John Doe, 81 Hawai'i 447, 918 P.2d 254, 261 (1996).

up to $15,000, criminal prosecution, and forfeiture of the shark fins, the vessel, license, and fishing equipment.[91]

The purpose of this law is to protect Hawai'i's natural resources and productive fisheries that the Legislature found were being affected by the decline in sharks due to shark finning.[92] The Legislature noted that shark finning was "a wasteful and inhumane practice" that did "little if anything to the economy of [the State of Hawai'i]."[93] In addition, the Legislature noted the increased vulnerability of sharks due to their delayed sexual maturity and the need for conservation of one of the top predators in the marine food chain.[94]

### *2. Cultural impact disclosures required for environmental impact statements*

The 2000 Legislature amended HRS Section 343-2 pertaining to environmental impact statements,[95] to require disclosure of the effects, including significant adverse effects, on the cultural practices of the community and state.[96] This means that environmental impact statements will have to address the impacts their projects will have on "cultural beliefs, practices, and resources of native Hawaiians as well as other ethnic groups."[97]

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[91] Act 277, § 2, *reprinted in* 2000 Haw. Sess. Laws 948, 949.

[92] Act 277, § 1, *reprinted in* 2000 Haw. Sess. Laws 948, 948-49.

[93] *Id.*

[94] *Id.*

[95] An environmental impact statement was previously defined as an:

> informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic and social welfare of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

HAW. REV. STAT. § 343-2 (1999).

[96] Act 50, § 2, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 93, 93. An environmental impact statement is now defined as an:

> informational document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and *cultural practices of the community and State*, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

*Id.*

[97] STAND. COMM. REP. NO. 2793, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1156.

This is in addition to the requirement that environmental impact statements address the economic and social welfare of the community.[98]

In enacting this law, the Legislature sought to preserve the "unique quality of life and the 'aloha spirit' in Hawaii."[99] The Legislature's purpose in amending this law was to protect the Hawaiian culture, especially with regard to cultural resources that have been lost due to the failure to address these concerns in the past.[100] This law is consistent with "other state laws that mandate the protection and preservation of the traditional and customary rights of native Hawaiians," such as the state Constitution.[101]

### *E. Health*

#### *1. Medical marijuana use approved*

The Legislature added a section onto HRS Section 329 to permit the use of marijuana for people with debilitating medical conditions who receive a certification from their physicians.[102] A person must have a debilitating medical condition, which the Legislature has defined as cancer, glaucoma, HIV, AIDS, a disease producing cachexia, severe pain or nausea, seizures, severe muscle spasms, or any other condition approved by the Department of Health.[103] In addition, the person is limited to a supply of "not more than is reasonably necessary to assure the uninterrupted availability of marijuana for the purpose of alleviating the symptoms . . . ."[104]

There are further limitations on medical marijuana use. Individuals under eighteen years of age cannot qualify unless they obtain parental consent and are informed of the potential risks and benefits of marijuana use.[105] In

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[98] Act 50, § 2, *reprinted in* 2000 Haw. Sess. Laws 93, 93.

[99] Act 50, § 1, *reprinted in* 2000 Haw. Sess. Laws 93, 93.

[100] STAND. COMM. REP. NO. 3298, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1378. This law is not limited to the cultural impact on Hawaiians. Its broad language can also cover other cultures.

[101] *Id.* The Hawai'i State Constitution reads: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendents of native Hawaiians who inhabited the Hawaiian islands prior to 1778, subject to the right of the State to regulate such rights." HAW. CONST. art. XII, § 7.

[102] Act 228, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 595, 596. This certification must provide that the potential benefits likely outweigh the health risks. *Id.*

[103] Act 228, § 2, *reprinted in* 2000 Haw. Sess. Laws 595, 596.

[104] *Id.* This amount, however, must "not exceed three mature marijuana plants, four immature marijuana plants, and one ounce of usable marijuana per mature plant." *Id.*

[105] *Id.* In addition, the individual's guardian must be explained the potential risks and benefits of marijuana use. *Id.*

addition, this authorized marijuana use cannot be used when it endangers the health of a third individual.[106] It also cannot be used, among other places, in any moving vehicle, at one's place of employment, on school grounds, or at any public facility, including parks and beaches.[107]

The purpose of this law was to allow the medical use of marijuana while ensuring that "seriously ill people are not penalized by the State for the use of marijuana for strictly medical purposes . . . ."[108] The Legislature recognized the beneficial uses of marijuana for patients that have certain medical conditions and the need to provide a guarantee of immunity from prosecution.[109] This bill, however, only provides immunity from state prosecution.[110] As the Legislature recognized, federal law still prohibits marijuana use, even for medical purposes.[111] While the Hawai'i Legislature intended to join with the initiatives in other states that have legalized the medical use of marijuana,[112] it is unclear what consequences medical marijuana users will face under federal law.[113]

### 2. *Children under the age of sixteen required to wear bicycle helmets while riding*

Beginning January 1, 2001, all children under the age of sixteen must wear a bicycle helmet when riding a bicycle, otherwise their parents will be subject to a $25 fine.[114] Parents will also be subject to a $25 fine if the child is riding in a restraining seat attached to a bicycle without a helmet.[115] Originally, House Bill 1763, the precursor to Act 255, applied only to children age twelve

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[106] *Id.* This might include the danger of second hand smoke although the Legislature did not specifically provide any definitions or examples of this situation. This may, however, be inferred from the limitations the Legislature provided on the places that marijuana is authorized to be used, which do not include public places. *Id.*

[107] *Id.*

[108] Act 228, § 1, *reprinted in* 2000 Haw. Sess. Laws 595, 596; *see also* STAND. COMM. REP. NO. 1319-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 526.

[109] Act 228, § 1, *reprinted in* 2000 Haw. Sess. Laws 595, 596.

[110] *Id. See* Controlled Substances Act, 21 U.S.C.S. § 812 (2000). Pursuant to this Act, drugs listed on the Schedule I list cannot be prescribed by physicians. Marijuana is on the Schedule I drug list. *See id.*

[111] Act 228, § 1, *reprinted in* 2000 Haw. Sess. Laws 595, 596.

[112] Act 228, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. laws 595, 596. The other states that have legalized medical marijuana use are Alaska, Arizona, California, District of Columbia, Maine, Nevada, Oregon, and Washington. *Id.*

[113] *High court will rule on medical marijuana*, HONOLULU ADVERTISER, Nov. 28, 2000, at A1. The Supreme Court of the United States agreed to hear a case surrounding the California law that, similar to Hawaii's law, legalizes medical marijuana use. *Id.*

[114] Act 255, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 917, 917.

[115] *Id.*

years and younger.[116] The Legislature felt that child safety would be improved by heightening the age to sixteen years.[117] The Legislature added that the bicycle helmet worn must be one "tested by a nationally recognized agency and . . . designed to protect against head trauma."[118] This is again one of the many preventive measures the Legislature passed this 2000 session.

*3. The seatbelt law extended to children seventeen and younger who ride in the backseat*

The Legislature extended the mandatory seatbelt law this session and increased the penalty for a violation of the seatbelt law. The Legislature amended HRS Section 291-11.6 to include that children under the age of eighteen must wear seatbelts whether in the front or the back seat of a vehicle.[119] In addition, the fine for not wearing a seatbelt increased from $20 to $45.[120] The Legislature's main intention for expanding and increasing the violation was to promote safety for passengers in vehicles, especially for children.[121] The Legislature noted that automobile crashes were the leading cause of fatal injuries to children, with more than two-thirds of the children being back seat passengers.[122] The Legislature specifically noted that concern for this matter arose after the death of Tanya Shirai, a seventeen year old who was killed when she was ejected from the backseat of an automobile.[123]

### *F. Wills & Trusts*

*1. Individuals allowed to provide the existence of advance health-care directives on their driver's licenses*

Beginning January 1, 2001, individuals in the State of Hawai'i will have the option of indicating whether they have an advance health-care directive on

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[116] CONF. COMM. REP. NO. 24, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 731.

[117] *Id.*

[118] *Id.*

[119] Act 294, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 1145, 1145. This law previously only required that persons be restrained while riding in the front seats of motor vehicles. HAW. REV. STAT. § 291-11.6 (2000).

[120] Act 294, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 1145.

[121] *See* STAND. COMM. REP. NO. 921-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 449; *see also* STAND. COMM. REP. NO. 1357-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 534.

[122] S. 2311, 20th Leg., Reg. Sess. (2000).

[123] *Id.*

their driver's licenses.[124] An advance health-care directive is "an individual instruction in writing, a living will, or a durable power of attorney for health care decisions."[125] Upon the application or renewal of a driver's license, the examiner of drivers will be required to ask whether the applicant has an advance health-care directive.[126] If chosen, the driver's license will have the words "advance health-care directive" imprinted on the license or a symbol or abbreviation for those words.[127] The license will not contain any further medical treatment information relating to the advance health-care directives.[128]

The purpose of this bill seems to be facilitation of communication between an individual and his/her attending physician when that individual can no longer convey his/her intentions. Although not noted by the Legislature, this bill was likely a response to increasing awareness about an individual's constitutional right to make health-care decisions, including the right to refuse medical treatment.[129] This bill should provide physicians at the scene of an accident or at the emergency room with easily accessible information about whether the individual has an instrument that will govern medical treatment given to the patient.

### 2. *Trust law streamlined*

The Legislature amended the Uniform Trustees' Powers Act[130] and the Hawai'i Probate Code[131] to give trustees the power to split trusts and to provide anti-lapse provisions for revocable living trusts.[132] A trustee may now "divide, sever, or separate a single trust into two or more separate trusts for administration or tax purposes, including the allocation of the generation-skipping transfer exemption . . . ."[133] In addition, anti-lapse provisions that previously only applied to wills have been extended to revocable living

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[124] Act 295, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 1146, 1146.

[125] *Id.* Generally, an advance health care directive, such as a living will, is a document that "contains directives concerning termination of medical treatment." JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 404 (sixth ed. 2000).

[126] Act 295, § 1, *reprinted in* 2000 Haw. Sess. Laws 1146, 1146.

[127] CONF. COMM. REP. NO. 68, 20th Leg., Reg. Sess. (2000), *reprinted in* HAW. SEN. J. 760.

[128] *Id.*

[129] *See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) (holding that a person has the right to refuse medical treatment under the due process clause of the Constitution).

[130] HAW. REV. STAT. § 554A (2000).

[131] HAW. REV. STAT. § 560 (2000).

[132] Act 48, § 1-2, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 83, 83-87.

[133] Act 48, § 1, *reprinted in* Haw. Sess. Laws 83, 84.

trusts.[134] This means assets from revocable living trusts will be distributed pursuant to HRS chapter 560, Section 2-603 and Section 2-604.[135] The purpose of these changes is to assist fiduciaries in their duties, conform the law of will substitutes to the law of wills, and streamline procedures for estates less than $100,000 in value.[136] The Legislature, with the support of local practitioners, desired to create a more efficient and flexible probate process.[137]

### *G. Miscellaneous*

#### *1. Fireworks strictly regulated*

The Legislature finalized a bill that withstood the scrutiny of the public, Senate, House of Representatives, and the Governor. The Legislature added HRS Section 132D that, among other things, does the following:

1. Limits the amount of fireworks that can be kept on hand to about a three month inventory.[138]
2. Requires approval of a fireworks storing facility.[139]
3. Requires a permit for aerial fireworks.[140]
4. Sets the penalty for purchasing, possessing, setting off, igniting or discharging aerial or special fireworks at a class C felony if the fireworks measure twenty five pounds or higher and a misdemeanor if the fireworks measure less than twenty five pounds.[141]

This law became effective July 6, 2000.[142]

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[134] Act 48, § 2, *reprinted in* Haw. Sess. Laws 83, 87.

[135] *Id.* HRS § 560:2-603 provides default rules for substitute gifts if a devisee fails to survive the testator. HAW. REV. STAT. § 560:2-603 (2000). "Except as provided in 560:2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue." HAW. REV. STAT. § 560:2-604 (2000).

[136] STAND. COMM. REP. NO. 503-00, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. HOUSE J. 213.

[137] STAND. COMM. REP. NO. 2857, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1183; STAND. COMM. REP. NO. 3238, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1355.

[138] Act 233, § 2, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 606, 611.

[139] Act 233, § 3, *reprinted in* 2000 Haw. Sess. Laws 606, 611.

[140] Act 233, § 6, *reprinted in* 2000 Haw. Sess. Laws 606, 611.

[141] Act 233, § 12, *reprinted in* 2000 Haw. Sess. Laws 606, 611. *See also* CONF. COMM. REP. NO. 63, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 756.

[142] Act 233, § 20, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 606, 613.

The purpose of this law is to limit the use of fireworks to cultural purposes and public displays in order to increase public health and safety.[143] The Legislature noted that there was widespread use of fireworks in the past few years that has led to serious safety hazards, including health risks, as a result of the emissions from the fireworks.[144] The Legislature also noted the increase in fires as reported by the Honolulu Fire Department that led to serious injuries and a depletion of county resources.[145] The Legislature limited, but did not ban, the use of fireworks because of its recognition that fireworks are an important part of the culture for people in the State of Hawai'i.[146]

*2. Uniform Electronic Transactions Act adopted*

The 2000 Legislature adopted the Uniform Electronic Transactions Act ("UETA"), making Hawai'i the fourth state to adopt UETA.[147] UETA, which was drafted by the National Conference of Commissioners on Uniform States Laws ("NCCUSL"), provides rules that govern electronic records and signatures in a transaction.[148] In Hawai'i, UETA assures that transactions done by electronic means will be enforceable, as long as certain provisions are met.[149] Among those provisions: 1) both parties must agree to electronically transact business; and 2) both parties must agree to what transactions electronic means will apply.[150] UETA, however, does not apply to certain specifically noted situations.[151]

This law will keep Hawai'i at the front line in terms of technological transactions and will help ensure that Hawai'i law is uniform with other states' laws. The main purpose of this law is to provide legal recognition for electronic transactions, especially in light of increasing technology.[152] The Legislature recognized that it was enacting UETA, a law that could potentially

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[143] Act 233, § 1, *reprinted in* 2000 Haw. Sess. Laws 606, 606.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] CONF. COMM. REP. NO. 32, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 737.

[148] *Id.*

[149] Act 282, § 1, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 Haw. Sess. Laws 1100, 1102-03. For example, electronic signatures may satisfy the requirement for signatures. Act 282, § 1, *reprinted in* 2000 Haw. Sess. Laws 1100, 1103.

[150] Act 282, § 1, *reprinted in* 2000 Haw. Sess. Laws 1100, 1102.

[151] *See* Act 282, § 1, *reprinted in* 2000 Haw. Sess. Laws 1100, 1102. For instance, UETA may not apply to transactions regarding the creation and execution of wills and trusts, certain section of the Uniform Commercial Code, notices of default, utility shutoff, insurance contract cancellation, and others. *Id.*

[152] CONF. COMM. REP. NO. 32, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 737.

be preempted by federal law.[153] Thus, the Legislature enacted UETA in relatively uniform fashion and also obtained other safeguards such as approval from NCCUSL and the Department of Commerce and Consumer Affairs.[154]

## III. CONCLUSION

Many bills were signed into law this past 2000 legislative session that have the potential to affect practicing attorneys in the State of Hawai'i. The 2000 Legislature was an active one, passing many preventive measures and increasing the penalties for violations on some of those measures. While many changes were made, this update was designed to provide practitioners with a glimpse of some newly passed legislation that might affect their legal practice.

Emi L. Morita[155]

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[153] *Id.* On June 30, 2000, President Clinton signed the Electronic Signatures in Global and National Commerce Act (E-SIGN), the federal counterpart to UETA. Patricia Brumfield Fry, *Federal Preemption and Electronic Commerce*, *at* http://www.nccusl.org/whatsnew-article3.htm (last visited Oct. 13, 2000). E-SIGN § 102 provides that UETA adopted by states will not be preempted unless inconsistent with E-SIGN. *Id.* The extent to which E-SIGN can preempt state enacted UETA is unclear, but pursuant to E-SIGN § 102, the most likely interpretation is that "inconsistent non-uniform provisions are ineffective but the balance [of UETA] would survive." *Id.*

[154] CONF. COMM. REP. NO. 32, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 737.

[155] Class of 2002, William S. Richardson School of Law.

# "If a Policeman Must Know the Constitution, Then Why Not a Planner?"[1] A Constitutional Challenge of the Hawai'i Public Access Statute

## I. INTRODUCTION

In 1965, the Hawai'i Legislature adopted the "public access statute" ("Statute")[2] which authorizes the State to require dedications of land as a condition precedent to developers receiving governmental approval of the project. Over the years, State and local government (collectively "government") have applied this Statute liberally to all aspects of development to ensure that hiking trails, hunting grounds and other recreational areas remain accessible to the public.[3] More recently, the Statute was applied to Hawai'i Loa Ridge,[4] where the developer acquiesced to the county's demand for dedications in order to protect their interests in the development and prevent costly delays.[5] The degree of access required by the government in the Hawai'i Loa Ridge illustration[6] suggests the possibility that the government may have progressed beyond the lawful preservation of public access into the realm of unconstitutional takings.[7]

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[1] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981).

[2] HAW. REV. STAT. § 46-6.5 (1999); *see infra* section II.B.

[3] The government applied the Statute to the Waialae Iki development and other smaller locations in Hawai'i, and thus has demonstrated a willingness to place the need for public access ahead of individual, private property rights. Telephone Interview with Curt Cottrell, Program Director, Hawai'i Department of Land and Natural Resources Na Ala Hele (Trails) Program (Sept. 14, 2000).

[4] Hawai'i Loa Ridge is a community of approximately 500 homes situated on the south shore of the island of Oahu, State of Hawai'i. Amenities of the community include private roads with controlled access, tennis courts, a park with picnic stations, twenty-four hour mobile security, a community building, maintained common landscape areas, and a professionally managed homeowners association. *Hawai'i Loa Ridge, at* http://www.lava.net/~hiloa/ (last visited Nov. 4, 2000).

[5] In addition to the Hawai'i Loa Ridge development, to provide access, the development at Waialae Iki Ridge was also required to dedicate land in order to receive permitting approval from the state. Telephone Interview with Curt Cottrell, *supra* note 3.

[6] The developer of Hawai'i Loa Ridge was required to not only provide vehicular access to the trail, but also required to set aside land for parking stalls located near the trail head.

[7] LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 13 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) ("Government appropriation of private land, either directly pursuant to a statute, or indirectly through the restrictive effect of its regulations, is termed a taking of property.").

This comment suggests that in its enthusiasm to preserve public access to certain areas of the Hawai'i Loa Ridge development, the government seems to have overlooked the constitutional rights of the private landowner.[8] Specifically, the comment analyzes the constitutionality of Hawai'i's public access statute according to the standards set forth in the recent Supreme Court decisions in *Nollan v. California Coastal Commission*[9] and *Dolan v. City of Tigard*.[10] The Hawai'i Loa Ridge development will serve as the primary example to illustrate that the Statute does not meet the standards set forth by the Supreme Court, and that the Statute arguably is an unconstitutional taking of private property without just compensation.

As Hawai'i's economy improves, real estate development will probably increase.[11] In conjunction with granting subdivision permits, the city is likely to invoke the Statute as a basis for requiring public access dedications. As the city demands more and more land from developers, a constitutional challenge seems imminent. Part II of this comment provides an overview of Hawai'i's public access statute and the Hawai'i Loa Ridge gated community. Part II goes on to describe the genesis of the *Nollan/Dolan* takings test. Part III argues that the Statute's language and the manner in which it was applied to the developers of Hawai'i Loa Ridge is troublesome and that the Statute is vulnerable to Fifth Amendment challenges.[12] Part IV suggests that if the Statute is constitutional, the language of the Statute does not authorize the County to require the Hawai'i Loa dedication.

## II. BACKGROUND

### *A. The History of the Hawai'i Loa Ridge Development*

The history of the gated community at Hawai'i Loa Ridge provides a typical example of how a developer acquiesced to the government's dedication requirements in order to avoid costly litigation and delays in construction. The developer, HMF, Inc. ("HMF") acquired the property in 1978 by way of quitclaim deed from Continental Mortgage Investors ("CMI") as part of

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[8] BERNARD H. SIEGAN, PROPERTY & FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 46 (1997) ("The United States Constitution established a government of limited and enumerated powers that was not accorded by any authority to deny or deprive its constituents of the right to acquire, use, and enjoy property.").

[9] 483 U.S. 825 (1987).

[10] 512 U.S. 374 (1994).

[11] Andrew Gomes & Susan Hooper, *Modest Gains Expected in Most Real Estate Markets*, HONOLULU ADVERTISER, Jan. 30, 2000, at B10.

[12] The Takings Clause provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

bankruptcy proceedings.[13] Prior to development of the area, the parcel was primarily used for agriculture and livestock grazing purposes.[14] In 1985, HMF applied for a subdivision permit from the City and County of Honolulu ("County") as the first step in developing a gated community on Hawai'i Loa Ridge.[15] Citing the Statute as authority, the County required a public access easement to a trailhead that was located at the rear of the proposed development as a condition precedent to approval of the subdivision permit.[16] Rather than challenge the constitutionality of the condition, HMF granted the easement to the County for "pedestrian traffic and restricted vehicular traffic through the Subdivision to the mountains."[17] In the agreement, the County and HMF agreed that use would be restricted to people of the State of Hawai'i who presented valid State identification and signed a waiver indemnifying HMF against any loss or damage incurred as a result of using the access.[18] In addition, HMF assumed responsibility for the maintenance and improvements of the easement,[19] although the Statute expressly provides that the County should bear this burden.[20] It is unclear why or how HMF assumed this responsibility, but the County views the situation as fortuitous because it does not have to pay for maintaining the easement.[21] Upon closing of the agreement, the subdivision permit was granted and construction of one of Hawai'i's first gated communities began at Hawai'i Loa Ridge.[22]

Gated communities are primarily founded on the principles of safety, preservation of property values, and "greatly diminished confidence in the

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[13] GRANT OF PUBLIC ACCESS EASEMENT, Grantor HMF, Inc. and Grantee City & County of Honolulu (Aug. 4, 1983) (on file with author).

[14] Telephone Interview with Curt Cottrell, *supra* note 3.

[15] HONOLULU, HAW., REV. ORDINANCES ch. 22, § 22-3.3 (1990) ("No person shall subdivide or consolidate any land unless the plans therefor conform to the provisions of this article and the regulations of the planning commission and the board of water supply, and have been duly approved by the director.").

[16] *See* GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[17] *Id.*

[18] Although the Hawai'i Recreational Use Statute, HAW. REV. STAT. § 520 (1999), already protected those landowners who decided to open their lands to public access, as an added precaution, HMF required hikers to sign a waiver. For a more detailed discussion of the Hawai'i Recreational Use Statute, see Amy Cardwell, *The Hawai'i Recreational Use Statute: A Practical Guide to Landowner Liability*, KA NU HOU (Hawai'i State Bar Ass'n/Real Prop. & Fin. Serv. Section, Honolulu, Hawai'i), Oct. 1999, at 1-11.

[19] *See* GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[20] HAW. REV. STAT. § 46-6.5 (1999).

[21] Telephone Interview with Curt Cottrell, *supra* note 3.

[22] Telephone Interview with Richard Asato, Partner, Dwyer, Imanaka, Schraff, Kudo, Meyer & Fujimoto (Sept. 15, 2000).

capability of the nation's basic institutions to meet public needs."[23] The community privatizes functions normally provided by the government and pays for these services by assessing mandatory dues and imposing a variety of covenants, conditions and restrictions ("CC&Rs") on its community members.[24] In addition to providing these functions, the gated community at Hawai'i Loa Ridge is an extremely upscale neighborhood where homes range in price from $650,000 to over $2.5 million.[25] Based on an increased desire for safety and preservation of property values, Hawai'i Loa Ridge homeowners pay mandatory association fees and subject themselves to numerous CC&Rs. Thus, to preserve those interests that they have sought by moving into a gated community, it is understandable that the members of the Hawai'i Loa Ridge Homeowners Association ("Association") have a heightened interest in invoking their "right to exclude" against those who are not members of the Association.[26]

### *B. An Overview of Hawai'i's Public Access Statute*

Although the Statute has been enacted for almost thirty years, its importance has recently resurfaced in light of growing demand for real estate development.[27] The Hawai'i Legislature originally enacted the "public access statute"[28] in response to increased urbanization and development in Hawai`i.[29] The Statute in relevant part provides that:

> (a) Each county shall adopt ordinances which shall require a subdivider or developer, as a condition precedent to final approval of a subdivision, in cases where public access is not already provided, to dedicate land for public access

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[23] David J. Kennedy, *Residential Associations As State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 766 (1995).

[24] *Id.* at 763. Some examples of CC&Rs include restrictions on the color of the house paint, the placement of trees, the size and location of fences, and the parking of automobiles in the driveway and in the street, among others. *See, e.g.* Hawai'i Loa Ridge Declaration of Covenants, Conditions and Restrictions (on file with author).

[25] Telephone interview with Michael Sklarz, Director of Research Prudential Locations, (Sept 22, 2000). Information based on the average sale price, from the past 12 months, for homes located at Hawai'i Loa Ridge.

[26] *See generally*, Kennedy, *supra* note 23 (noting that the two primary motivations for living in a gated community are safety and preservation of property values, both of which are enhanced by keeping out unwanted individuals).

[27] Gomes & Hooper, *supra* note 11, at B10.

[28] HAW. REV. STAT. § 46-6.5 (1999).

[29] S. STAND. COMM. REP. NO. 878, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. SEN. J. 982-83. "Your committee finds that access to many of our existing outdoor recreational facilities is threatened by urbanization and development. With increasing frequency, development is occurring along our shores and on our mountain ridges which blocks public access . . . ." *Id.*

> by right-of-way or easement for pedestrian travel from a public highway or public streets to . . . the mountains where there are ***existing facilities*** for hiking, hunting, fruit-picking, ti-leaf sliding, and other recreational purposes, and where there are ***existing mountain trails***. . . .
>
> (c) Upon the dedication of land for a right-of-way, as required by this section and acceptance by the county, ***the county concerned shall thereafter assume the cost of improvements for and the maintenance of the right-of-way***, and the subdivider shall accordingly be relieved from such costs.[30]

As directed by the Statute, the County adopted section 22-6.3 of the Revised Ordinances of Honolulu ("ROH") which essentially mirrors the language set forth in the Statute.[31] The Legislature promulgated this Statute based on an "imperative [need] that means be provided to guarantee the public's right of access to our mountains and shores."[32] In addition to providing access for recreation, hiking and fruit picking, the Legislature cited testimony of groups that use the beach and mountain areas for collecting food and herbs that are used to "supplement their dining room tables."[33] The reasoning behind the requirement is that the public had enjoyed access to the mountain trail prior to the subdivision, and because the developer placed a subdivision between the public road and the trail head, he/she should be required to provide the means necessary to preserve public access.[34] The Legislature viewed preservation of public access to trails as a need created by the development of the subdivision and even specifically referred to the required dedications as "similar to the existing requirement of dedicating sites for parks and playgrounds in subdivisions."[35] Thus, the State Legislature seems to have assumed the

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[30] HAW. REV. STAT. § 46-6.5 (1999) (emphasis added).

[31] Although gated communities are not specifically mentioned in either the Hawai'i Revised Statutes ("HRS") or the Revised Ordinances of Honolulu ("ROH"), gated communities typically require subdivision approval and thus fall within the scope of both provisions. Telephone Interview with Richard Asato, *supra* note 22.

[32] S. STAND. COMM. REP. NO. 878, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. SEN. J. 982-83.

[33] S. STAND. COMM. REP. NO. 62, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. HOUSE J. 777. "The Hawaiians and several other groups also indicated a need for public access . . . [t]he use of the mountain areas is for the collection of food and herbs as well as for recreation." *Id.*

[34] Telephone Interview with Curt Cottrell, *supra* note 3.

[35] S. STAND. COMM. REP. NO. 62, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. HOUSE J. 777. "Your committee thinks that requiring subdividers to dedicate land for right-of-way is similar to the existing requirement of dedicating sites for parks and playgrounds in subdivisions." *Id.*

constitutionality of the Statute by associating the public access requirement with the type of dedications that were already deemed Constitutional.[36]

Of particular interest in both the Statute and the ROH is the specific condition that requires the trail must be in existence at the time of the development.[37] Specifically, the Ordinance provides that "where there are existing facilities . . . and where there are existing mountain trails," the developer shall be required to dedicate land for public access to the trail as "a condition precedent to final approval of a subdivision or issuance of a building permit."[38] The purpose of this provision is to prevent hikers from starting new trails in order to deliberately prevent development.[39] Furthermore, in failing to define what constitutes an "existing mountain trail," the Statute, whether purposefully or not, has the effect of granting the government great latitude in determining what is, and what is not, an "existing trail."[40] Although the County possesses the potential to abuse its discretion, the "*Nollan/Dolan*" test has been established to prevent the County from effecting unconstitutional takings.

### *C. The Takings Issue*

#### *1. Overview*

The "Takings Clause" provides: "[N]or shall private property be taken for public use, without just compensation."[41] Set forth in the Fifth Amendment to the United States Constitution, the "Takings Clause" has produced a great deal of litigation[42] and promises to be a heavily contested issue in many cases

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[36] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that an ordinance adopted as part of a comprehensive zoning plan was constitutional and not a regulatory taking).

[37] HAW. REV. STAT. § 46-6.5 (1999); HONOLULU, HAW., REV. ORDINANCES ch. 22, § 6.3 (1990).

[38] HONOLULU, HAW., REV. ORDINANCES ch. 22, § 6.3 (1990).

[39] Telephone Interview with Curt Cottrell, *supra* note 3.

[40] SIR PETER BENSON MAXWELL, THE INTERPRETATION OF STATUTES 55 (1991) ("However wide in the abstract, they [words & phrases] are more or less elastic, and admit of restriction or expansion to suit the subject matter.").

[41] U.S. CONST. amend. V.

[42] *See, e.g.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (taking found where government forced property owner to allow television cable through dedicated utility easement), United States v. Causby, 328 U.S. 256 (1946) (taking found where low-flying military planes passed over a chicken ranch, scaring chickens so that they flew into walls, often killing themselves), Cable Holdings of Georgia v. McNeil Real Estate Fund VI Ltd., 953 F.2d 600 (11th Cir.) *cert. denied*, 506 U.S. 862 (1992) (taking found where government attempted to expand its use of easement through private property).

to come. Presently, in deciding whether a title taking[43] has occurred, the Supreme Court applies the three-pronged "*Nollan/Dolan*" test as established by its decisions in *Nollan v. California Coastal Commission*[44] and *Dolan v. City of Tigard*.[45]

*2. The Nollan/Dolan takings test*

The Nollans were private landowners who wished to develop their beachfront property.[46] There was an existing bungalow on the property that the Nollans planned to demolish and replace with a larger house.[47] The Nollans, thereafter, applied for a building permit from the California Coastal Commission and the Commission conditioned approval of the permit on Nollans' agreement to provide public access "in the form of an easement to pass across [a portion of] their property."[48] In requiring the dedication, the Commission's stated reasoning was that "the new house would increase blockage of the view of the ocean . . . that would prevent the public 'psychologically' . . . from realizing a stretch of coastline exists nearby that they have every right to visit."[49] The Nollans challenged the Commission's requirement claiming it was a violation of the Takings Clause of the Fifth Amendment.[50] The Supreme Court agreed with the Nollans holding that the requirement did not constitute a "legitimate state interest."[51] The Court required an "essential nexus" between the condition and the purpose of the

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[43] "A title taking differs from a physical taking in that the regulating body does not physically invade the land but places a restriction on the use of the property that significantly interferes with the incidents of ownership." Robert H. Freilich & Elizabeth A. Garvin, *Takings after Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 56 (David L. Callies, ed., 1993).

[44] 483 U.S. 825 (1987).

[45] 512 U.S. 374 (1994). The *Nollan/Dolan* test requires a local government to show a real relationship between the public impact of a proposed project and how an exaction is warranted to offset those impacts. The local government is then required to show, by using some level of quantification, both in nature and extent, that the required exaction is roughly proportional to the impact of the proposed development. Richard Duane Faus, *Exactions, Impact Fees, and Dedications: Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675, 681 (2000). The test will be further discussed *infra* section II.

[46] *Nollan*, 483 U.S. at 828.

[47] *Id.* at 829.

[48] *Id.*

[49] *Id.* at 828-29.

[50] *Id.* at 831.

[51] *Id.* at 837; *see also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that where the court first established that a land use regulation does not effect a taking if it "substantially advance[s] legitimate state interests").

original building restriction,[52] and found that there was no essential nexus between the purpose for the restriction (the decreased view from the street) and the requirement (the dedication of land on the other side of the house for public access).[53] In establishing the "essential nexus" test, the Court specifically noted that under circumstances similar to those presented in *Nollan*, courts should be aware of the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power-objective."[54]

Although the decision in *Nollan* established the requirement of an "essential nexus" between the condition imposed and the purpose for the condition, it did not address the degree of proportionality that determines when the exaction will be regarded as excessive and thus become an unconstitutional taking.[55] The Court in *Dolan* analyzed this very issue and set forth the standard of "rough proportionality" to describe the essential nexus between the "required dedication" and the "impact of the proposed development."[56]

In *Dolan*, the petitioner, Florence Dolan, owned a 1.67 acre parcel in the City of Tigard, Oregon, on which there was an existing hardware store that occupied only 9,700 square feet (approximately .22 acres) of the parcel.[57] Fanno Creek flows through the southwest portion of the parcel and on the western border of the property.[58] Mrs. Dolan's proposed development, which would have doubled the size of the store and paved an existing area parking area with thirty nine spaces, and was deemed to be consistent with the city's zoning scheme.[59] In seeking approval for the improvements from the city planning commission, the city granted the permits on the condition that Mrs. Dolan dedicate two areas of her property: the portion lying 1) within the 100 year floodplain for improvement of a storm drainage system along Fanno Creek, and 2) a fifteen foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.[60] The dedication prevented Mrs. Dolan from developing approximately 7,000 square feet, or roughly 10% of the total area of her property.[61]

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[52] *Nollan*, 483 U.S. at 837 (defining the "essential nexus" as the relationship between the condition imposed by the state and the end that the state is trying to accomplish).

[53] *Id.* at 838.

[54] *Id.* at 841.

[55] Dolan v. City of Tigard, 512 U.S. 374, 386 (1994) (recognizing that the Nollan Court did not address the degree of connection between the exactions and the projected impact of the proposed development).

[56] *Id.* at 391.

[57] *Id.* at 379.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 380.

[61] *Id.*

In holding that the required dedication was an unconstitutional taking, the Court applied the "essential nexus" test established in *Nollan* and determined that "a nexus exist[ed] between preventing flooding along Fanno Creek and limiting development within the creek's 100 year floodplain."[62] The Court further stated "[t]he same may be said for the city's attempt to reduce traffic congestion by providing for [a bike path]."[63] However, the Court expanded upon the *Nollan* test and evaluated whether the degree of the exaction bore "the required relationship to the projected impact of [Mrs. Dolan's] proposed development."[64] Specifically, the Court stated that the term "rough proportionality" best encapsulated the requirement to satisfy the Fifth Amendment, and although "[n]o precise mathematical calculation is required . . . the city must make some sort of *individualized determination* that the required dedication is related both in nature and extent to the impact of the proposed development."[65]

In making its decision, the *Dolan* Court finalized the third prong in what has come to be known as the *Nollan/Dolan* test for determining whether an unconstitutional taking has occurred. The test requires that: 1) there be a legitimate state interest in requiring the regulation;[66] 2) there must be an "essential nexus" between the condition and the purpose of the original building restriction;[67] and 3) that there must be a "rough proportionality" between the degree of the exaction and the required relationship to the projected impact of the development.[68] The *Nollan/Dolan* test is the applicable standard for determining whether the public access easement required by the County under the HRS and the ROH constitutes an unconstitutional taking of the property rights of the Hawai'i Loa Ridge developers.

## III. THE CONSTITUTIONALITY OF HRS SECTION 46-6.5

As the Hawai'i Loa Ridge fact pattern illustrates, developers have two methods by which to expose the unconstitutionality of the Statute. First, the landowner can attack the Statute on its face, claiming that any conceivable application of the Statute will be unconstitutional.[69] Secondly, the landowner

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[62] *Id.* at 387.

[63] *Id.*

[64] *Id.* at 388.

[65] *Id.* at 391 (emphasis added).

[66] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[67] Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).

[68] *Dolan*, 512 U.S. at 391 (1994).

[69] ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 107 (1999).

can wait and attack the particular application of the Statute.[70] Facial attacks are not often successful as the issue is often deemed not "ripe" for litigation.[71] Furthermore, the Supreme Court has demonstrated "a steadfast unwillingness to in fact find that the 'mere enactment' of a given regulation has resulted in a taking of all affected property."[72] The facts of the Hawai'i Loa Ridge illustration provide a strong basis for both a "facial attack" and an "as applied" challenge of the constitutionality of the Statute.

### *A. Facial Attack to HRS Section 46-6.5*

If a facial challenge of a statute is to prevail, "it may have to be based on takings criteria other than economic impact–for example, the alleged failure of the law 'to substantially advance legitimate state interests,' or an effective appropriation of land through statutory text alone."[73] In cases involving facial attacks, the *Nollan/Dolan* test is inapplicable because instead of analyzing the degree of the exaction, "the court looks to whether the enactment of the ordinance, under which exactions will be imposed, effects a taking."[74] Thus, if the statute effects a physical taking[75] or total regulatory taking,[76] it will be deemed facially invalid. Here, it is arguable that the Statute is an "effective appropriation of land through statutory text alone."[77]

The Statute authorizes the County to require developers of subdivisions to grant the public an easement on a permanent basis in order to allow the public

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[70] *Id.*

[71] For an overview of ripeness and the application of the doctrine, see Thomas E. Roberts, *Ripeness After Lucas*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 11 (David L. Callies, ed., 1993).

[72] Taylor v. Vill. of N. Palm Beach, 659 So. 2d 1167, 1171 (Fla. App. 1995); *see* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (describing the battle of asserting a facial challenge as "uphill" and "especially steep" for the landowner); *see also*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[73] MELTZ, MERRIAM & FRANK, *supra* note 68, at 108-09; *see also* Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468, 473-74 (9th Cir. 1994). "A facial challenge involves 'a claim that the mere enactment of a statute constitutes a taking,' while an as-applied challenge involves 'a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation.'" *Id.*

[74] Garneau v. City of Seattle, 147 F.3d 802, 811 (9th Cir. 1998).

[75] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) (invalidating a New York City ordinance because "it require[d] the landlord to suffer the physical occupation of a portion of his building by a third party").

[76] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (A total regulatory taking was found where a government regulation prohibited all economically viable use of the property.).

[77] MELTZ, MERRIAM & FRANK, *supra* note 68, at 108-09.

access to the mountain trails.[78] Thus, by enacting the Statute, the State effects a permanent physical occupation of privately owned land, an action that has long been declared by the Court as "the most serious form of invasion of an owner's property interests."[79] In *Loretto v. Teleprompter Manhattan CATV Corp.*[80] the Court held that any permanent physical occupation is taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[81] In *Loretto*, the Court found a taking had occurred when a private landowner was required by a state statute to allow the installation of cable television facilities on his property.[82] Although the physical invasion of the property only consisted of a cable and two cable boxes located on the roof of the property,[83] the Court still found the action to be a "permanent physical occupation" that required just compensation.[84] The Court revisited the *Loretto* decision five years later in *Nollan*, where Justice Scalia classified the type of activity that was encompassed under the term "permanent physical occupation" by remarking: "We think 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[85] Although easements are traditionally considered to be non-possessory interests,[86] the government required the Hawai'i Loa Ridge developers to allow the public to pass to and fro continuously over the development.[87] Described as such, the Hawai'i Loa Ridge easement would seem to fall within the ambit of Justice Scalia's definition of a "permanent physical occupation" which constitutes a taking of property that requires just compensation.[88]

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[78] HAW. REV. STAT. § 46-6.5 (1999); HONOLULU, HAW., REV. ORDINANCES ch. 22, § 6.3 (1990).

[79] *Loretto*, 458 U.S. at 435 (1982).

[80] 458 U.S. 419 (1979).

[81] *Id.* at 434-35.

[82] *Id.* at 422.

[83] *Id.*

[84] *Id.* at 441.

[85] Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987).

[86] "Easements . . . are traditionally described as servitudes which are non-possessory interests created by agreements between private parties that entitle one party to use or restrict the use of the land of another." J. GORDON HILTON, ET AL., PROPERTY LAW AND THE PUBLIC INTEREST 477 (1998).

[87] *See* GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[88] A strong argument can be made that easements have the effect of giving another individual the permanent and continuous right to pass to and fro on the property of another.

Having broadened the range of actions that fall within the term "permanent physical occupation," the Court in *Nollan* went on to outline the outer limits of the application of the new definition by distinguishing an earlier decision, *Pruneyard Shopping Center v. Robbins*.[89] In *Pruneyard*, the Court declared that a taking had not occurred in a situation where individuals were allowed to "engage in any publicly expressive activity" on the grounds of a private shopping center. [90] The shopping center owner claimed that his Fifth Amendment right to exclude others from his property had been violated by the California State Constitution and he was therefore deserving of just compensation.[91] At first glance, *Pruneyard* may seem like a "permanent physical occupation" as characterized by the *Nollan* Court, however, the *Nollan* Court distinguished *Pruneyard* by explaining that the shopping center was an area voluntarily opened to the public, and in that case, regardless of whether the plaintiff could establish "permanent access," requiring the owner to allow the public expressive activity did not constitute a taking.[92] In the present situation, Hawai'i Loa Ridge was never voluntarily opened to the public. Rather, the opposite is true. By gating the community and creating a private subdivision where members pay association fees,[93] the Hawai'i Loa Ridge Homeowners Association created a single property regime that possessed the same fundamental right to exclude just as any other private owner did.[94] As such, any physical invasion of that property by an act of the government may be construed as a taking that requires just compensation.[95] Thus, according to *Nollan*, by promulgating a Statute which requires the dedication of a "public access by right-of-way or in fee or easement"[96] to existing mountain trails, the State has caused private land to be "permanently physically occupied."[97] Accordingly, the Statute, by text alone, effectuates an

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[89] 447 U.S. 74 (1980).

[90] *Id.* at 77.

[91] *Id.* at 82.

[92] *Nollan*, 483 U.S. at 832 n.1.

[93] Telephone interview with Mark Congdon, Manager, Hawai'i Loa Ridge Homeowners Association (Sept. 14, 2000).

[94] Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 830 (Summer 1999) (stating "[t]he homeowners association . . . is a separate legal entity that holds title to the streets, parks, neighborhood common buildings, and other 'common areas'.").

[95] The Fifth Amendment expressly prohibits the taking of any private property without just compensation.

[96] HONOLULU, HAW., REV. ORDINANCES ch. 22, § 6.3 (1990).

[97] *Nollan*, 483 U.S. at 832.

appropriation of land and could therefore be deemed facially unconstitutional.[98]

### *B. HRS Section 45-6.5 "As Applied" to Hawai'i Loa Ridge*

In the alternative, the Statute may be challenged "as applied" by way of the landowner demonstrating that the government action has resulted in a taking as specifically applied to his or her property.[99] Here, the County applied the Statute to require the Hawai'i Loa Ridge developers to dedicate a public access easement to a trail head that was located within the subdivision.[100] As such, the application of the Statute is unconstitutional under the *Nollan/Dolan* test.

As discussed earlier, the *Nollan/Dolan* test determines whether a regulation effects a taking of private property.[101] The first prong in determining whether an unconstitutional taking has occurred under the *Nollan/Dolan* test is to determine if the statute advances a legitimate state interest.[102] In *Nollan*, Justice Scalia's cautions courts to be wary of takings that are guised as advancing a legitimate state interest:

> We are inclined to be particularly careful about the objective where the actual conveyance of the property is made as a condition to the lifting of the land-use restriction, since in the context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.[103]

Furthermore, the Supreme Court has repeatedly held that the "right to exclude," is a fundamental property right.[104] Therefore it is with a critical eye that courts must examine the government's argument that the applicable statute advances a legitimate state interest. Here, the Statute is perpetuating the

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[98] A facial taking is established when it is shown that the law takes the plaintiff's parcel under any conceivable implementation scenario. MELTZ, MERRIAM & FRANK, *supra* note 68, at 107.

[99] *Id.* at 109.

[100] *See* GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[101] *See supra* note 45 and accompanying text.

[102] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[103] *Nollan*, 483 U.S. at 841.

[104] Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979). *See also* College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999) (The hallmark of a constitutionally protected property interest is the right to exclude others.); Dolan v. City of Tigard, 512 U.S. 374, 393 (1994) (The right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.). *See generally* David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39 (2000) (discussing the fundamental nature of the right to exclude as it emanates from the decisions of the U.S. Supreme Court and other lower courts).

public's access to recreational facilities that would otherwise be inaccessible because of private development.[105] Based on Hawai'i's unique island status, land has always been, and will always be at a premium. Often times, private development surrounds land that the State zoned for conservation use simply because the amount of residential land in Hawai'i is limited to approximately 4% of the state's surface area.[106] In addition, development limits the amount of natural public recreational facilities. As such, the Legislature has determined that "it is imperative that means be provided to guarantee the public's right of access to our mountains and our shores."[107] As a result, there is arguably a legitimate state interest in providing public access to these conservation areas that were existing at the time of the proposed development.

The second prong of the test focuses on whether an "essential nexus" between the legitimate state interest and the condition exacted by the city exists.[108] Here, the trailhead is located behind the gates of the community, and based on the surrounding terrain and lack of public roads leading up the Hawai'i Loa Ridge, there are no other feasible access points.[109] Therefore, the development of the gated community created a need for public access to the existing trail head. Thus, there is an "essential nexus" between the requirement for public access and the state interest of preserving recreational uses for the public.

However, heeding Justice Scalia's warning in *Nollan*, arguably the development of the gated community does not affect public access to the trailhead because the public was trespassing on private land to get to the trail in the first place. [110] Furthermore, as evidenced by the use of the terms "existing facilities" and "existing mountain trails,"[111] the Legislature specifically intended to limit the application of the Statute to those particular instances.[112] Thus, a strong argument can be made that by simply exercising the right to develop the property and preventing the trespassers from entering on the land, the developers did not create the need for access as it was intended

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[105] S. STAND. COMM. REP. NO. 878, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. SEN. J. 982-83.

[106] Interview with David L. Callies, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (Sept. 12, 2000). Less than 4% of the land area of the state is classified "urban" by the state Land Use Commission. DAVID L. CALLIES, ET. AL., CASES AND MATERIALS ON LAND USE 690 (3d ed. 1999).

[107] S. STAND. COMM. REP. NO. 878, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. SEN. J. 982-83.

[108] *Nollan*, 483 U.S. at 837.

[109] Telephone Interview with Curt Cottrell, *supra* note 3.

[110] The issue of trespass will be discussed *infra* section III.A.

[111] HAW. REV. STAT. § 46-6.5 (1999).

[112] See *supra* note 38 and accompanying text.

by the Statute.[113] Access to the trail, prior to the development was accomplished by trespassing over private land, and thus the government has arguably created a permanent access right where there initially were no such rights.[114]

The final prong of the *Nollan/Dolan* test requires that there be a rough proportionality between the required dedication and the impact of the proposed development.[115] As applied, the test requires that the state make some sort of individualized determination that the dedication "is related in both nature and extent to the impact of the proposed development."[116] In the case of Hawai'i Loa Ridge, no such determination was made. The developer agreed to grant the easements over the property in an effort to avoid litigation and problems obtaining a permit.[117]

With regard to the impact of the proposed development, although it blocked the public access to an existing trail, the prior use was trespassory, and thus no rights were being violated except those of the landowner.[118] The dedication, roughly equivalent to eight acres,[119] is therefore not proportional, in any sense, to the impact of the development. Although the eight acres is a small portion of land when comparing it with the entire area of the development,[120] the "rough proportionality" test does not involve a mathematical analysis.[121]

*1. The parking stall requirement as an essential nexus*

An equally persuasive argument can be made for the proposition that the development of a subdivision does not share an "essential nexus" with the dedication of land to create parking stalls. Public access prior to development of Hawai'i Loa Ridge did not include a parking lot near the trail head.[122]

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[113] The intent of the statute was to preserve access rights to mountain trails and recreational areas. S. STAND. COMM. REP. NO. 62, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. HOUSE J. 776-77.

[114] There was not an established state access-way to the trail at Hawai'i Loa Ridge at the time of the development. Telephone Interview with Curt Cottrell, *supra* note 3.

[115] Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).

[116] *Id.*

[117] Telephone Interview with Curt Cottrell, *supra* note 3.

[118] At common law, "an action for trespass would lie for any unauthorized entry, either by person or thing, upon another's land directly resulting from a volitional act." JAMES A. HENDERSON, JR., ET AL., THE TORTS PROCESS 437 (1999).

[119] GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[120] There are over 500 homes on the Ridge, with the average lot size approximately 15,000 square feet. Telephone interview with Michael Sklarz, Director of Research at Prudential Locations (Sept. 22, 2000). Information based on the average lot size of listed properties from the past 12 months, for homes located at Hawai'i Loa Ridge.

[121] *Dolan*, 512 U.S. at 392.

[122] Telephone Interview with Curt Cottrell, *supra* note 3.

Hikers parked their motorcycles and trucks on the rugged terrain and walked the rest of the distance to the trail head.[123] The developer did not build over an existing parking facility, nor did he restrict access to an existing parking structure. In developing the land, the public simply lost its ability to park illegally that it enjoyed in the past. Thus, it is extremely difficult to suggest that there is any nexus, let alone an "essential nexus," as to why the developer should be required to provide for a facility that was never available in the first place.

*2. Rough proportionality of the parking requirement*

The "rough proportionality" prong of the *Nollan/Dolan* test is also difficult to establish with regards to the parking requirement imposed by the government. Under this prong of the analysis, the government is required to make an "individualized determination"[124] that the dedication is related both in nature and extent to the impact of the proposed development.[125] Here, the government has not submitted any statistics or data that support its contention that parking was a necessary feature.[126] Furthermore, in the Hawai'i Loa Ridge subdivision, the residents themselves are not allowed to park on the streets.[127] Why then, should the government be able to require the subdivision developers to build a parking area for the public? This requirement extends beyond the "rough proportionality" considered by the Court in *Dolan*,[128] and arguably establishes that the parking requirement is an unconstitutional taking of property that requires just compensation.

## IV. HRS SECTION 46-6.5 DOES NOT AUTHORIZE THE COUNTY TO REQUIRE THE HAWAI'I LOA DEDICATION

Besides the unconstitutionality of HRS Section 46-6.5, another objection to applying the Statute in this and like situations is that fact patterns like Hawai'i Loa Ridge do not fall under the purview of the Statute. In the present

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[123] *Id.*

[124] *Dolan*, 512 U.S. at 391.

[125] PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS & PRACTICAL APPLICATION OF LAND USE LAW 77 (1998).

[126] In support of this contention, the GRANT OF PUBLIC ACCESS EASEMENT, Grantor HMF, Inc. and Grantee City & County of Honolulu (Aug. 4, 1983) makes no mention of the parking stalls. The parking stall requirement was in all likelihood an oral agreement between the developers and the state. Telephone Interview with Curt Cottrell, *supra* note 3.

[127] Hawai'i Loa Ridge Declaration of Covenants, Conditions and Restrictions, § 4.14.17. "Owners and tenants occupying a Residence shall at all times park their automobiles and other permitted motor vehicles in the garage or driveway." *Id.*

[128] *Dolan*, 512 U.S. at 392.

situation, the Hawai'i Loa Ridge trail was not an "existing mountain trail," nor were there "existing facilities for hiking . . . and other recreation purposes."[129] Additionally, by not meeting the criteria that the trail be "an existing mountain trail," the government, arguably, has overstepped its authority by requiring the developer to dedicate land for public parking.[130] The Statute makes no mention of a parking requirement, yet the government required provision of ten parking stalls as a part of the public access dedication.[131] It has been argued by the government that public access in the present day sense of the term includes vehicular traffic, and as a natural consequence of vehicular traffic, parking will be required.[132] However, the Statute merely provides that the developer shall provide "public access . . . for pedestrian travel from a public highway or public street."[133] If vehicular traffic and parking stalls were intended to be included in the public access requirement, the Legislature would have incorporated those terms into the Statute.

### *A. The Hawai'i Loa Ridge Trail Is Not an "Existing Trail" for Purposes of the Statute*

The Statute specifically states that in order for the city to require a public access dedication from the developer, there must be an existing mountain trail.[134] However, there is no guidance provided from the Legislature as to how to determine an existing trail at the time of the subdivision application. The government contends that the public has had access to the trail dating back to the early 1900's and that it is obvious that the area was being used as a recreational and food gathering facility.[135] Accordingly, at the time the Hawai'i Loa Ridge subdivision was being planned, the trail had been established, and for the purposes of HRS Section 46-6.5, it was an existing facility that demanded public access.[136]

The government contends that the trail has always been a public trail and that the placement of the subdivision between the public road and the trail head is what triggers the application of the Statute.[137] However, at the time that the government claims the trail was established as a public facility, the individuals who used the trail were arguably trespassing over private land to

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[129] HAW. REV. STAT. § 46-6.5 (1999). See *infra* section III.B.

[130] GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[131] Telephone Interview with Curt Cottrell, *supra* note 3.

[132] *Id.*

[133] HONOLULU, HAW., REV. ORDINANCES ch. 22, § 6.3 (1990).

[134] HAW. REV. STAT. § 46-6.5 (1999).

[135] Telephone Interview with Curt Cottrell, *supra* note 3.

[136] *Id.*

[137] *Id.*

get to the trail head which is located approximately 1.5 miles from the public road.[138] Hikers and hunters would drive their vehicles as far as they could on the unpaved terrain of the ridge where they would then park their cars and continue on foot to the trail head.[139] Thus, the government relies on this illegal trespassing to argue that the public became vested with a right to have access to the trail.[140]

Furthermore, the Hawai'i Department of Land and Natural Resources ("DLNR") maintains a list which notes each trail's date of creation, which are useful in determining what trails are "existing" for purposes of the Statute.[141] Notably, the Hawai'i Loa Ridge trail is one of the few trails that does not have a creation date, [142] which implies that the status of the trail as an "existing trail" is tenuous at best. In addition, the government also admits that the trail was not formally built or graded, but instead developed over time from public foot traffic through the area.[143] These facts support the contention that the trail was not an "existing mountain trail" as is required to invoke the authority of the Statute. To further support the contention that the Hawai'i Loa Ridge dedication was not authorized by HRS Section 46-6.5, arguably there are no "existing facilities" located on the trail.[144]

### *B. There Were No "Existing Facilities" on the Hawai'i Loa Ridge Trail*

In 1983, when the easement was granted to the County, there were no "existing facilities" on the Hawai'i Loa Ridge trail. The Statute itself does not define the term "facilities" and thus by its silence, the Legislature has allowed

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[138] *See* Ridge Map Trail (East Honolulu - Kuliouou Area) by Dep't Land and Natural Resources Na Ala Hele (on file with author).

[139] Telephone Interview with Curt Cottrell, *supra* note 3.

[140] The State's argument would be posited on the legal theory of prescriptive easements which states where there is a "continuous use of an easement over a long period of time without the landowner's interference [there] is presumptive evidence of its existence." MacDonald Properties, Inc. v. Bel-Air Country Club, 140 Cal. Rptr. 367, 373 (1977). However, the State's claim that the public possessed a prescriptive easement over the property is expressly prohibited by HRS Section 520-7 which states, "No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes as provided in this chapter." The recreational uses mentioned in HRS Section 420 include hunting, fishing, hiking, viewing scenic sites and other uses. Thus, any claim based on prescriptive rights would be thwarted by the express prohibition set forth in HRS Section 520-7.

[141] Telephone Interview with Curt Cottrell, *supra* note 3.

[142] *Id.*

[143] *Id.*

[144] The Statute authorizes the State to require dedications of land where "there are existing facilities for hiking, hunting . . . and other recreational purposes." HAW. REV. STAT. § 46-6.5 (1999).

the County to interpret the term as broadly or narrowly as it sees fit.[145] The DLNR maps of established trail areas arguably provides guidance as to the proper definition of "facilities."[146] In the context of Hawai'i's hiking trail maps, the term "facilities" refers to amenities such as restrooms, picnic tables, and shelters.[147] None of these facilities were in existence on the Hawai'i Loa Ridge trail at the time that the Statute was invoked.[148] Furthermore, according to DLNR maps, to this date there are still no "facilities" located on the Hawai'i Loa Ridge trail.[149]

When the ambiguity of the term "facilities" is combined with the equally ambiguous term "existing," the resulting combination is a term that could be applied to virtually any situation. For example, in a situation where community members were accustomed to picking bananas from trees located on an undeveloped, mountainside lot, would this constitute an "existing facility" for fruit picking? Under this hypothetical, the lot was "existing" at the time of the proposed development and the government would argue that it was a "facility" used for the gathering of fruits. Would this mean that the landowner would fall under the ambit of the Statute and have to grant a public access easement to the banana trees? As evidenced by the government's broad interpretation of the term "facilities" in the Hawai'i Loa Ridge illustration, under the current statutory construction, an outcome similar to the banana hypothetical is not that unreasonable. If the brief analysis employed in the hypothetical seems beyond what the government would possibly advocate, consider the required dedication of parking stalls that the government justifies under the term "public access."

### *C. A Requirement for Parking Stalls is Not Established in the Statute*

In addition to requiring an access easement be granted, the County also required HMF to dedicate land for ten parking stalls near the access point of the trail.[150] The text of the Statute does not mention parking stalls, nor is there any indication that the Legislature intended parking stalls to be considered as part of the access.[151] However, by using its permitting power as a means to

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[145] Maxwell, *supra* note 40, at 55 ("However wide in the abstract, they [words & phrases] are more or less elastic, and admit of restriction or expansion to suit the subject matter.").

[146] *See* Ridge Map Trail (East Honolulu - Kuliouou Area) by Dep't Land and Natural Resources Na Ala Hele (on file with author).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *See* S. STAND. COMM. REP. NO. 62, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. HOUSE J. 777 (making reference only to creating a "public access right-of-way"); S. STAND. COMM. REP. NO. 878, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 HAW. SEN. J. 982-83

gain leverage, the County was able to expand the scope of the Statute and require dedication of parking stalls. Not only can the parking stall requirement be construed as reaching beyond the contemplated scope of the Statute, but it also arguably cannot withstand the level of scrutiny applied in the *Nollan/Dolan* test.

A strong argument can be made that the requirement for parking stalls does not advance a legitimate state interest as required by the *Nollan/Dolan* test. Here, the purpose of the Statute is to "provide an easement for pedestrian travel,"[152] not to provide luxurious amenities for trail users. However, HMF specifically mentions a right of way for "restricted vehicular traffic" in its access agreement,[153] which the government argues is logically associated with providing for public access.[154] If logical implications could always be used to justify expansion of a statute's applicability, the limits as to how far a logical connection would be able to extend are boundless. Under this logic, the government could require provisions of additional amenities such as water fountains, restrooms, benches and even covered parking stalls. Thus, in order to prevent the government from applying the Statute in ways that were unintended by the Legislature, the Statute should be limited to the ends for which it provides: "public access."[155]

## V. CONCLUSION

At first glance, the Hawai'i Public Access Statute appears to be an effective use of legislative authority to preserve Hawai'i's mountain trails. However, upon closer inspection, the Statute is arguably unconstitutional on its face[156] and raises a serious "takings" issue.[157] The government has been able to continue this practice unchallenged because developers rather acquiesce to satisfy the government's demands rather than endure countless delays that would inevitably result otherwise. As demonstrated by the Hawai'i Loa Ridge illustration, HMF could have challenged the application of the Statute on numerous grounds, but instead chose to acquiesce to the government's demands. In this sense, developers have applied a cost/benefit analysis and

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(making reference only to guaranteeing "the public's right of access to our mountains and shores").

[152] HAW. REV. STAT. § 46-6.5 (1999).

[153] GRANT OF PUBLIC ACCESS EASEMENT, *supra* note 13.

[154] Telephone Interview with Curt Cottrell, *supra* note 3.

[155] "Public Access" is defined as access "for pedestrian travel means a public right-of-way in fee or easement for pedestrian traffic, and may also be used as a bikeway, utility easement or for restricted vehicular traffic." HONOLULU, HAW., REV. ORDINANCES ch. 22, § 6.2 (1990).

[156] *Supra* section II.A.

[157] *Supra* section II.

have reached the conclusion that complying with HRS Section 46-6.5 is more efficient than litigating in the long run.

However, there are certain fundamental rights that are protected by the Constitution that should not be compromised. Included among these is the right to private property.[158] The Supreme Court has developed a test to determine whether the constitutional right to private property has been violated and the government should apply the *Nollan/Dolan* test on a case by case basis to determine whether a dedication required pursuant to HRS Section 46-6.5 constitutes an unconstitutional taking. Until then, the government will continue to use the power provided to it via the permitting process to coerce developers into complying with the dedication requirements. Although the result benefits the public in that access is preserved, is this access so beneficial that the Constitution of the United States should be allowed to be overlooked? I certainly hope not.

Norman Cheng[159]

[158] U.S. CONST. amend V.

[159] Class of 2002, William S. Richardson School of Law.