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ARTICLES

COMMENTS

CASENOTES

RECENT DEVELOPMENTS

Extreme Mental or Emotional Disturbance (EMED)

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I. OVERVIEW

This article focuses on extreme mental or emotional disturbance (EMED) as mitigation to murder in Hawai'i. Part II – HOW EXTREME MENTAL OR EMOTIONAL DISTURBANCE IS DEFINED BY HAWAI'I LAW, first examines the development of the "heat of passion" defense at common law and its modification when codified as EMED. Based on a review of more than two dozen cases on the subject, the section then discusses the subsequent development of EMED as the Hawai'i courts slowly recognized self-control as a significant factor in establishing EMED. Part II further considers the interaction between EMED and the defense of physical or mental disease or defect excluding penal responsibility, *i.e.*, insanity.

Part III – CONTRIBUTIONS OF BEHAVIORAL SCIENCE TO EMED, proposes a psycholegal model which links case law and behavioral science. This model presents a three-part test of EMED as follows: (1) significant environmental stressors impinge on the defendant; (2) the defendant suffers negative cognitive (thinking) and affective (emotional) consequences; and (3) the defendant loses self-control. Self-control for the times before, during, and to a lesser extent after the alleged murder remains the pivotal concept in EMED cases. Also included is one table which contrasts the two basic violence modes and a second table graphing the degree of self-control with respect to the time periods (before, during and after) of a murder.

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Finally, in Part IV – SUMMARY AND RECOMMENDATIONS, the findings of the article are summarized and practical suggestions are offered for the bench and bar. A comprehensive checklist listing self-control factors and their significance is appended to this article for use by practitioners as a preliminary screen for EMED.

II. HOW EXTREME MENTAL OR EMOTIONAL DISTURBANCE IS DEFINED BY HAWAI'I LAW

Section 707-702 of the Hawai'i Revised Statutes ("H.R.S.") provides as follows:

> Manslaughter. (1) A person commits the offense of manslaughter if:
> (a) He recklessly causes the death of another person; or
> (b) He intentionally causes another person to commit suicide.
> (2) In a prosecution for murder in the first and second degrees *it is a defense, which reduces the offense to manslaughter, that the defendant was*, at the time he caused the death of the other person, *under the influence of extreme mental or emotional disturbance* for which there is a reasonable explanation. The reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be.
> (3) Manslaughter is a class A[2] felony.[3]

While the Hawai'i Penal Code does not define extreme mental or emotional disturbance ("EMED"), the Code, including H.R.S. section 702-202, was derived from and patterned after the Model Penal Code (Proposed Official Draft 1962) promulgated by the American Law Institute. Thus, in order to understand how EMED is applied in Hawai'i, it is necessary to review the

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[2] As initially promulgated in 1972, HAW. REV. STAT. § 707-702 made manslaughter a class B felony, punishable with ten years imprisonment, while HAW. REV. STAT. § 707-701 made murder a class A felony punishable with: in aggravated cases such as the murder of a police officer – life imprisonment without parole; in all other cases - life imprisonment with parole or 20 years imprisonment according to the discretion of the sentencing judge. Act 9, 1972 HAW. SESS. LAWS 72, 86.

However, in 1981, the Legislature amended HAW. REV. STAT. § 707-701 to limit the possible sentences to life imprisonment with or without parole to provide uniformity in sentencing and to reflect the seriousness of the offense. Act 27, 1981 HAW. SESS. LAWS 46; H.R. REP. NO. 629, 1981 Leg. Sess., House J. 1204; S. REP. NO. 944, 1981 Leg. Sess., Senate J. 1311-12. Similarly, in 1996, the Legislature upgraded manslaughter to a class A felony, subject to a sentence of twenty years imprisonment, to protect the public and reflect the seriousness of the offense. Act 197, 1996 HAW. SESS. LAWS 449; S. REP. NO. 2109, 1996 Leg. Sess., Senate J. 1018-19; H.R. REP. NO. 1237-96, 1996 Leg. Sess., House J. 1522.

[3] (1993 Repl. & 2000 Supp.) (emphasis and footnote added).

development of the law leading up to the Model Penal Code, as well as subsequent interpretation of the Hawai'i Penal Code.

A. Common Law Manslaughter and its Codification in the Model Penal Code.

"At common law, murder was defined as the unlawful killing of another human being with 'malice aforethought.'"[4] Malice was a complicated concept which generally consisted of four possible states of mind:

1. the intent to kill or an awareness that death would result, unless it was caused by the heat of passion – a concept that will be discussed in greater detail later in this article;
2. the intent to cause grievous bodily injury;
3. extreme recklessness variously described as circumstances evincing "a depraved mind," an "abandoned or malignant heart" or a "wanton and wilful [sic] disregard of an unreasonable human risk"; or
4. the intent to commit a felony, known as the "felony-murder" rule.[5]

All other unlawful homicides committed without malice aforethought were considered manslaughter.[6] The common law recognized two broad categories of manslaughter: voluntary and involuntary.[7] Involuntary manslaughter consisted of unintentional homicides due to ordinary recklessness or arising in the commission of minor crimes (known as "misdemeanor-manslaughter" because it stood in the same relationship to manslaughter as felony-murder did to murder).[8] Voluntary manslaughter, the precursor of EMED, consisted of an intentional homicide committed in the heat of passion due to adequate provocation.[9] Hence, one early Hawai'i case stated:

> Whoever kills another without malice aforethought, under the sudden impulse of passion, excited by provocation or other adequate cause, by the party killed, of a nature tending to disturb the judgment and mental faculties, and weaken the possession of self-control of the killing party, is not guilty of murder, but manslaughter. Our statutes make this allowance for human infirmity, and under an indictment for murder, the jury may return a verdict for manslaughter.[10]

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[4] MODEL PENAL CODE § 210.2 cmt. 1, at 13-14.

[5] *Id.* at 14-15.

[6] MODEL PENAL CODE § 210.3 cmt. 1, at 44.

[7] *Id.* § 210.3, at 44-45.

[8] *Id.*

[9] *Id.* § 210.3, at 44.

[10] The King v. Greenwell, 1 Haw. 146, 149 (1853). From the discussion, it appears that the deceased, Salai, already weakened by illness and exposure, died after Greenwell whipped him. *Id.* at 146. The Chief Justice instructed the jury that, before it could find Greenwell guilty of murder it must find that the whipping accelerated Salai's death and that Greenwell acted with

Thus, in Hawai'i, the common law recognized that voluntary manslaughter resulted from three distinct steps: 1) provocation or other adequate cause; 2) exciting a sudden impulse of passion; 3) which tended to disturb the judgment and mental faculties and to weaken the self-control of the killing party.

Codification engendered a variety of approaches to the offense of murder. Beginning with Pennsylvania in 1794, many states sought to distinguish premeditated murder, classified as murder in the first degree, from other murders in order to limit the application of the death penalty.[11] At the same time, while recognizing manslaughter as a separate offense, most states had no explicit definition, preferring to rely on the definition provided by common law.[12] Thus, prior to the adoption of the Hawai'i Penal Code in 1972, H.R.S. section 748-6 defined manslaughter as, "[w]hoever kills a human being without malice aforethought, and without authority, justification, or extenuation by law, is guilty of the offense of manslaughter."[13]

Other states adopted definitions substantially similar to the common law definition, but divided manslaughter into different categories, such as voluntary and involuntary, for the purposes of sentencing.[14] Thus, in promulgating the Model Penal Code, the draftsmen noted that "the law . . . was not well developed" and the "perception on which the Model Code was based was that this pattern of statutory treatment was substantially deficient for failing to confront the major policy questions posed by the offense."[15] Consequently, Model Penal Code section 210.3 defined manslaughter as follows:

> (1) Criminal homicide constitutes manslaughter when:
> (a) it is committed recklessly; or
> (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.
> (2) Manslaughter is a felony of the second degree.[16]

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malice aforethought. *Id.* at 148. Alternatively, the jury was instructed that it could find Greenwell guilty of manslaughter if it found that he acted out of passion provoked by the victim. *Id.* at 149. Greenwell was acquitted. *Id.*

[11] MODEL PENAL CODE § 210.2 cmt. 2, at 16.

[12] *Id.* § 210.3 cmt. 1, at 45.

[13] HAW. REV. STAT. § 748-6 (1968).

[14] MODEL PENAL CODE § 210.3 cmt. 2, at 45-48.

[15] *Id.* at 48-49.

[16] *Id.* § 210.3.

The Model Penal Code made four major changes to the common law definition of manslaughter. First, it excluded negligence, basing manslaughter instead on recklessness as to risks of which an actor was actually aware.[17] Second, under a separate provision, it allowed for imperfect justification.[18] As a result, if an actor killed in self-defense but did so recklessly or negligently, he would be excused from the offense of murder but guilty of, respectively, manslaughter or negligent homicide because recklessness or negligence sufficed to establish those offenses.[19] Third, the Model Penal Code entirely rejected the concept of Misdemeanor-Manslaughter.[20] Fourth, and most importantly for the purposes of this article, the Model Penal Code draftsmen intended EMED to be both broader and more subjective than heat of passion was at common law.[21]

For example, at common law, heat of passion had both an objective and a subjective component. From an objective point of view, provocation had to be adequate.[22] Thus, provocation was considered adequate only if a reasonable person would have lost control under the circumstances and would not have cooled off, i.e., regained control, in the period between the provocation and ensuing violence.[23] Courts allowed some individualization for characteristics of the actor such as blindness.[24] Generally, though, the courts rejected individualization of the standard.[25] Furthermore, over time, application was limited to specific situations. Generally, provocation had to come from the deceased and usually required a physical assault on the actor or a close relative; mere words usually did not suffice.[26]

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[17] *Id.* § 210.3 cmt. 3, at 49.

[18] *Id.* § 210.3, at 50.

[19] *Id.* § 210.3 cmt. 6, at 73-75.

[20] *Id.* § 210.3 cmt. 3, at 51.

[21] *Id.* § 210.3, at 49-50.

[22] *Id.* § 210.3 cmt. 5(a), at 56.

[23] *Id.* § 210.3, at 56, 59.

[24] *Id.* § 210.3, at 56.

[25] *Id.* § 210.3, at 56-57.

[26] For example, the draftsmen of the Model Penal Code commented:

> Traditionally, the courts have also limited the circumstances of adequate provocation by casting generalizations about reasonable human behavior into rules of law that structured and confined the operation of the doctrine. Thus, the decisions usually required that the provocation arise from some action of the deceased or at least that the defendant reasonably so believe. Further, there emerged a series of categories defining conduct that a jury might deem adequate provocation. First and foremost, physical attack might constitute provocation, though not every technical battery could suffice. Of course, even a violent blow would be inadequate if the deceased were entitled to use force, as for example in self-defense. Mutual combat became another established category of provocation. Less clearly, a threat of physical attack might constitute provocation, at least in extreme cases. Unlawful arrest would sometimes suffice, and the law frequently

Common law heat of passion also possessed a subjective component. An actor was not excused unless he was actually provoked.[27] Thus, courts held a person of exceptional restraint to a higher standard and would not excuse him because he did not actually lose control even though a reasonable person would have.[28] Similarly, if the actor actually regained self-control before killing, he would be guilty of murder even though a reasonable person might not have cooled.[29] "The underlying rationale is that the individual whose passions are not aroused by provocation merits the same condemnation and punishment as one who kills without provocation of any sort."[30]

In contrast, the draftsmen of the Model Penal Code eliminated these arbitrary limits placed upon provocation by the common law. For example, the deceased need no longer perpetrate the provoking act.[31] "This development reflects the trend of many modern decisions to abandon preconceived notions of what constitutes adequate provocation and to submit that question to the jury's deliberation."[32] The Model Penal Code retained an objective component by requiring that the defendant's emotional distress be based on a reasonable explanation or excuse.[33] However, it also qualified that objectivity by requiring that the "reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."[34]

The draftsmen explained that the use of the term "situation" was designedly ambiguous.[35] On the one hand, it allows consideration of physical handicaps such as blindness.[36] On the other hand, it excludes idiosyncratic moral values such as an assassin's belief that it is right to kill a political leader.[37]

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recognized witnessing adultery as provocation for intentional homicide of either the unfaithful spouse or the paramour. Certain other acts—chiefly violent or sexual assault on a close relative—might also constitute adequate provocation. Most importantly, the courts excluded some situations from the jury's consideration altogether. Thus, it became an established rule at common law that words alone, no matter how insulting, could not amount to adequate provocation. The only apparent exception concerned informational words disclosing a fact that would have been provocation had the actor observed it himself.

Id. (footnotes omitted).

[27] *Id.* § 210.3 cmt. 5(a), at 56.

[28] *Id.* § 210.3, at 60.

[29] *Id.*

[30] *Id.*

[31] *Id.* § 210.3, at 61.

[32] *Id.*

[33] *Id.* § 210.3, at 62.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] The draftsmen explained:

Despite these changes, the Model Penal Code retained in the concept of EMED the same three step progression developed at common law for voluntary manslaughter. An actor is only guilty of manslaughter where he kills because: 1) exposure to his situation; 2) reasonably disturbs his mental or emotional state; 3) to the point that he loses control.

B. Subsequent Development Through Hawai'i Case Law.

In adopting H.R.S. section 707-702(2), the Hawai'i State Legislature signaled its intent to adopt as well the concept of manslaughter as modified by the Model Penal Code:

> The reduction of murder to manslaughter, when mitigating mental or emotional disturbances are present, appears in the Model Penal Code and most recent state revisions. This reduction is a clarification of the common law on the subject. The [Hawai'i Penal] Code adopts this approach in subsection 2.[38]

Initially, it was unclear whether and to what extent common law principles continued under the Hawai'i Penal Code. In an early case, *State v. Tagaro*,[39] a defendant convicted of attempted murder argued that, given his claim that he shot the victim in self-defense, it was error for the trial court not to instruct the jury on attempted manslaughter.[40] The State countered that an attempt

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> Any other result would undermine the normative message of the criminal law. In between these two extremes, however, there are matters neither as clearly distinct from individual blameworthiness as blindness or handicap nor as integral a part of moral depravity as a belief in the rightness of killing. Perhaps the classic illustration is the unusual sensitivity to the epithet "bastard" of a person born illegitimate. An exceptionally punctilious sense of personal honor or an abnormally fearful temperament may also serve to differentiate an individual actor from the hypothetical reasonable man, yet none of these factors is wholly irrelevant to the ultimate issue of culpability. The proper role of such factors cannot be resolved satisfactorily by abstract definition of what may constitute adequate provocation. The Model Code endorses a formulation that affords sufficient flexibility to differentiate in particular cases between those special aspects of the actor's situation that should be deemed material for purpose of grading and those that should be ignored. There thus will be room for interpretation of the word "situation," and that is precisely the flexibility desired. There will be opportunity for argument about the reasonableness of explanation or excuse, and that too is a ground on which argument is required. In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case.

Id. at 62-63 (footnotes omitted).

[38] Commentary to HAW. REV. STAT. § 707-702.

[39] 7 Haw. App. 291, 757 P.2d 1175 (1987).

[40] Although Tagaro sought instructions on both reckless manslaughter and EMED, the Intermediate Court of Appeals found that the evidence did not support a claim of EMED.

required the specific intent to commit the offense while manslaughter, as a reckless act, could not be intentionally attempted.[41] Finding that EMED and Reckless Manslaughter were not synonymous with voluntary and involuntary manslaughter, the Intermediate Court of Appeals disagreed with the State and ruled that it was error to refuse a defendant's request to instruct the jury on attempted reckless manslaughter.[42]

Several years later, in *State v. Holbron*,[43] a defendant convicted of attempting to murder his girlfriend by throwing gasoline on her and igniting it, argued that it was error for the lower court to instruct the jury on attempted reckless manslaughter because no such offense existed.[44] Finding that H.R.S. section 702-202(1)(a) codified only involuntary manslaughter as reckless manslaughter while H.R.S. section 702-202(2) codified only voluntary manslaughter as EMED,[45] the Hawai'i Supreme Court agreed that there was

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"Nothing in the evidence could support a finding that he acted under the influence of extreme mental or emotional disturbance. His was merely the 'garden variety' of provocation." *Id.* at 293 n.3, 757 P.2d at 1176 n.3. Unfortunately, other than the fact that Tagaro claimed he shot his victim in self-defense, no details are given in the opinion.

[41] *Id.* at 293, 757 P.2d at 1176.

[42] *Id.* at 297, 757 P.2d at 1179. The Intermediate Court of Appeals explained:

> In our view, although [HAW. REV. STAT. § 707-702(1)(a)] defines manslaughter as causing the death of another through recklessness, the statute was intended by the legislature to include both offenses of involuntary manslaughter, where the killing was unintentional, and voluntary manslaughter, where the killing was intentional. Stated otherwise, the word "recklessly" in the statute does not preclude prosecution or conviction for an intentional homicide which was committed under circumstances which provided mitigation but did not completely excuse the act. The commentary to [HAW. REV. STAT. § 707-702 (1985)] points out that
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> > [i]n the case of an intentional or knowing killing, where mitigating circumstances are present, the prosecutor may, but need not, bring a prosecution for murder. He may, if he chooses, bring a prosecution for manslaughter. Since recklessness will be satisfied by proof that the defendant acted intentionally or knowingly, a charge of manslaughter could be employed where a prosecutor, in his discretion, did not wish to push for a murder conviction. [Footnote omitted.]
>
> Additionally, [HAW. REV. STAT. § 702-208 (1985)] states in part that, "[w]hen the law provides that recklessness is sufficient to establish an element of an offense, that element also is established if, with respect thereto, a person acts intentionally or knowingly." Clearly, then, a person can be found guilty of "recklessly" causing the death of another, even when he or she acted intentionally or knowingly. It follows that a person charged with attempted murder, an intentional crime, may be found guilty of attempted manslaughter if the person acted intentionally or knowingly under mitigating circumstances that do not constitute complete justification.

Id. at 296-97, 757 P.2d at 1178.

[43] 80 Hawai'i 27, 904 P.2d 912 (1995).

[44] *Id.* at 28-32, 904 P.2d at 913-17.

[45] *Id.* at 42, 904 P.2d at 927. After reviewing the development of the offense of manslaughter, the high court adopted the following analysis:

no such offense as attempted reckless manslaughter and overruled *Tagaro*.[46] Over time, Hawai'i cases applying H.R.S. section 707-702(2) revealed that the Hawai'i Penal Code still retains the three step process developed at common law: 1) a stressful situation; 2) which reasonably causes an extreme mental or emotional disturbance; 3) resulting in a lack of control. For example, in an early case, *State v. Dumlao*,[47] a defendant claimed that his testimony that he accidentally shot his mother-in-law while warding off an attack by his brother-in-law warranted instructions on EMED.[48] The Intermediate Court of Appeals agreed and, in so ruling, endorsed the following definition:

> An explanation of the term "extreme emotional disturbance" which reflects the situational or relative character of the concept was given in *People v. Shelton*, 88 Misc.2d 136, 149, 385 N.Y.S.2d 708, 717 (1976), as follows:

> With respect to the present appeal, the foregoing discussion in *Pinero I* is noteworthy for several reasons. First, for purposes of [HAW. REV. STAT. § 701-114(1)(b)], it conclusively identifies *recklessness* as the "state of mind *required* to establish each element of the offense" of manslaughter. (Emphasis added.) [citations omitted].
> Second, and correlatively, manslaughter as defined by [HAW. REV. STAT. § 707-702(1)(a)] could not be a "*lesser* included offense of murder" (emphasis added) if that form of manslaughter contemplated *intent* or *knowledge* as requisite states of mind; if such were the case, as noted above, second degree murder in violation of [HAW. REV. STAT. § 707-701.5(1)] and manslaughter in violation of [HAW. REV. STAT. § 707-702(1)(a)] would be the *same* offense—a manifestly absurd result. [citations omitted].
> Third, [HAW. REV. STAT. § 707-702(1)(a)] is therefore the only form of *involuntary* manslaughter codified in the HPC. [citations omitted].
> Fourth, [HAW. REV. STAT. § 707-702(2)] describes the only traditional form of *voluntary* manslaughter codified in the HPC, involving, as it does, the intentional or knowing killing of another while under the influence of a reasonably induced emotional disturbance causing a temporary loss of normal self-control. [citations omitted].
> Finally, fifth, insofar as [HAW. REV. STAT. § 707-702(2)] does not constitute a criminal "offense" as such, but is a "mitigating defense" that serves to reduce murder to manslaughter, *see also Matias*, 74 Haw. at 199, 840 P.2d at 376, an alleged violation of the statute obviously could not be charged as voluntary manslaughter in an indictment or complaint; rather, a defendant can be convicted of this form of manslaughter only if he or she is initially charged with first or second degree murder and the prosecution fails to negative the defense of "extreme mental or emotional disturbance for which there is a reasonable explanation" beyond a reasonable doubt. [citation omitted].

Id. at 42-43, 904 P.2d at 927-28.

[46] *Id.* at 45-47, 904 P.2d at 930-32.

[47] 6 Haw. App. 173, 715 P.2d 822 (1986). Dumlao, who suffered from a paranoid personality disorder and who often assaulted his wife in a pique of jealousy, suspected his wife of having sexual relations with her brothers. *Id.* at 185-86, 715 P.2d at 831-32. Defendant testified that, at the time of the offense, he thought he heard the others talking about him and went to investigate with a gun in his waistband. *Id.* Dumlao's brother-in-law suddenly attacked Dumlao with a knife but, when Dumlao drew his gun to scare his brother-in-law, the gun went off and fired the bullet that killed Dumlao's mother-in-law. *Id.*

[48] *Id.* at 174, 715 P.2d at 825.

> [T]hat extreme emotional disturbance is the emotional state of an individual, who: (a) has no mental disease or defect that rises to the level established by Section 30.05 of the Penal Law; and (b) is exposed to an extremely unusual or overwhelming stress; and (c) has an extreme emotional reaction to it, as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions. [Footnotes added].
>
> It is clear that in adopting the "extreme mental or emotional disturbance" concept, the MPC intended to define the provocation element of manslaughter in broader terms than had previously been done. It is equally clear that our legislature also intended the same result when it adopted the language of the MPC.[49]

Although the Hawai'i Supreme Court later rejected in *State v. Seguritan*[50] the suggestion that the stress to which an actor is subjected must be "extremely unusual and overwhelming," it noted that "[T]he statute focuses, as the ICA opinion in *Dumlao* demonstrates, on the defendant's *reaction to the stress*, and requires only that the defendant be under the influence of extreme mental or emotional disturbance for which there is 'a reasonable explanation.'"[51] In so ruling, the high court implicitly acknowledged that an actor's EMED must be a reaction to stress.

While the *Dumlao* court noted that it was the intent of the Hawai'i State Legislature to adopt the more subjective approach of the Model Penal Code, subsequent decisions make clear that H.R.S. section 707-702(2) retained an objective standard as well. For example, in *State v. Russo*,[52] a defendant convicted of murder argued for the first time on appeal that the jury should have been instructed on EMED as well as insanity.[53] In rejecting Russo's claim, the Hawai'i Supreme Court noted that the defendant, Russo, coolly sought out and killed the occupants of a bar because they were "leaving him out" and they were going to kill him if he didn't kill them.[54]

The *Russo* court further observed that, while section 707-702(2), couched in the terms of the Model Penal Code, was more subjective than the common law, "The ultimate test, however, is objective; there must be a 'reasonable'

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[49] *Id.* at 181-82, 715 P.2d at 829 (footnotes omitted).

[50] 70 Haw. 173, 766 P.2d 128 (1988).

[51] *Id.* at 174, 766 P.2d at 129 (emphasis added). Unfortunately, the opinion gives no details regarding the evidence at trial.

[52] 69 Haw. 72, 734 P.2d 156 (1987).

[53] *Id.* at 77-78, 734 P.2d 159.

[54] *Id.* at 79-80, 734 P.2d at 160 (footnote omitted). On the day of the offense, Russo procured a gun permit, bought a .38 caliber pistol, then practiced shooting targets at a firing range. *Id.* at 74-75, 734 P.2d at 157. Around 8:00 p.m., he fired four to seven shots into a bar Russo used to frequent, the Sports Page Lounge, killing two people. *Id.*

explanation or excuse for the actor's disturbance."[55] Accordingly, the Hawai'i Supreme Court rejected Russo's claim that he was entitled to have the jury instructed on the EMED defense because, "A ruling that evidence of this nature also furnishes a basis for mitigating the offense of murder to manslaughter 'would undermine the normative message of the criminal law' communicated via HRS §§ 707-701 and 707-702. MPC § 210.3 comment 5."[56]

Similarly, the Hawai'i Supreme Court reaffirmed *Russo* recently in *State v. Perez* ("*Perez II*"),[57] when it noted that, if it were to hold that evidence that Perez lay in wait at his wife's work place with a loaded gun, shot methodically, and walked away constituted evidence of EMED, it "'would [likewise] undermine the normative message of the criminal law' communicated via HRS §§ 707-701 and 707-702."[58] Thus, as codified by HRS section 707-702(2), Hawai'i law retains the requirement that an actor's mental or emotional disturbance must be reasonably caused by his situation.

Finally, the Hawai'i courts have recognized that an actor's loss of self-control continues to be the linchpin upon which EMED turns. As already noted, early on, the Intermediate Court of Appeals adopted in *Dumlao* a definition of EMED which required that a defendant have an extreme emotional reaction to stress, "as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation or other similar emotions."[59]

While, the Hawai'i Supreme Court disapproved in *Seguritan* of the reference in *Dumlao* to extremely unusual or overwhelming stress rather than a defendant's extreme mental or emotional disturbance,[60] it recently noted in *State v. Moore*[61] that the rest of the *Dumlao* court's analysis remains good law.[62] Moreover, cases after *Seguritan* have consistently recognized the need

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[55] *Id.* at 77-78, 734 P.2d at 159.

[56] *Id.* at 80, 734 P.2d at 160.

[57] State v. Perez ("*Perez II*"), 90 Hawai'i 65, 976 P.2d 379 (1999), *recons. denied*, __ Hawai'i __, __ P.2d __.

[58] *Id.* at 76, 976 P.2d at 390, (citing Model Penal Code § 210.3 comment 5).

[59] State v. Dumlao, 6 Haw. App. 173, 182, 715 P.2d 822, 829 (1986).

[60] *Seguritan*, 70 Haw. at 173-74, 766 P.2d at 128-29.

[61] 82 Hawai'i 202, 921 P.2d 122 (1996).

[62] *Id.* at 211 n.9, 921 P.2d at 131 n.9. At trial, the evidence indicated that Moore shot his wife at one location, drove her to another location where he shot her again, and delayed seeking help for 30 minutes during which time Mrs. Moore lost half her blood volume. *Id.* at 212, 921 P.2d at 132. The Hawai'i Supreme Court found that, even if the victim's statements to the police that she told Moore she was leaving and "[h]e's distraught" established that Moore acted under the influence of EMED *at the time of arrest*, there was no evidence of EMED *at the time of the shooting* nor any evidence of a reasonable explanation for Moore's disturbance. *Id.* at 210-11, 921 P.2d at 130-31.

for a loss of self-control. For example, based on previous cases, the Hawai'i Supreme Court ruled in *State v. Matias*[63] that, when the defendant asserted EMED as a defense, it would have been an abuse of discretion to exclude rebuttal expert testimony regarding self-control.[64]

In *State v. Knight*,[65] the defendant claimed that he slit the victim's throat when he "whigged out" during an experimental homosexual encounter.[66] In discussing whether the evidence necessitated reckless manslaughter instructions, the Hawai'i Supreme Court noted that, in finding Knight guilty of murder, the jury, which had been instructed on EMED, necessarily concluded that Knight had suffered no loss of control.[67] In so ruling, the *Knight* court recognized that loss of control was an indispensable element to EMED manslaughter.

Similarly, in another case, *State v. Kaiama*,[68] the defendant claimed that when the male victim, Jerald Canada, unexpectedly offered at the beach to perform fellatio on them, Kaiama and a third male beat Canada and drove him into the water where Canada ultimately drowned.[69] The Hawai'i Supreme

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[63] 74 Haw. 197, 840 P.2d 374 (1992).

[64] *Id.* at 206, 840 P.2d at 379. Matias admitted fatally shooting his girlfriend, Lee Ann Kauhane, but presented expert testimony that he acted under the influence of EMED because Kauhane, who Matias knew was seeing another man, was breaking off her relationship with Matias. *Id.* at 199-200, 840 P.2d at 376. Dr. Harold Hall, one of the co-authors of this article, testified in rebuttal that he did not believe that Defendant acted under the influence of EMED because Matias maintained a relatively high degree of control before, during, and after the shooting. *Id.* at 201, 840 P.2d at 376-77. In rejecting Defendant's claim that Dr. Hall's testimony regarding self-control was irrelevant, the Hawai'i Supreme Court stated:

> The applicable case law leaves no doubt that the question of a killer's self-control, or lack of it, at the time of the killing is a significant, even determining, factor in deciding whether the killer was under the influence of an extreme emotional disturbance such that his conduct would fall under [HAW. REV. STAT.] § 707-702(2).

Id. at 204, 840 P.2d at 378.

[65] 80 Hawai'i 318, 909 P.2d 1133 (1996).

[66] *Id.* at 320, 909 P.2d at 1135.

[67] *Id.* at 326, 909 P.2d at 1141. At trial, Knight argued that it was reckless of Knight to remain with Rowe because Knight was homophobic due to alleged sexual abuse by Knight's father. *Id.* In rejecting Knight's claim, the Hawai'i Supreme court stated:

> In effect, Knight does not argue that his actions were unintentional, but rather that they were *uncontrollable. Such a defense is encompassed under EMED manslaughter*, that is, the intentional killing of another "while under the influence of a reasonably induced emotional disturbance causing a temporary loss of normal self-control." *Holbron*, 80 Hawai'i at 42, 904 P.2d at 927. As previously indicated, the jury received an EMED instruction; thus, *the jury, in finding Knight guilty of second degree murder, necessarily determined either that Knight experienced no loss of control*, or, if he did, that it was not, in fact, reasonable.

Id. at 326, 909 P.2d at 1141 (emphasis added).

[68] 81 Hawai'i 15, 911 P.2d 735 (1996).

[69] *Id.* at 17-20, 911 P.2d at 737-40.

Court upheld the trial court's refusal to give EMED manslaughter instructions because there was no evidence of any loss of self control.[70] Again, in so ruling, the Hawai'i Supreme Court recognized that loss of self-control was a prerequisite to EMED manslaughter.

In *State v. Perez* ("*Perez I*"),[71] the trial court relied on *Matias* when it instructed the jury that the defendant's self-control was a significant factor in determining whether he acted under the influence of EMED.[72] The State's evidence indicated that when Perez, who was over sixty years old, discovered that his thirty year old wife was having a lesbian affair and had cleaned out his bank account, he waited for her at her workplace with a loaded gun, fired several shots at her and, when she escaped, walked over to her car and sat in it.[73] However, noting that *Matias* concerned only the admission of evidence, the Intermediate Court of Appeals ruled that the instruction improperly emphasized loss of self-control.[74] The State sought *certiorari* on the grounds that a reading of the Hawai'i Supreme Court's decisions revealed that the loss of self-control was an important criterion in assessing EMED and the high court agreed:

> The prosecution's argument demonstrates the better understanding of the mitigating EMED defense. It is insufficient for a criminal defendant merely to allege that he or she was experiencing emotional distress at the time of the charged offense. As this court noted in *Seguritan*, the mitigating EMED defense "focuses . . . on the defendant's *reaction* to the stress," *i.e.*, on whether the defendant's *reason* was "overborne." 70 Haw. at 174, 766 P.2d at 129 (emphasis added). The key distinction, therefore, is between the "intentional" or "knowing" character of conduct, on the one hand, and its "controllability," on the other.[75]

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[70] *Id.* at 26, 911 P.2d at 746. The Hawai'i Supreme Court noted the following:

> [T]he facts adduced at trial show absolutely no "extreme mental or emotional disturbance" on Kaiama's part. Nor does the evidence demonstrate any loss of self-control on Kaiama's part. If anything, Kaiama's statements to the police indicate that he was completely under control in the situation. Additionally, while Kaiama may have believed that his masculinity was threatened when Canada, whom Kaiama did not "suspect of being a homosexual," unexpectedly exposed him to a sexual overture, Kaiama's actions fall far short of satisfying any objectively reasonable explanation. . . . We therefore hold that a manslaughter instruction under [HAW REV. STAT.] § 707-702(2) was not supported by the evidence.

Id. at 26, 911 P.2d at 746 (footnotes omitted).

[71] 90 Hawai'i 113, 976 P.2d 427 (Haw. Ct. App. 1998), *aff'd in part, rev'd in part, Perez II*, 90 Hawai'i 65, 976 P.2d 379 (Haw. 1999), *recons. denied*, __ Hawai'i__, __ P.2d __.

[72] *Id.* at 121, 976 P.2d at 435.

[73] *Id.* at 116-18, 976 P.2d at 430-32.

[74] *Id.* at 124, 976 P.2d at 438.

[75] *Perez II*, 90 Hawai'i at 74, 976 P.2d at 388.

Thus, the Hawai'i courts have recognized that a loss of self-control is a significant, if not determinative factor in EMED. As the Hawai'i Supreme Court has recognized since *Matias* the need to admit evidence of a defendant's lack of self-control, one factor that might be important to determining whether a defendant's lethal violence resulted from a loss of self-control is his or her past history of violence. However, Rule 404(b) of the Hawai'i Rules of Evidence limits the introduction of such evidence in a criminal case.[76] Accordingly, the Hawai'i Supreme Court has held that evidence of a defendant's prior bad acts cannot be admitted to show his or her propensity for violence.[77]

However, Hawai'i Rule of Evidence 703 provides that an expert's opinion can be based on inadmissible evidence so long as it is the type of data normally relied upon by experts in that field.[78] Similarly, Rule 705 provides that an expert may be questioned about the data relied upon in forming his or her opinion.[79]

Hence, in a recent case, *State v. Maelega*,[80] the Hawai'i Supreme Court ruled that it was not an abuse of discretion for the trial court to admit evidence of defendant's prior acts of violence in an abusive relationship when offered to rebut Maelega's EMED defense.[81] Similarly, in *State v. Nizam*,[82] the

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[76] HAW. R. EVID. 404(b) states in pertinent part:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.

Id.

[77] State v. Castro, 69 Haw. 633, 633, 756 P.2d 1033, 1036 (1988). Castro was convicted of attempted murder after the State presented evidence that Castro went to the club where his estranged girlfriend worked as a dancer, repeatedly stabbed her, then fled. *Id.* at 633, 644-46, 756 P.2d 1033, 1041-42. However, Castro's conviction was overturned when the high court found that any probative value of evidence of Castro's earlier acts of violence and aggression was outweighed by the danger of unfair prejudice. *Id.*

[78] HAW. R. EVID. 703.

[79] HAW. R. EVID. 705.

[80] 80 Hawai'i 172, 907 P.2d 758 (1995). Maelega was prosecuted for murder when, believing that his wife had been having sexual relations with her stepfather, Maelega strangled and repeatedly stabbed her. *Id.* at 175, 907 P.2d at 761. The State was allowed to introduce evidence that Maelega had repeatedly beat and threatened his wife in the past, as well as expert testimony regarding the dynamics of domestic violence, to rebut Maelega's claim that he acted under the influence of EMED. *Id.* at 175, 907 P.2d at 762.

[81] *Id.* at 183-84, 907 P.2d at 769-70.

[82] 7 Haw. App. 402, 771 P.2d 899 (1989). After inflicting severe injuries on his six-month-old son, Nizam was prosecuted for attempted murder but convicted only of first degree assault. At Nizam's trial, Dr. Hall, one of the co-authors of this article, was allowed to testify that his

Hawai'i Intermediate Court of Appeals found evidence of prior acts of aggression against a defendant's wife and her family relevant to rebut the defendant's EMED defense to the attempted murder of his infant son.[83] Thus, when a defendant raises an EMED defense, evidence of that defendant's violent history ordinarily excluded may become admissible.

C. Interaction with Physical or Mental Disease, Disorder, or Defect Excluding Penal Responsibility.

As noted, the concept of EMED deals with the mitigation of the offense of murder because of "human infirmity" and the fact that reasonable people can understand that, under certain circumstances, any person might act violently.[84] However, EMED should not be confused with the defense of "insanity", which H.R.S. section 704-400 (1993 Repl.) codifies as follows:

> (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.
> (2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

Although there have been a number of opinions defining various aspects of the EMED defense, one area that has not yet been well litigated and in which the decisions of the Hawai'i appellate courts have not been well articulated is the relationship of EMED to the insanity defense.[85] While there are a few Hawai'i cases finding insufficient evidence to support both defenses, the cases shed little light on how, as a matter of law, each defense relates to the other.

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opinion that Nizam did not act under the influence of EMED was based in part upon information that Nizam had committed other acts of aggression against his wife, her sister, and her father. *Id.* at 405, 771 P.2d 902.

[83] *Id.* at 412, 771 P.2d at 906.

[84] King v. Greenwell, 1 Haw. 146, 149 (1853); MODEL PENAL CODE § 210.3 cmt. 5(a), at 56.

[85] In a relatively early case, the Hawai'i Supreme Court observed:

> "Extreme mental or emotional disturbance" sometimes is, but should not be, confused with the "insanity" defense. The point of the extreme emotional disturbance defense is to provide a basis for mitigation that differs from a finding of mental defect or disease precluding criminal responsibility. State v. Ott, 297 Or. at 391, 686 P.2d at 1011. The disturbance was meant to be understood in relative terms as referring to a loss of self-control due to intense feelings.

State v. Dumlao, 6 Haw. App. 173, 180, 715 P.2d 822, 828 (1986); *see also, Nizam*, 7 Haw. App. at 408, 771 P.2d at 903 (applying different procedures "because the two defenses are not the same").

In *State v. Manloloyo*,[86] for example, the defendant was convicted of murder and assault in the first degree.[87] Relying on a case, *State v. Warner*,[88] which held that evidence of self-defense automatically necessitated instructions on EMED,[89] Manloloyo claimed on appeal that the trial court erred in not giving his requested instruction on EMED because he had relied on the defense of insanity at trial.[90]

The Hawai'i Supreme Court responded that although there was evidence that the appellant suffered from a mental disease or disorder at the time of the offense, no evidence was adduced showing that the appellant caused the death of the victim while under the "influence of extreme mental or emotional disturbance for which there is a reasonable explanation."[91] The high court explained:

> The facts show that appellant did deliberately and intentionally set out to kill and did kill the victim. The facts do not show that appellant's mental disease or disorder caused him to kill the victim while he was under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.
>
> Concededly, an argument can be made that appellant's mental disease or disorder "diminished" his "mental capacity". However, in our opinion, even a strained construction of the provisions of Section 707-702(2) would not permit

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[86] 61 Haw. 193, 600 P.2d 1139 (1979).

[87] *Id.*

[88] 58 Haw. 492, 573 P.2d 959 (1977). Warner testified that he returned after a four month trip to find his girlfriend, Helen Crawley, and former roommate, Thomas Boykin, had become lovers and moved into another apartment, taking many of Warner's belongings with them. *Id.* at 493-94, 573 P.2d at 960-61. When Warner went to retrieve his things, he quarreled with Boykin, obtained an empty revolver from a neighbor, but left following another confrontation with Boykin. *Id.* at 494, 573 P.2d at 961. After loading the revolver in anticipation of returning the gun to its owner, Warner returned to the building where Boykin called upon Warner to settle things, threatened to "kick his ass," and started swinging. *Id.* Afraid Boykin would knock him down the stairs, Warner pulled the gun and shot Boykin. *Id.* Recognizing that some degree of fear or anger was always present whenever self-defense was raised, the Hawai'i Supreme Court ruled that, unless a defendant objected that they were not supported by the evidence, EMED instructions were required whenever instructions on self-defense were warranted. *Id.* at 500-01, 573 P.2d at 964-65.

[89] The Hawai'i Supreme Court recently overruled the *Warner* holding, finding that, "[I]t is not difficult to conceive of a situation where a defendant exerts deadly force in self-defense, without a loss of self-control due to the influence of extreme mental or emotional disturbance." State v. Sawyer, 88 Hawai'i 325, 333, 966 P.2d 637, 645 (1998). In *Sawyer*, for example, the defendant claimed that, when she pushed the victim away during a fight, Sawyer was unaware that she was cutting the victim with a broken vodka bottle Sawyer had picked up. *Id.* at 329, 966 P.2d at 640.

[90] *Manloloyo*, 61 Haw. at 194-95, 600 P.2d at 1140-41.

[91] *Id.* at 196, 600 P.2d at 1141.

"diminished mental capacity" as a defense which would reduce the offense of murder to an offense of manslaughter.[92]

Regrettably, there are insufficient facts in the opinion from which to gauge the factual underpinnings of the defendant's claim that he was entitled to an instruction on EMED. The *Manloloyo* court's statement that there was "no evidence" that the defendant acted under the influence of EMED[93] can be seen simply as a fact driven decision. While the opinion does indicate that evidence of a mental illness, without more, is not enough to establish EMED,[94] there is no clear discussion of the relationship, if any, between EMED and mental illness.

Similarly, in *Russo*,[95] a defendant charged with murder and claiming insanity argued that his jury should also have been instructed on EMED. The evidence showed that Russo set out one morning and obtained a permit to acquire a firearm.[96] He then went and purchased a .38 caliber pistol.[97] He test fired it and engaged in target shooting that afternoon.[98] That same evening he fired four to seven shots into a bar that he had frequented in the past but had not visited for some time.[99] The bar owner and a patron were killed.[100]

At trial, Russo's defense counsel focused on establishing a defense of insanity.[101] Psychologists and psychiatrists were called to support the claims that the defendant was suffering from paranoid schizophrenia at the time of the crimes.[102] At the close of evidence, the defendant's counsel requested instructions not only on insanity but EMED.[103] Relying on *Manloloyo*, the trial court refused to instruct on EMED but did instruct on insanity.[104] The jury's guilty verdict implicitly rejected Russo's claim that he was legally insane.

In deciding the issue on appeal, the *Russo* court noted that the drafters of the Hawai'i Penal Code adopted a provision serving to reduce murder to manslaughter "when mitigating mental or emotional disturbances are present."[105] The EMED defense "treats on a parity with classic provocation

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[92] *Id.* at 197, 600 P.2d at 1141 (citations omitted).
[93] *Id.* at 196, 600 P.2d at 1141.
[94] *Id.* at 197, 600 P.2d at 1141.
[95] State v. Russo, 69 Haw. 72, 74, 734 P.2d 156, 157 (1987).
[96] *Id.*, 734 P.2d at 157.
[97] *Id.*, 734 P.2d at 157.
[98] *Id.*, 734 P.2d at 157.
[99] *Id.*, 734 P.2d at 157.
[100] *Id.* at 74-75, 734 P.2d at 157.
[101] *Id.* at 75, 734 P.2d at 158.
[102] *Id.*, 734 P.2d at 158.
[103] *Id.*, 734 P.2d at 158.
[104] *Id.* at 75-76, 734 P.2d at 158.
[105] *Id.* at 77, 734 P.2d at 159.

cases situations where the provocative circumstance is something other than an injury inflicted by the deceased on the actor but nonetheless is an event that arouses extreme mental or emotional disturbance."[106]

However, as the ultimate test is that there must be a "reasonable" explanation or excuse for the actor's disturbance,[107] the Hawai'i Supreme Court reasoned that the defense does not authorize "mitigation on the basis of individual abnormality without any measure of the defendant against an objective standard."[108] As an example, the *Russo* court identified *Manloloyo* as a case in which a "[m]ental disorder clearly does not preclude moral depravity, and . . . where the actor's mental condition, although recognized as disturbed or abnormal, should be regarded as having no just bearing on his liability for intentional homicide."[109] Noting that, like Manloloyo, Russo acted "deliberately," the high court concluded that, although he may have been mentally or emotionally disturbed, he was not entitled to instructions on EMED because "nothing Russo offered in support of his claim of insanity provided 'a "reasonable" explanation or excuse' for his conduct[.]"[110]

There are two possible readings to the *Russo* decision. Russo calmly went about obtaining a gun, practiced shooting with it, and then killed two people. Thus, one could read *Russo*, together with *Manloloyo*, as merely finding that, on those facts, there was no extreme emotional disturbance. However, the decision can also be read to state that a mental disease, defect or disorder by itself does not qualify as EMED; while mental disease may establish a mental or emotional disturbance, it does not show that there is a "reasonable" explanation or excuse for the actor's disturbance. Thus, in reviewing the *Manloloyo* decision, the *Russo* court stated:

> "Specifically," we said, "the question then is whether the ... evidence of mental disease or disorder [offered by John Manloloyo, Jr.] fall[s] within the scope of the provision of Section 707-702(2): 'while under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation.'" *State v. Manloloyo*, 61 Haw. at 197, 600 P.2d at 1411.
> We ruled the evidence *fell beyond the scope of the provision* because "[t]he facts show[ed] ... appellant did deliberately and intentionally set out to kill and did kill the victim."[111]

Elsewhere, the Hawai'i Supreme Court has held that the crux of the EMED defense is not that a killing was unintentional but rather that it was

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[106] *Id.*, 734 P.2d at 159.
[107] *Id.* at 77-78, 734 P.2d at 159.
[108] *Id.* at 78, 734 P.2d at 159.
[109] *Id.* at 78, 734 P.2d at 159 (citation omitted).
[110] *Id.* at 79, 734 P.2d at 160.
[111] *Id.* at 78-79, 734 P.2d at 160 (emphasis added).

uncontrollable.[112] If the *Russo* Court meant to say that the killing was not "uncontrollable" because Russo deliberately set out to kill his victim, again it is merely a holding that there is insufficient evidence. However, the language seems much broader *because* it also states that evidence of mental disease or defect "fell beyond the scope of the provisions" of H.R.S. section 707-702(2).[113] Similarly, the *Russo* Court later states that:

> Like John Manloloyo, Jr., Patrick Russo deliberately set out to kill his victims. Granted, he may have been mentally or emotionally disturbed; but *nothing Russo offered in support of his claim of insanity provided "a 'reasonable' explanation or excuse" for his conduct under any test of reasonableness.* One who would coolly seek out and intentionally kill the owner and a patron of a bar he once frequented and justify the acts on grounds that habitués of the establishment were "leaving me out" of their activities and "[t]hese guys were going to kill me unless I killed them" is either insane or morally depraved. A ruling that *evidence of this nature* also furnishes a basis for mitigating the offense of murder to manslaughter *"would undermine the normative message of the criminal law."*[114]

Of course, under section 707-702(2), the issue is not whether there is a reasonable explanation for one's *conduct*, but rather whether there is a "reasonable explanation for the actor's *disturbance*."[115] The question that should have been posed by the *Russo* Court was whether, in addition to establishing that Russo was disturbed, evidence of Russo's mental illness might also have offered a reasonable explanation for that disturbance. The *Russo* court did conclude that "evidence of this nature" could not establish a reasonable explanation for Russo's disturbance without "undermin[ing] the normative message" of the law.[116] However, as the *Russo* court did not specify whether it was referring to the evidence supporting Russo's insanity claim, the evidence which showed that Russo coolly sought out and shot his victims, or both, the relationship between insanity and EMED remains unclear.

Recently, in *State v. Young*,[117] a defendant argued that the lower court erred when it found Defendant penally responsible and rejected his EMED defense.[118] The evidence in that case showed that, after being chased away from a Burger King, Young retrieved a hammer from his truck and returned to the restaurant where he attacked a customer, repeatedly striking him in the

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[112] State v. Knight, 80 Hawai'i 318, 326, 909 P.2d 1133, 1141 (1996) (holding that the jury found that Knight was not uncontrollable and convicted him of second degree murder).

[113] *Russo*, 69 Haw. at 79, 734 P.2d at 160.

[114] *Id.* at 79-80, 734 P.2d at 160 (emphasis added) (citations omitted).

[115] *Id.* at 77-78, 734 P.2d at 159 (emphasis added).

[116] *Id.* at 80, 734 P.2d at 160.

[117] 93 Hawai'i 224, 999 P.2d 230 (2000).

[118] *Id.* at 226, 999 P.2d at 232.

head.[119] At his jury-waived trial for murder, three defense experts each testified that Young suffered from psychosis, lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law and was not under the influence of alcohol or drugs at the time of the offense.[120]

Called in rebuttal, one State expert opined that drugs and alcohol caused Young's psychosis while a second expert,[121] testified that the defense experts had failed to differentiate between the effects of substance abuse and psychosis.[122] Dr. Hall further described how methamphetamine can cause psychotic behaviors and hallucinations similar to those experienced by schizophrenics but a methamphetamine user still possessed enough self-control to decide whether or not to act violently.[123]

The trial court concluded that Young was suffering from a mental disease or disorder caused by drugs or alcohol but that it did not impair his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.[124] On appeal, the Hawai'i Supreme Court upheld the determination that Young was penally responsible because, based on the evidence adduced, it was not clearly erroneous for the lower court to find the State's witnesses more credible than the defense witnesses.[125]

Further noting that, in convicting Young of murder, the trial court implicitly rejected his EMED defense, the Hawai'i Supreme Court upheld that decision as well, noting that the State had adduced substantial evidence that, "Young was not experiencing a loss of control during the attack and was not acting under extreme mental or emotional distress."[126] While conceding it was possible that person experiencing loss of self-control might behave in an outwardly calm or semi-catatonic state, the high court continued:

> There is little evidence in the record specifically addressing the question whether Young lacked self-control. Dr. Golden testified that the fact that Young attacked [the victim] in broad daylight, in front of several witnesses, indicated that Young did not plan the attack. However, a lack of planning, in itself, does not establish a lack of self-control. Further, Dr. Farkas testified that Young was not acting "in an automatic fashion" at the time of the incident.[127]

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[119] *Id.* at 227, 999 P.2d at 233.
[120] *Id.* at 228, 999 P.2d at 234.
[121] Dr. Harold Hall, the co-author of this article.
[122] *Id.* at 229, 999 P.2d at 235.
[123] *Id.*, 999 P.2d at 235.
[124] *Id.* at 230, 999 P.2d at 236.
[125] *Id.* at 232, 999 P.2d at 238.
[126] *Id.* at 233, 999 P.2d at 239.
[127] *Id.*, 999 P.2d at 239.

As a result, the *Young* court concluded that the trial court did not err in rejecting Defendant's EMED defense.[128] It is interesting to note that, unlike *Manloloyo* and *Russo*, the high court did not find that Young failed to present any evidence of EMED; it merely ruled that the State's evidence was sufficient to rebut Young's claim. One could argue that the *Young* court's failure to question the propriety of raising both defenses together represents tacit approval of such action. However, as the question was not at issue, it was not expressly decided. Again, unfortunately, the decision in *Young* sheds little light on the relationship between the insanity and EMED defenses.[129]

Regardless, the essence of the EMED defense has been held to be the overwhelming of the actor's self control by extreme emotional disturbance for which there is a reasonable explanation.[130] As noted above, EMED is derived from the common law doctrine of "heat of passion" which was premised on the idea that an actor was less culpable if he killed under circumstances that might have provoked "most people" to violence.[131] Why should a person who is mentally ill, but still criminally responsible, not be able to avail himself or herself of the same defense? After all,

> In *State v. Horn*, 58 Haw. 252, 255, 566 P.2d 1378, 1380 (1977), the supreme court held that a defendant has the constitutional right to present any and all competent evidence in his defense, and stated that "where the accused asserts a defense sanctioned by law to justify or to excuse the criminal conduct charged, and there is some credible evidence to support it, the issue is one of fact that must be submitted to the jury."[132]

At least two jurisdictions have recognized a relationship between mental illness and extreme emotional disturbance. In *State v. Counts*,[133] the Oregon Supreme Court found that the defense of insanity and extreme emotional disturbance were not mutually exclusive.[134] The Oregon definition of insanity is similar to that employed in Hawai'i.[135]

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[128] *Id.*, 999 P.2d at 239.

[129] The factual components to raise the issue of whether the underlying mental disturbance--drug induced or not--could be considered by the trier of fact in determining whether Young's explanation or excuse for his alleged "extreme emotional disturbance" was reasonable under the circumstances as he believed them to be appear to have been available to trial counsel. This issue was not raised on appeal and it is not known whether it was raised at trial.

[130] *See, e.g.*, State v. Matias, 74 Haw. 197, 204, 840 P.2d 374, 378 (1992).

[131] MODEL PENAL CODE § 210.3 cmt. 5(a), at 56.

[132] State v. Nizam, 7 Haw. App. 402, 410, 771 P.2d 899, 904 (1989).

[133] 816 P.2d 1157 (Or. 1991).

[134] *Id.* at 1159.

[135] Oregon Revised Statutes § 161.295(1) predicates the defense of insanity on a defendant who "lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law." This is similar to Hawai'i where a person is to be acquitted if, because of mental disease, defect, or disorder, the person "lacks substantial

Oregon law also provides that an intentional murder may be reduced to manslaughter if:

> the homicide was committed under the influence of extreme emotional disturbance when such disturbance is not the result of the person's own intentional, knowing, reckless or criminally negligent act, and for which disturbance there is a reasonable explanation. The reasonableness of the explanation for the disturbance shall be determined from the standpoint of an ordinary person in the actor's situation under the circumstances as the actor reasonably believes them to be.[136]

Under Oregon law, both insanity and extreme emotional disturbance are affirmative defenses. In Oregon, if the defendant prevails on an insanity defense, the defendant is found guilty except for insanity and is put under the supervision of the Psychiatric Security Review Board for a period of time equal to the maximum sentence for the offense.[137] Under Oregon law, the maximum penalty of intentional murder is life[138] and for manslaughter is 20 years.[139]

In *Counts*,[140] the defendant was charged with the murder of his wife. He shot her in her sleep because he believed that she was trying to kill him and his dogs. Counts stated that he knew she was trying to kill him because of a mark on his arm from a supposed injection of poison, and because he thought he heard her whispering "die, die," when he walked past her room. There was no evidence that the defendant's wife was in fact trying to kill Counts. At his bench trial, the defendant relied upon both extreme emotional disturbance and insanity.[141] The defense was that because of extreme emotional disturbance, the defendant was only guilty of manslaughter and as to manslaughter he was "guilty except for insanity".[142]

The trial court held that the defenses were mutually exclusive. "More precisely, the court held that upon a defendant's proof of the mental disease or defect defense, the trier of fact is precluded from considering the mitigating factor of extreme emotional disturbance."[143] The Oregon Supreme Court

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capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirement of the law." HAW. REV. STAT. § 704-400(1) (1996).

[136] OR. REV. STAT. § 163.135(1) (1999).

[137] *Id.* § 161.327(1).

[138] *Id.* § 163.115(5)(a).

[139] *Id.* § 161.605(1). Under Hawai'i law, a defendant who establishes that he was legally insane at the time of an offense is acquitted but subject to involuntary commitment proceedings. HAW. REV. STAT. §§ 704-400, 704-402, and 704-411 (1996).

[140] State v. Counts, 816 P.2d 1157, 1157 (Or. 1991).

[141] *Id.* at 1159.

[142] *Id.* at 1166.

[143] *Id.* at 1159.

reversed, holding that the first issue at trial where an insanity defense is raised is whether the defendant is guilty of some offense; the State must prove all the elements of the offense including its requisite mental state before sanity becomes an issue.[144] In considering the defense of extreme emotion, the Oregon Supreme Court noted that:

> However, because the defenses relate to different psychological occurrences does not mean that both conditions may not arise in the same defendant. The drafters of the extreme emotional disturbance defense recognized that there is no reason why a defendant who is "insane" may not also be "extremely emotionally disturbed."[145]

The Oregon Supreme Court reversed the finding of "guilty except for insanity" to murder and remanded the case so that the issue of extreme emotional disturbance could be considered by the trial court.[146]

Whether EMED must be established prior to a finding of insanity is not an important issue under Hawai'i law because upon a finding of lack of penal responsibility for either offense the person is acquitted and may be under the jurisdiction of the court for life.[147] Rather, the importance of the *Counts* decision lies not in the exact parallel of law, but in the recognition that a person who suffers from mental illness can also be under the influence of extreme emotional disturbance.

Similarly, in the Kentucky case of *McClellan v. Commonwealth*,[148] a defendant who killed his wife's ex-husband after finding them together in an apartment raised both insanity and EMED. The Kentucky Supreme Court summarized the relationship between the defenses as follows:

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[144] *Id.* at 1159-61. The Oregon Supreme Court explained the need to first establish guilt as follows:

> In State v. Olmstead, 310 Or. 455, 800 P.2d 277 (1990), this court considered whether the insanity defense could be applied to a strict liability offense. We held that it could be applied to such an offense because a defendant's proof of the insanity defense was not an issue of whether a defendant possessed or lacked a culpable mental state; rather, it was an issue of whether society wanted to hold that person criminally responsible. Id. at 461-66, 800 P.2d 277. In considering the issues, we examined the legislative history of the insanity defense. We determined that one of the reasons the insanity defense did not go to the issue of defendant's mental state is because an application of the insanity defense presupposes proof of all of the material elements of the crime charged including any requisite mental state. An absence of proof on any material element of the crime would mandate acquittal rather than a verdict of "guilty except for insanity." Id. at 462, 800 P.2d 277.

Id. at 1160 (footnote omitted).

[145] *Id.* at 1162.

[146] *Id.* at 1166.

[147] HAW. REV. STAT. § 704-411 (1996).

[148] 715 S.W.2d 464, 467 (Ky. 1986).

> A mental disease which does not in itself result in a lack of capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law does not rise to the level of insanity, nor does it, in itself, constitute extreme emotional disturbance. As we noted in *Wellman v. Commonwealth*, supra, *an underlying mental disturbance may be considered by a jury in making its determination of whether a defendant's explanation or excuse* for his alleged "extreme emotional disturbance" *is reasonable* under the circumstances as he believed them to be, but standing alone, evidence which tends to establish insanity or mental illness is not sufficient to establish extreme emotional disturbance.[149]

Again, *McClellan* is not relevant for its exact parallel to Hawai'i case law, but for its recognition that insanity can be used to determine if an "extreme emotional disturbance" is reasonable under the circumstances as the defendant believed them to be. Had the *Russo* court looked to whether the defendant's "extreme mental or emotional disturbance" was reasonable given his mental illness and his beliefs that the people were threatening him, slighting him, and attempting to kill him, it might have held the trial court erred in failing to give the instruction on EMED.

In the future, counsel would do well to carefully review both the insanity defense and the EMED defense in a homicide case to determine if either or both are viable defenses for trial. If both are viable, they should not be presented as mutually exclusive defenses but as a factual mosaic where the defendant's conduct and the facts could show either: 1) that he lacked criminal responsibility because of a mental disease, defect, or disorder that caused him to lack the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law; or 2) that the defendant was under the influence of an extreme mental or emotional disturbance for which, given various factors such as the defendant's mental illness, there is a reasonable explanation or excuse.

Indeed, while a defendant's ability to raise both the insanity and EMED defenses remains an open question in Hawai'i, there is authority suggesting that a defendant's mental illness might be considered at least as a factor in his EMED claim. The *Dumlao* Court noted that:

> Although the MPC does not recognize diminished capacity as a distinct category of mitigation, . . . by placing more emphasis than does the common law on the actor's subjective mental state, it also may allow inquiry into areas which have traditionally been treated as part of the law of diminished responsibility or the insanity defense.[150]

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[149] *Id.* at 468 (emphasis added).

[150] State v. Dumlao, 6 Haw. App. 173, 180-81, 715 P.2d 822, 828-29 (1986).

As noted by *Dumlao*, the draftsmen of the Model Penal Code stated:

> Unlike the cases that have recognized this form of diminished responsibility as a mitigation, the Model Code does not authorize mitigation on the basis of individual abnormality without any measure of the defendant against an objective standard. Mental disorder clearly does not preclude moral depravity, and there surely will be cases where the actor's mental condition, although recognized as disturbed or abnormal, should be regarded as having no just bearing on his liability for intentional homicide. The fact that, given the actor's "situation," the jury will be called upon to determine the "reasonableness" of the actor's conduct will require this factor to be taken into account.[151]

Hence, the draftsmen of the Model Penal Code left it to the courts to determine when an actor's mental abnormality should be considered part of his "situation" as the cases arise.[152] Similarly, the Hawai'i Intermediate Court of Appeals noted that:

> The phrase "actor's situation," as used in § 210.3(b) of the MPC, is designedly ambiguous and is plainly flexible enough to allow the law to grow in the direction of taking account of *mental abnormalities* that have been recognized in the developing law of diminished responsibility. 1980 MPC Commentary, supra, at 72.[153]

Accordingly, the Hawai'i Intermediate Court of Appeals ruled as follows:

> In light of the foregoing discussion and the necessity of articulating the defense in comprehensible terms, we adopt the test enunciated by the New York Court of Appeals in *People v. Casassa*, 49 N.Y.2d 668, 427 N.Y.S.2d 769, 775, 404 N.E.2d 1310, 1316, cert. denied, 449 U.S. 842, 101 S.Ct. 122, 66 L.Ed.2d 50 (1980):
>
> [W]e concluded that the determination whether there was reasonable explanation or excuse for a particular emotional disturbance should be made by viewing the *subjective, internal situation* in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been and assessing *from that standpoint* whether the explanation . . . for his emotional disturbance was reasonable, so as to entitle him to a reduction of the crime charged from murder . . . manslaughter. . . . [Footnote omitted].
>
> The language of HRS § 707-702(2) indicates that the legislature intended to effect the same change in the test for manslaughter in Hawai'i's law as was made by the MPC. Therefore, we hold that under HRS § 707-702(2) the broader sweep of the emotional disturbance defense applies when considering whether an offense should be reduced from murder to manslaughter. To hold that the pre-

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[151] MODEL PENAL CODE § 210.3 cmt. 4(b), at 72.

[152] *Id.* § 210.3, at 73.

[153] *Dumlao*, 6 Haw. App. at 183, 715 P.2d at 830 (emphasis added).

penal code law of provocation continues to hold sway would be to render the language of § 707-702(2) meaningless.[154]

Thus, it appears that the Hawai'i Intermediate Court of Appeals recognized that a defendant's mental abnormalities could be considered under the EMED defense as a part of a defendant's "situation."

III. CONTRIBUTIONS OF BEHAVIORAL SCIENCE TO EMED

A psycholegal model which links case law and behavioral science in regard to EMED can now be proposed. The database for this next section relies on the psychological implications of the above-discussed cases and senior author, Dr. Harold Hall's experience[155] and works.[156]

In *Lethal Violence*,[157] respondents tended to believe that extreme emotion was a regressive behavior, more often occurring in bonded relationships, where one or both parties lost control of their behavior. These legal professionals found that, when a perpetrator acted under the influence of extreme emotion, the crime scene made for ready identification and apprehension of the perpetrator. Thus, the perpetrator might have killed at home, or at a party or bar with many witnesses, leaving a disorganized scene with diverse clues to the identity of the perpetrator. In contrast, when extreme emotion was absent, the respondents in *Lethal Violence*[158] were uniformly impressed with the high degree of self-control shown by the perpetrator. As examples of cases in which they found that extreme emotion was not suggested, the respondents pointed to those in which the perpetrator: stalked his victim; rehearsed the slaying; or showed complex behaviors at the time of the lethal violence such as an ability to operate, reload, and shoot the victim in vital bodily areas.[159] In the opinion of these respondents, extreme emotion

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[154] *Id.* at 183-84, 715 P.2d at 830 (emphasis added).

[155] Dr. Hall was an expert witness in approximately sixty to eighty EMED cases since the Hawai'i Penal Code was enacted until the present.

[156] Dr. Hall is the author of *Extreme Emotion*, 12 U. HAW. L. REV. 39 (1990), with a 25-page appendix on self-control factors and defendant incompetencies used by a decade of criminal attorneys as a preliminary screen for EMED. He is also the editor of LETHAL VIOLENCE: A SOURCEBOOK ON FATAL DOMESTIC ACQUAINTANCE AND STRANGER AGGRESSION 126 (Harold Hall ed., Pacific Institute For The Study Of Conflict And Aggression 1996, republished CRC Press 1999) [hereinafter LETHAL VIOLENCE], which describes an important research study on homicidal violence conducted from 1990 to 1995 involving feedback from about forty judges, defense attorneys, and prosecuting attorneys.

[157] LETHAL VIOLENCE, *supra* note 156.

[158] *Id.*

[159] *Id.*

did not support mitigation if the breakdown in self-control was due to voluntary substance intoxication.[160]

When one considers all of the above material, including the case analyses in the second section of this article, a three-part test of EMED can be formulated which incorporates the critical notions of stress and mental disturbance from the perspective of the defendant, as well as the breakdown of choice and self-control, which is an indispensable factor in the determination of EMED. From a psychological perspective, the three-part test leading to EMED can be articulated in its simplest form as follows:

1. Stress From Environmental Events Occurs
↓
2. Mental And/Or Emotionally-Based Disturbances Result
↓
3. Self-Control And Choice Behavior Become Compromised

A. Stress

Concerning the first part, a century of empirical investigation on stress reveals a multitude of findings on its potential significance to EMED. For example, the stress stages leading to a physical, mental or behavioral disease, disorder or defect have been identified.[161] Compromised self-control under excessive stress (i.e., decompensation) creates an overresponsiveness to stressors or, in many cases, an insensitivity to stressors, as in apathy and loss of hope.[162] The General Adaptation Syndrome (GAS) describes three basic biological and psychological stages that occur when an individual is exposed to continual and/or intense stress: (1) alarm and mobilization; (2) resistance; and (3) exhaustion and disintegration.[163]

Thus, the mere accumulation of change events for an individual creates a risk of physical, mental or behavioral disorders, as popularized in the empirically derived Social Readjustment Rating Scale (SRRS).[164] Relevant to EMED cases, the key stressors on the SRRS include death of a spouse or, as

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[160] *Id.*

[161] Eugene Stotland, *Stress*, *in* R. CORSINI, ENCYCLOPEDIA OF PSYCHOLOGY 473-74 (2d ed. 1994); H. Anisman, *Stress Consequences*, *in* R. CORSINI, ENCYCLOPEDIA OF PSYCHOLOGY 473-74 (2d ed. 1994).

[162] *See* HANS SEYLE, 1 SEYLE'S GUIDE TO STRESS RESEARCH (1980); HANS SEYLE, 2 SEYLE'S GUIDE TO STRESS RESEARCH (1983a); HANS SEYLE, 3 SEYLE'S GUIDE TO STRESS RESEARCH (1983b); J. COLEMAN, J. BUTCHER & R. CARSON, ABNORMAL PSYCHOLOGY AND MODERN LIFE (7th ed. 1984).

[163] Stotland, *supra* note 161, at 473-74.

[164] Thomas Holmes & Roy Rahe, *The Social Readjustment Rating Scale*, JOURNAL OF PSYCHOSOMATIC RESEARCH, *11*, 213-18 (1967); *see also* R. CORSINI, *supra* note 161, at 473-74.

shown in later investigations, the death of a person acting in a role of a spouse in a central love relationship. Under increasing stress, these scales indicate that the likelihood of mental, emotional or behavioral deficiencies increases, sharply reducing the range of choices and behaviors available to the person.

Four distinct types of immediate responses to severe stress occur: (1) fight; (2) flight; (3) freezing; and (4) effective performance.[165] The first two responses, "fight or flight,"[166] are a response tendency recognized for at least seventy years and involve either attacking the threatening stimulus or fleeing after the body and mind have been mobilized for action. Fight responses under intense stress typically involve surprise, startle responses, impulsive acting, disorientation and mental confusion, and disorganized action sequences.[167]

Disorganized action sequences refer to the lack of an orderly, synchronized set of behaviors.[168] The behavior of a victim who is trapped in the corner by a mugger and is fighting her assailant is one example. Another is a man who kills a peer in a fistfight in a bar, perhaps in a contest of dominance. A third is the classic situation in which a man kills his wife after catching her with her lover. Fight responses are the key area of inquiry in EMED cases. Defense attorneys in particular should not overlook disorganized, fragmented and/or impulsive behavior of their client at the time of the alleged offense.

Fleeing the threatening stimulus, the second type of response to intense stress, rarely occurs in EMED cases unless violence is perpetrated prior to fleeing the scene. It should be noted that fleeing the scene to escape detection or apprehension for one's violence is not the same as running away from a threatening stimulus. Fleeing the scene to avoid apprehension is compatible with awareness of the aversive consequences of arrest.

Also rare is the third major type of immediate response to a severe stress – freezing. Freezing involves immobilization, psychic numbing, cringing and withdrawal, mute or restricted verbal flow, disorientation and confusion, and likely amnesia. As with fleeing the threatening stimulus, freezing is rarely seen in EMED cases.

The last major type of immediate response to severe stress is effective performance. Emotionless behavior frequently accompanies this type of reaction. Individuals who would be likely to express this response tendency would be those who would be well-trained to deal with stressors through "stress innoculation" techniques, combat training, or exposure to martial arts. In addition, violent acts that were preceded by rehearsal, planning, knowledge

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[165] Hall, *supra* note 156, at 47-52.

[166] "Fight or flight" is defined as the body and mind's mobilization for action when faced with stress. Usually the heart speeds up, the breath comes quickly, and muscles tense in anticipation. WILLIAM CANNON, THE WISDOM OF THE BODY 10-28 (1932).

[167] Hall, *supra* note 156, at 47-52.

[168] *Id.* at 52.

of outcome, foreknowledge of the severe stress and arousing/threatening stimulus to follow would lower the tendency to act in a fragmented manner. Increased familiarity with the expected process and outcome of violence allows more time for deliberation and action as well as smooth "executive"[169] type of responses. This means that more self-control and choice would be involved. Prosecuting attorneys would tend to focus on this response tendency in analyzing EMED cases.

B. Cognition and Affect

Mental and/or emotional changes occurring from severe stress are inferred from the defendant's behaviors for the time of the lethal event. Typically, there is never one single emotion for the entire sequence of violence.[170] Anger may be associated with fear of detection, and other emotions may wax and wane in response to internal and external stimuli. Because feelings are not directly verifiable by evaluators, subsequent reports of emotional states are frequently subject to distortion and deception in the direction of the defendant's vested interest.[171] Therefore, evaluators should analyze for possible deception in order to see whether material relevant for the time of the evaluation and/or the time of the charged offense has been deliberately modified and distorted.[172]

It is an elementary mistake to assume that particular emotions must have existed at the time of the lethal violence. A person who murders does not have to be angry, for example, in order to kill the victim. This is particularly true for many types of instrumentally motivated crimes. Many perpetrators inflict lethal violence on persons whom they claim to like and love, as in domestic violence.[173] In general, emotions are established for the time of the alleged crime by a congruence of defendant behaviors, events at the scene, and statements, if any, by the defendant, victim, or third parties.[174]

Cognitive processes associated with lethal violence involve changing thoughts, self-statements, and judgments. As with emotions, they are subject to much *post hoc* modification and should be analyzed for deception.[175] The best reflectors of cognitive processes are behaviors and verbal statements

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[169] "'Executive' behavior is a neuropsychological term referring to motor output, self-monitoring, and judgment after sensory and processing functions have been initiated." *Id.*

[170] LETHAL VIOLENCE, *supra* note 156, at 27-33.

[171] HAROLD HALL & DAVID PRITCHARD, DETECTING MALINGERING AND DECEPTION: FORENSIC DISTORTION ANALYSIS 1-20 (1996).

[172] *Id.*

[173] LETHAL VIOLENCE, *supra* note 156, at 27-33.

[174] HALL & PRITCHARD, *supra* note 171, at 187-94.

[175] *Id.*

uttered by the defendant during the violence sequence. Spontaneous statements made to the police and others soon after the violence may also reflect the actual thinking of the defendant.[176]

If normal coping responses fail during this second part, the individual's adaptive resources become taxed. The following may occur:

> 1. Psychosis, including hallucinations and delusions. Basically, psychosis represents a last-ditch compensatory effort by the individual to save his or her integrity by restricting and redefining reality. Exaggerated defense mechanisms may occur here. An insanity defense should be considered if psychotic symptoms are shown.
> 2. An acute stress reaction, involving disorganized or highly unusual stress-related behavior for a particular individual. This condition could represent a focus of an insanity defense and/or an EMED defense.
> 3. Affective disorders such as a reactive or major depression, resulting in psychomotor retardation, general feelings of sadness or hopelessness, and associated features. The individual may be in a learned helplessness mode. Other affective disorders are possible. Again, this can represent the focus of either an EMED or insanity defense.
> 4. Death or debilitating physical illness. Recompensation to near normal health may or may not occur, depending on a host of factors.[177]

C. Self-Control

Impaired self-control, as discussed above, can be demonstrated by any condition which impairs one's ability to modulate and modify one's own behavior. Thus, events or behaviors which signify lack of or diminished self-control and which can be targeted by the defense attorney are as follows:

> 1. Disorganized action sequences, as in unsynchronized, fragmented and haphazard acts;
> 2. Non-goal directed hyperactivity, where the behavioral focus of the defendant is scattered and accompanied by random or nonfunctional motor movements;
> 3. Startle reactions, resulting from the threat stimulus surprising the defendant;
> 4. Immediate responses, as in a short latency of time between the onset of the threatening stimulus and the violent behavior;
> 5. Uncontrolled crying, tearfulness, and include other signs of autonomic arousal;

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[176] *Id.*

[177] *See* HANS SEYLE, 1 SEYLE'S GUIDE TO STRESS RESEARCH (1980); HANS SEYLE, 2 SEYLE'S GUIDE TO STRESS RESEARCH (1983a); HANS SEYLE, 3 SEYLE'S GUIDE TO STRESS RESEARCH (1983b); J. COLEMAN, J. BUTCHER & R. CARSON, ABNORMAL PSYCHOLOGY AND MODERN LIFE (7th ed. 1984).

6. Hyposuggestibility, or resistance to influence, as in becoming impervious to outside influences or actions of others during the threat stage of violence;
7. Mental confusion, as in disorganized thoughts and signs of cognitive ambivalence;
8. Disorientation, as in unawareness of person, time, place or circumstances of the context within which the defendant finds himself or herself;
9. Amnesia, as in non-substance abuse induced lapses of memory from the trauma of the situation;
10. Lack of deception, for example openly telling the victims of the perpetrator's intent to attack;
11. Continued violence where the aggression is not confined to the period of the immediate threat; perseverative violence past the point where it is functional may be observed (e.g., kicks victim repeatedly after death);
12. Post-Traumatic Stress Disorder (PTSD), as in reactions such as flashbacks and nightmares from the instant violence signifying that it was traumatic to the defendant.[178]

Indications of self-control and choice, implying that impulsive behavior was not present, and which can be scrutinized by the prosecution, include the following:

1. Preparation, as in gathering tools or weapons for the violence to follow (e.g., assembly of a rape-murder kit to carry in the car while searching for victims);
2. Rehearsal, as in practicing for the anticipated violence (e.g., shooting at a target range before a homicide with a firearm);
3. Deception, for example giving false information to the victim in order to gain an advantage in overcoming the victim, or concealing a weapon;
4. Ability to orchestrate multi-step, multi-task schemes (e.g., step by step to effect a robbery, kill the victim-witness, and escape undetected);
5. Demonstration of acts showing flexibility of responses (e.g., use of both a knife and firearm during a homicide);
6. Ability to show a "change in principle" (e.g., switching from robbery to rape, or from killing to theft);
7. Ability to show responses which occur infrequently when highly stressed (e.g., sex resulting in ejaculation, eating, or drinking during a violence sequence);
8. Hypothesis testing, as when the defendant changes his or her own behavior in order to see and respond to the reaction of the victim;
9. Ability to delay responses or to resist distracting stimuli;
10. Ability to monitor and check on-going behavior (e.g., defendant reviewing his handiwork prior to resuming violence);
11. Ability to regulate tempo, intensity, and duration of behaviors (e.g., reviving the victim of sex murder from unconsciousness in order to elicit pain cues);

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[178] LETHAL VIOLENCE, *supra* note 156 at 32; Hall, *supra* note 156, at 51-52.

12. Ability to stop violence after task is complete (i.e., response cessation with no perseveration);
13. Obliteration or destruction of evidence during or after lethal violence.[179]

Thus, the two basic violence modes – impulsive violence vs. self-controlled violence – can be broken down by when they occurred in the violence sequence and are illustrated in Figure 1.

Similarly, the degree of self-control can be illustrated to the trier of fact by either the prosecution or defense in an easily understandable chart showing the defendant's level of self-control in the expert's judgment for the times before, during, and after the lethal violence. Figure 2 presents on the vertical axis the degree of self-control during each time period on a scale ranging from negligible to minimal through mild and moderate to substantial. The horizontal axis presents the three time periods – before, during, and after the alleged murder.[180]

IV. SUMMARY AND RECOMMENDATIONS

This article represents an attempt to consider both legal and empirically grounded psychological concepts in the analysis of EMED. A three-part test of EMED which comports well with the empirical literature on stress, mental and emotional functioning as a result of stress, and self-control is offered. The analysis of self-control before, during, and after the alleged murder is crucial from both a case law and psychological perspective. Both of these perspectives are founded on the assumption that mental functioning as a result of stress and self-control must always be viewed, measured, and interpreted from the unique position of the defendant. People are different, respond differently to environmental and internal events, and have unique behavior patterns and maladaptive responses.

Thus, the requirement of HRS section 707-702 that the reasonableness of the explanation be determined from the viewpoint of the defendant is built into the three-part test. The totality of circumstances and history of the defendant in the three-part test is considered in the "subjective-objective test"—the subjective mental life and objective appraisal of events. More encompassing, the viewpoint of the defendant is part and parcel of the alleged killing at every stage. The defendant's behavior can be compared against itself (e.g., the level of self-control shown prior to the alleged offense versus that shown during the actual violence) in addition to comparing the defendant's behavior to a standardized sample (e.g., as in norm-based psychological testing). Empiricists will recognize this approach as both a within and between factor

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[179] LETHAL VIOLENCE, *supra* note 156, at 32; Hall, *supra* note 156, at 52.

[180] Hall, *supra* note 156, at 52.

comparison, which can then be used to closely estimate the amount of self-control for the times before, during, and after the alleged crime.

Final points include the following:

1. As the right of a defendant to raise both an insanity defense and EMED has never been contested on appeal in Hawai'i, there are no appellate decisions in this jurisdiction regarding that issue. However, nothing in the Hawai'i Penal Code precludes a defendant from raising both defenses so long as they are supported by the evidence. As a result, it is not uncommon for a defendant to attempt to raise both in a single trial.[181] However, the overall credibility of the defendant's case may suffer when insanity defense criteria are not met if, for example, both an EMED and an insanity defense are offered. The defendant should keep in mind that the volitional arm of Hawai'i test of insanity deals with self-control factors found in EMED.

2. The logic and procedures behind the three-part test outlined in this paper apply to all violence-related incidents, not just murder. However, by its terms, the EMED defense established by HRS section 707-702(2) applies only to prosecutions for murder. Subsequent cases have held that it applies to attempted murders as well.[182] While thus precluded statutorily from using EMED as a mitigating defense to any other offenses, defense counsel might argue EMED as a mitigating factor in sentencing or plea negotiations.

3. The defendant needs to focus on disorganized action sequences as shown by norm-based testing, behavioral observations, interviewing, interviews of significant and knowledgeable others, review of records, as well as by a self control analysis of the defendant.[183] The State, however, will focus on organized, competent behavior, showing once more that the analysis of self-control is a double-edged sword, with data-driven conclusions.

4. Currently, EMED is an ordinary defense. HRS section 701-115(2)(a) provides that, once evidence supporting a defense such as EMED has been presented, the State bears the burden of disproving that defense beyond a reasonable doubt.[184]

For the prosecution, this means an active search for self-control factors which rule in competency at the time of the alleged crime. Relying on personalizing the victims as well as the perceived heinousness of the crime in order to obtain

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[181] *See, e.g.*, State v. Young, 93 Hawai'i 224, 228-33, 999 P.2d 230, 234-39 (2000); State v. Manloloyo, 61 Haw. 193, 194-95, 600 P.2d 1139, 1140-41 (1979); State v. Russo, 69 Haw. 72, 75-76, 734 P.2d 156, 158 (1987).

[182] *See, e.g.*, State v. Moore, 82 Hawai'i 202, 210, 921 P.2d 122, 130 (1996); State v. Nizam, 7 Haw. App. 402, 410, 771 P.2d 899, 904 (1989).

[183] *See supra* section III.C. (discussing self-control).

[184] A recent attempt to make EMED an affirmative defense, which would have required defendants to establish EMED by a preponderance of the evidence, was vetoed by the governor. Statement Of Objections To Senate Bill No. 1119, 1999 Leg. Sess., Senate J. 802-03.

a guilty verdict is a limited strategy and may even be counterproductive. Many homicide victims, for example, have suffered multiple blows or injuries. Yet, multiple blows to the victim may actually be a sign of behavioral disorganization or perseveration, which is supportive of an EMED conclusion. Even multiple blows to the face, as the most common site of attack when victims are hated, can signify perseveration.

5. In providing that it is a defense for murder that a person acted under the influence of EMED for which there is a reasonable explanation, HRS section 707-702(2) further provides that, "[t]he reasonableness of the explanation shall be determined from the viewpoint of a person in the defendant's situation under the circumstances as he believed them to be." Therefore, the prosecution and the defense need to incorporate as much of the defendant's background in the analysis as possible. Previous violence not related to instant violence may be excluded by the court. More material allows for full evaluation of the circumstances from the defendant's own perspective.

6. The prosecution and the defense can incorporate information on stress (i.e., the effects of stress on the inner or mental life of the defendant), but the focus should be on overt behavior from which state of mind can be inferred. As noted, self-control is "a significant factor" in establishing whether a defendant acted under the influence of EMED.[185] A comprehensive checklist of self-control factors is attached to this article and should be routinely scanned in contemplating EMED defenses.[186]

7. When utilized, the expert witness should always specify the decision path used to arrive at EMED-related conclusions. The victim and context of the violence should be considered in addition to merely considering facts about the defendant. Findings regarding the defendant should be empirically grounded and geared to the times before, during, and after the violence. Confidence in one's ratings[187] for each time period should be shared with the court. Importantly, because it is rarely offered by experts, competing hypotheses to explain the instant violence should be presented, especially when those explanations support the adversarial party.

In sum, a three-part test of EMED emerges from the analysis of case law and behavioral science as follows: (1) environmental stress leads to (2) internal changes in thinking and feelings that cause (3) compromised self-control. The readership should keep in mind that the presented model attempts as much as possible to focus on objective and verifiable stressors, mental functioning, and self-control. Extreme emotional reactions, which involve the

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[185] State v. Perez ("*Perez II*"), 90 Hawai'i 65, 74, 976 P.2d 379, 388 (1999), *recons. denied*, __ Hawai'i __, __ P.2d __.; State v. Matias, 74 Haw. 197, 200, 840 P.2d 374, 378 (1992).

[186] *See* Appendix A.

[187] *See id.*

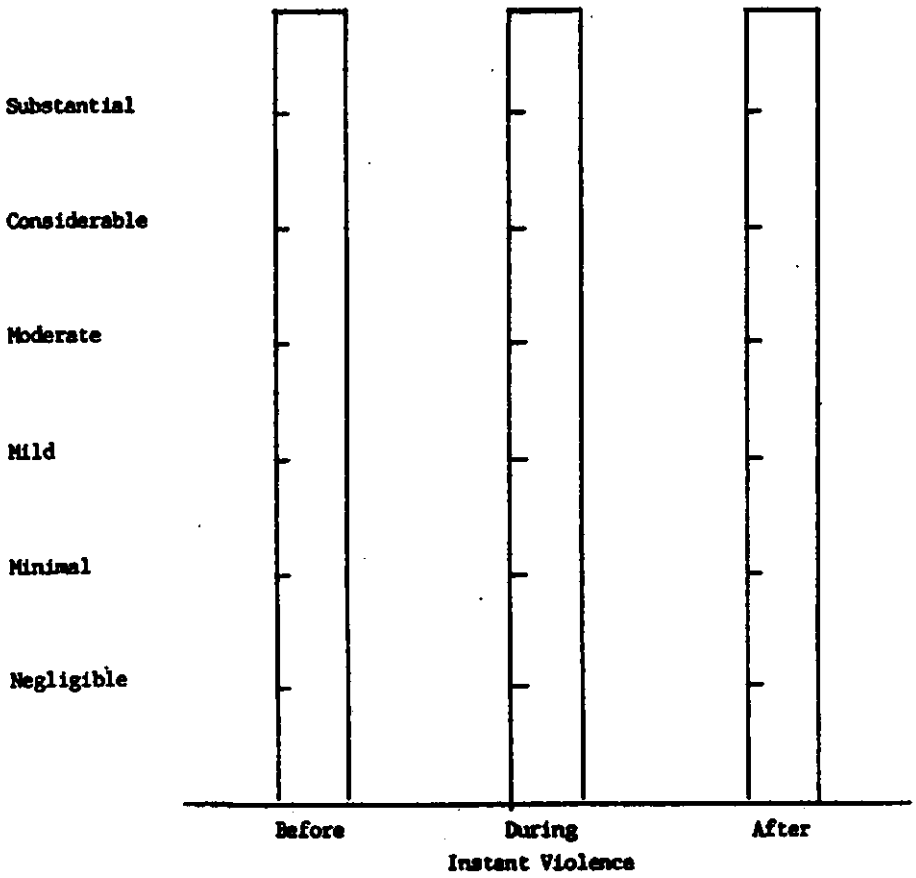
breakdown of self-control, have definable characteristics. Contrariwise, certain behaviors such as higher order executive functioning, as illustrated in this article for times before, during, and after the instant violence, are incompatible with EMED. When used, expert witnesses should always specify the decision path utilized to arrive at proffered conclusions. Experts should present any competing hypotheses to explain the data to the court in all EMED cases.

APPENDIX A

BASIC VIOLENCE MODES

IMPULSIVE VIOLENCE	SELF CONTROLLED VIOLENCE
1. BASELINE STAGE	
Little or no planning for violence	Goal formulation/plans
Target is a perceived threat	Target does not represent a threat
2. ESCALATION (I.E. TRIGGERING STAGE)	
More likely public rituals	Preceded by private ritual
Intense arousal/emotion	Minimal arousal/emotion
Confused thinking	Clarity of thought
Crying, tearfulness	Subdued negative emotion
Startle reactions	Rapid habituation
Reduced verbiage/mute	Verbal interaction
Reactive and impulsive	Organized execution of plan
Heightened and diffuse awareness	Heightened and focused awareness
3. VIOLENCE	
Global, diffuse hyperactivity	Goal directed motor responses
Perseveration	Change in action principle
Goal is to reduce threat	Goal is consumption/ exploitation
Rapid displacement of target	No displacement of target
Time limited	Less time limited
4. RECOVERY PERIOD	
Crying, tearfulness	More likely depressed/ subdued
Attempts to leave immediately	Attempts to hide/conceal scene deed
5. RETURN TO BASELINE	
More Likely to amnesia	More likely to have experience recall
Post-trauma stress	More likely positive likely memories

ESTIMATE OF SELF-CONTROL BY TEMPORAL PERIOD



Combining all events within a time period, present the overall degree of self-control for BEFORE, DURING, and AFTER the instant violence on the above histogram.

Physical and Mental Activities

These refer to rudimentary skills and/or homeostatic activities of the defendant. They create the foundation for all self-control behaviors exhibited before, during or subsequent to instant violence by the accused. Check the space and present comments when appropriate.

	Insufficient Data	No	Yes	Specify
Ability to sleep	____	___	___	_____
Ability to eat/drink	____	___	___	_____
Responds to autonomic pressure (e.g., urinates)	____	___	___	_____
Self-awareness (e.g., "I" statements)	____	___	___	_____
Long-term memory skills	____	___	___	_____
Short-term memory skills	____	___	___	_____
Reports cognitive activity	____	___	___	_____
Awareness of surroundings (e.g., observations of environment)	____	___	___	_____
Ability to estimate time	____	___	___	_____
Ability to ambulate (e.g., voluntary movements)	____	___	___	_____
Intact sensory skills (e.g., visual, olfactory, hearing)	____	___	___	_____

Ability to express feelings(e.g., verbalizes anger, shows rage or fear)	____	___	___	____
Intact motor skills (e.g., grasping reflex, biting)	____	___	___	____
Withdrawal reflex from pain	____	___	___	____
Voice recognition (e.g., of victim)	____	___	___	____
Self-grooming	____	___	___	____
Ability to maintain posture	____	___	___	____
Ability to show facial expression	____	___	___	____
Rudimentary chaining of behaviors (e.g., tracking and moving toward visual stimulus)	____	___	___	____
Ability to drive	____	___	___	____
Other signs of basic self-regulation	____	___	___	____

Goal Formulation

Relevant to the time before the alleged violence, goal formulation taps the ability to systematically analyze and integrate the accused's awareness of self and environment. The capability of productively elaborating from a small number of cues from the crime context is also measured. The ability to think of the violence act before it occurred, as evidenced by behaviors compatible with the idea of the violence to follow, is the central issue of this section

	Insufficient Data	No	Yes	Specify
Marked cognitive and/or behavioral focus	____	___	___	_____
Ability to link thoughts with adaptive behavior (e.g., walking until entrance is found)	____	___	___	_____
Verbal coherence and verbal fluency	____	___	___	_____
Speaks to victim (e.g., requests money)	____	___	___	_____
Controlled conversation with victim	____	___	___	_____
Appreciation of temporally distant need (e.g. need for more drugs to prevent withdrawal)	____	___	___	_____
Knowledge of steps or elements in violent sequence	____	___	___	_____
Cognitive mapping (e.g., navigating from home to crime scene	____	___	___	_____
Shows capacity for reflective thought about violence (e.g., verbalizations which involve comparisons)	____	___	___	_____
Ability to think of alternatives to instant violence	____	___	___	_____

Statements to others that he/she would harm the victim (e.g., for socially undesirable behavior)	____	___	___	_____
Victim a targeted individual	____	___	___	_____
Personalizes victim	____	___	___	_____
Other signs of goal formulation	____	___	___	_____

Planning and Preparation

Relevant to the time before the alleged crime, this refers to the ability to show cognitive preparation for subsequent behaviors. Routine rehearsals for the alleged crime are the highest form of ability in this dimension.

	Insufficient Data	No	Yes	Specify
Foreknowledge of alleged crime	____	___	___	_____
Creation of time schedules	____	___	___	_____
Temporal ordering of steps to complete task	____	___	___	_____
Ability to revise plan given new information	____	___	___	_____
Completes plan in reasonable time frame	____	___	___	_____
Ability to interpersonally relate to others as planned	____	___	___	_____

Motor or mental rehearsal of crime sequence	____	___	___	____
Use of ruse to fool victim	____	___	___	____
Lured victim into defenseless position	____	___	___	____
Brings weapon and paraphernalia (e.g., "rape kit") to scene	____	___	___	____
Telephone, lights, security devices disabled	____	___	___	____
Other signs of planning/ preparation	____	___	___	____

Effective Performance

Occurring during the violence sequence, effective performance reflects the notion that the accused may simultaneously observe and change his or her, behavior in response to a fluctuating environment, all in accordance with the goal or desired object of the action sequence. Hypothesis testing is the highest form of effective performance, as when the accused changes his own behavior (e.g., threatens victim, puts key in lock) in order to see the reaction (e.g., victim acquiescence, door becomes unlocked) and then changes his own behavior accordingly (e.g., proceeds to rape victim, goes through door to bedroom). In essence, this skill taps the ability to show a concordance between intentions/plans and actions.

	Insufficient Data	No	Yes	Specify
Able to view environment objectively (takes abstract attitude)	____	___	___	____
Violence did not occur close to home/work (for planned violence)	____	___	___	____

Demonstrates a variety of acts (flexible behavior as with several weapons)	____	___	___	_____
Displaying multiple sets of simultaneous motor behaviors	____	___	___	_____
Able to orchestrate multi-step, multi-task scheme (e.g., long-connected chains of behaviors)	____	___	___	_____
Concerted effort in order to accomplish goal (e.g., despite victim resistance)	____	___	___	_____
Ability to show change in principle (e.g., from robbery to rape)	____	___	___	_____
Ability to show self-controlled somatic responses (e.g., sex with ejaculation, eating, drinking, all within violence sequence)	____	___	___	_____
Ability to delay responses	____	___	___	_____
Ability to monitor and self-correct ongoing behavior	____	___	___	_____
Nonstimulas boundedness (acts independent of environmental influence)	____	___	___	_____

Ability to regulate tempo, intensity and duration of behaviors	____	___	___	____
Controlled mood during infliction of violence	____	___	___	____
Ability to avoid non-erratic behavior unless planned (e.g., deliberately becomes substance intoxicated)	____	___	___	____
Hypothesis testing	____	___	___	____
Awareness of wrongdoing during violence (e.g., from statements to victim)	____	___	___	____
Ability to hit/penetrate vital body target (e.g., deep knife penetration, shots to head)	____	___	___	____
Controlled cutting of victim	____	___	___	____
Ability to stop violence (e.g., response cessation with no perseveration)	____	___	___	____
Intact self-control (retroactively reported by accused)	____	___	___	____
Victim bound or other restraints used	____	___	___	____
Mouth taped	____	___	___	____
Mouth gag used	____	___	___	____

Blindfold placed over victim's eyes	____	___	___	_____
Absence of bite marks on victim	____	___	___	_____
No blood smearing or spattering	____	___	___	_____
Victim tied to another object	____	___	___	_____
Takes pictures of victim	____	___	___	_____
Perpetrator encourages bystander to engage in violence to victim	____	___	___	_____
Torture of victim	____	___	___	_____
Other aggressive acts prior to death	____	___	___	_____
Obliteration or destruction of evidence during instant violence	____	___	___	_____
Other signs of effective performance	____	___	___	_____

Recovery Period Behaviors

The accused may, after the instant offense, exhibit behaviors suggestive of memory/knowledge that a possible crime had been committed. These include efforts ostensibly directed towards not getting caught for the alleged offense, or of minimizing possible aversive consequences.

	Insufficient Data	No	Yes	Specify
Moves away when help arrives	____	___	___	_____

Disposes of or hides victim's body	_____	___	___	_____
Amputation of "ID" body parts (i.e., head, hands)	_____	___	___	_____
Disposes of victim's clothing	_____	___	___	_____
Other alteration of crime scene	_____	___	___	_____
Disposes of weapon used in offense	_____	___	___	_____
Disposes of other crime related material	_____	___	___	_____
Takes souvenir from victim/scene	_____	___	___	_____
Cleans up own body	_____	___	___	_____
Washes own clothes used in alleged crime	_____	___	___	_____
Cleans/washes other material	_____	___	___	_____
Makes verbal statements of crime recall (e.g., spontaneous statements)	_____	___	___	_____
Relevant nonverbal gestures (e.g., points to victim's body)	_____	___	___	_____
Prevaricates incompatible behavior (e.g., makes up verifiably false story)	_____	___	___	_____

Writes confession	_____	____	____	_____
Other signs of recall for instant offenses	_____	____	____	_____

Post-Violence Depression Phase

For some violent perpetrators, a period of guilt and remorse is experienced after the exhibited aggression. This is especially true for episodic or rare violent offenders. The self-control to avoid self-punitive behavior is the focus of concern here (e.g., suicidal, self-mutilative gestures). Apology and remorseful behaviors are very common here and imply little about self-control or choice at the time of the instant violence.

Routine Mental/Psychological Behaviors

Eventually, there is a return to baseline functioning for most individuals who perpetrate violence (see Physical and Mental Activities). The new baseline of routine activities and skills would also include that which is a function of violence-related learning, such as increased substance abuse, disturbed sleep patterns, and fashioning of new weapons. Some behaviors may be reduced (e.g., driving after conviction for negligent homicide, social activities which require trust and reciprocity). In the final analysis, an individual is never the same after the perpetration of substantial violence to others.

Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional

Gregory S. Walston*

I. INTRODUCTION

Truth is indeed stranger than fiction. Who among us would have believed that a bizarre alliance between Senators Orrin Hatch and Ted Kennedy would produce a sweeping statutory *coup d'état* in our constitutional balance of power between state and federal governments? Who would have believed that conservative senators, such as Senator Hatch, would support a law that assaults longstanding principles of state sovereignty by requiring the states to justify every state prison regulation that affects religion under strict scrutiny, even after the Supreme Court explicitly held that such regulations are subject to a reasonableness standard? Who would have believed that they would do so even when such a sweeping federal intrusion into state matters is, at best, of dubious constitutionality and when a virtually identical act of Congress had been struck down by the Supreme Court? This, however, is exactly what happened in September 2000, when Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),[1] which re-enacts the Religious Freedom Restoration Act ("RFRA")[2] and establishes that state prisons may not regulate inmates' religious rights unless the regulation is narrowly tailored for a compelling state interest.[3]

While it is certainly true that a foolish act of Congress does not necessarily offend the Constitution,[4] it is difficult to overlook the ludicrous implications

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[1] 42 U.S.C.A. § 2000cc (West 2000).

[2] *Id.* § 2000bb.

[3] *Id.* § 2000cc-1.

[4] *See* Schweiker v. Hogan, 457 U.S. 569, 589 (1982). "A belief that an Act of Congress may be inequitable or unwise is of course an insufficient basis on which to conclude that it is unconstitutional." *Id.*; *see also* United States v. Butler, 297 U.S. 1 (1936) (Stone, J., dissenting), commenting that:

> [w]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute

RLUIPA will have on prisons and society – if its constitutionality is upheld. Remarkably, RLUIPA confers greater religious rights on inmates than on free citizens. It is well established that a government regulation affecting the religious activities of free citizens is permissible if the burden on religion is merely "incidental" rather than "intentional."[5] However, under RLUIPA, a state regulation affecting the religious activities of an inmate is invalid unless the State can prove it is narrowly tailored for a compelling state interest.[6] To the extent that Congress somehow believed these rewards for convicted felons served a noble purpose, RLUIPA's nobility has already been overtaken by its naivete. In the necessarily closed and perilous confines of state prisons, no good act by prison officials will go unpunished by prisoners who will exploit the benefit for unintended evils. In only two months between the enactment of RLUIPA and the writing of this Article, we have already seen Satan-worshiping inmates,[7] as well as one inmate who made up his own religion with a Monday Sabbath so that he would be exempted from his Monday job duties, argue that they are entitled to special rights under RLUIPA.[8] It is in light of exactly these types of problems that the Supreme Court has repeatedly held that prison regulations that burden prisoners' constitutional rights are valid if they are "reasonable,"[9] and it is for just these reasons, and countless others, that RLUIPA will wreak untold chaos on prisons and society.[10]

RLUIPA's foolishness is not the end of the Act's perils, but rather merely the beginning. RLUIPA re-enacts the language of RFRA, which the Supreme Court explicitly held unconstitutional. In *City of Boerne v. Flores*,[11] the Supreme Court struck down RFRA because it required a strict scrutiny standard where the Supreme Court had used a less stringent standard, and thus

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books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.

Id. at 78-79.

[5] Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

[6] 42 U.S.C.A. § 2000cc-1.

[7] Defendants' Motion to Dismiss at Exhibit F, Amero v. Cal. Youth Auth. (E.D. Cal. Dec. 8, 2000) (No. CIV F-00-7080).

[8] Findings and Recommendations Re Defendants' Motion for Summary Judgment, Menefield v. Maddock (E.D. Cal. Mar. 8, 2001) (No. CIV F-95-5329).

[9] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) (concluding that prison regulation that burdens constitutional rights of inmates is valid if the regulation is "reasonably related to legitimate penological interest"); *see also* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-52 (1987) (upholding prohibition on Muslim inmates attending Jumu'ah as reasonably related to legitimate penological interest of controlling inmates' movements); Mauro v. Arpaio, 188 F.3d 1054, 1062 (9th Cir. 1999) (holding that an inmate has the burden to prove that a challenged prison regulation is unreasonable).

[10] Although a portion of RLUIPA applies to religious land use rather than to institutionalized persons, *see* 42 U.S.C.A. § 2000cc, this Article does not concern the former.

[11] 521 U.S. 507 (1997).

"created" constitutional rights in excess of Congress's authority in violation of Section Five of the Fourteenth Amendment.[12] Now, in its own words, Congress has reenacted RFRA by passing RLUIPA under its Commerce Clause and federal spending powers.[13]

Congress's overt circumvention of the Supreme Court's decision in *City of Boerne* is transparently unconstitutional. While RLUIPA is based upon different congressional powers, the result is the same as RFRA: a significant and undue intrusion into the authority of the judiciary and the states in violation of fundamental notions of separation of powers and federalism. Congress cannot override the Supreme Court's explicit holding in *City of Boerne* by simply drawing on different congressional powers.[14] RLUIPA, like its precedent RFRA, is patently unconstitutional.

Part II of this Article examines the background of RLUIPA.[15] Part III examines the limitation and concepts of Congress's authority under separation of powers principles, and concludes that, in enacting RLUIPA, Congress exceeded its authority.[16] Part IV examines Congress's authority in light of the delicate balance of power set forth in the Tenth Amendment, and concludes that RLUIPA upsets that balance in violation of fundamental principles of federalism.[17] Finally, Part V predicts that RLUIPA will not survive judicial review.

II. BACKGROUND OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

A. The Religious Freedom Restoration Act

Before 1990, the Supreme Court held that laws that substantially affect the practice of religion were subject to strict scrutiny. In *Sherbert v. Verner*[18] and *Wisconsin v. Yoder*,[19] the Supreme Court held that a state could not impose a substantial burden on religion unless the state could demonstrate the law was narrowly tailored for a compelling state interest.[20] This standard changed,

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[12] *Id.* at 532.

[13] *See* discussion *infra* section II (discussing background of RFRA and RLUIPA).

[14] *See* discussion *infra* section III-IV (arguing that RLUIPA is unconstitutional).

[15] *See* discussion *infra* section II (discussing background of RFRA and RLUIPA).

[16] *See* discussion *infra* section III (arguing RLUIPA violates separation of powers principles).

[17] *See* discussion *infra* section IV (arguing RLUIPA violates the Tenth Amendment).

[18] 374 U.S. 398 (1963).

[19] 406 U.S. 205 (1972).

[20] *Sherbert*, 374 U.S. at 403 (subjecting law substantially affecting religion to strict scrutiny); *Yoder*, 406 U.S. at 220 (following the *Sherbert* Court's requirement for compelling interest as justification for laws that burden religion).

however, in the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.[21]

In *Smith*, the Supreme Court abandoned the strict scrutiny standard as unworkable.[22] The Court noted that strict scrutiny only applied when the burden on religion was substantial, and was not applicable when the burden was merely negligible or marginal.[23] To determine whether the burden on religion was substantial, the strict scrutiny standard required courts to evaluate whether the prohibited conduct was essential to the religious belief.[24] These determinations involved subjective inquiry into religious belief, since the question of whether the burden on religion was substantial turned on a consideration of the religious belief themselves.[25] Subjective inquiries into religious belief, according to the Court, were factually difficult to resolve and, therefore, beyond courts' competence.[26]

In the stead of strict scrutiny, the Court held that laws burdening religious liberty are valid if the burden is incidental, *i.e.* if the law is a neutral law of general applicability.[27] Therefore, the Supreme Court upheld an Oregon statute prohibiting the use of peyote as part of a Native American tribe's religion, since the prohibition of peyote was a neutral law of general applicability, and the effect on the Native American tribe was only incidental.[28]

Responding to the Supreme Court's decision in *Smith*, Congress enacted RFRA[29] pursuant to its enforcement powers under the Fourteenth Amendment.[30] Most notably, RFRA restored the strict scrutiny standard of review for questions involving religious liberty, which would eventually prove fatal for the Act.[31] RFRA specifically indicated Congress's disapproval of the

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[21] 494 U.S. 872 (1990).

[22] *Id.* at 887-88.

[23] *Id.* at 883; *see also Yoder*, 406 U.S. at 214 (explaining that strict scrutiny prohibited substantial burdens on religion unless supported by compelling state interest).

[24] *Smith*, 494 U.S. at 887 (holding that the determination of whether a burden on religion was substantial required courts to consider subjective questions of religious beliefs).

[25] *Id.* at 890 (examining limits of judicial competence).

[26] *Id.* at 887 (holding that inquiry into subjective questions of religious belief was outside "judicial ken").

[27] *Id.* at 878.

[28] *Id.* at 890.

[29] 42 U.S.C.A. § 2000bb (West 2000).

[30] U.S. CONST. amend. XIV, § 5.

[31] 42 U.S.C.A. § 2000bb. The statute provides:

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

Supreme Court's decision in *Smith*, and its intention to override that decision.[32] Accordingly, the Act stated that its purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[33] Therefore, under RFRA, laws that substantially burdened religion, which were permissible under *Smith*, were invalid unless supported by a compelling state interest.[34] In *City of Boerne v. Flores*,[35] the Supreme Court struck down RFRA on grounds that Congress had exceeded its authority under separation of powers principles.[36]

B. City of Boerne v. Flores

The crux of the Supreme Court's decision in *City of Boerne* was driven by the perennial principles that "[u]nder our Constitution, the federal government is one of enumerated powers,"[37] and that "[t]he judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten.'"[38] Accordingly, Congress's

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(3) governments should not burden religious exercise without compelling justification;
(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
(b) Purposes
The purpose of this chapter are—
(1) To restore the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) To provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id.

[32] *Id.*

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

[34] *Id.*; *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994) (explaining the purpose of RFRA's enactment); Erwin Chemerinsky, *Reflections on* City of Boerne v. Flores*: The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601 (1997) (arguing for constitutionality of RFRA, and explaining RFRA's purpose).

[35] 521 U.S. 507 (1997).

[36] *Id.* at 529; *see infra* section II.B (discussing Supreme Court's decision in *City of Boerne*).

[37] *City of Boerne*, 521 U.S. at 516 (citing McCulloch v. Maryland, 17 U.S. 316 (1819) and THE FEDERALIST No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961)).

[38] *Id.* (quoting Marbury v. Madison, 5 U.S. 137 (1803)).

power to regulate, under *City of Boerne*, is limited by the delicate balance inherent in the division between the prerogatives of the federal and state governments required by fundamental concepts of federalism.[39] Additionally, under *City of Boerne*, separation of powers principles require that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[40]

RFRA, under the Supreme Court's decision in *City of Boerne*, exceeded Congress's power. Under the enforcement power of the Fourteenth Amendment[41]—the basis of power asserted by Congress in enacting RFRA–Congress may "remedy" constitutional violations, but not "create" constitutional rights.[42] RFRA, however, had not merely "remedied" violations of the existing rights under *Smith*, but had rather "created" additional rights by imposing strict scrutiny where the Court had previously applied a less stringent standard.[43] The *City of Boerne* Court found that Congress had exceeded its authority under its enforcement powers under the Fourteenth Amendment in violation of the separation of powers doctrine, and at the expense of state authority in violation of principles of federalism.[44]

C. The Religious Land Use and Institutionalized Persons Act of 2000

By its own words, Congress was deeply troubled by the Supreme Court's decision to strike down RFRA, and passed RLUIPA, which "tracks the

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[39] *Id.* at 533-34; *see also* Steven A. Engel, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115 (1999) (discussing *City of Boerne*'s implication on the delegated powers of Congress).

[40] *City of Boerne*, 521 U.S. at 524. The intent of the Framers on this subject, as the *City of Boerne* Court noted, is clear:

> The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions. The Bingham draft, some thought, departed from that tradition by vesting in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation. Under it, "Congress, and not the courts, was to judge whether or not any of the privileges or immunities were not secured to citizens in the several States." While this separation of powers aspect did not occasion the widespread resistance which was caused by the proposal's threat to the federal balance, it nonetheless attracted the attention of various Members.

Id.

[41] U.S. CONST. amend. XIV, § 5.

[42] *City of Boerne*, 521 U.S. at 524-27.

[43] *Id.* at 532-34 (holding RFRA exceeded Congress's delegated authority under enforcement power of the Fourteenth Amendment).

[44] *Id.*; *see also* Thomas W. Beimers, *Searching for the Structural Vision of* City of Boerne v. Flores*: Vertical and Horizontal Tensions in the New Constitutional Architecture*, 26 HASTINGS CONST. L.Q. 789 (1999) (discussing implications of *City of Boerne*).

substantive language of the Religious Freedom Restoration Act,"[45] and "applies the RFRA standard to protect the religious exercise of persons residing in or confined to institutions . . . such as prisons or hospitals."[46] Under RLUIPA, Congress re-enacted RFRA's strict scrutiny standard in the context of incarcerated persons, mandating that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution [*e.g.*, a prison or hospital], . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is the least restrictive means of furthering [a] compelling governmental interest.[47]

However, rather than passing RLUIPA under the enforcement provisions of the Fourteenth Amendment, which the Supreme Court had foreclosed in *City of Boerne*, Congress drew from its federal spending and Commerce Clause powers, stating that it "applies in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance; or . . . the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."[48] Remarkably, RLUIPA also took a great step past the sweeping provisions of RFRA, shifting the burden from plaintiff to defendant in prosecuting a civil rights action under the First Amendment, mandating that "[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim . . . ."[49]

III. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 VIOLATES SEPARATION OF POWERS PRINCIPLES

In *City of Boerne v. Flores*,[50] the Supreme Court found the Religious Freedom Restoration Act ("RFRA") unconstitutional because it required a strict scrutiny standard where the Supreme Court had used a less stringent standard, and thus "created" constitutional rights in excess of Congress's

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[45] 146 CONG. REC. E-1563 (daily ed. Sept. 22, 2000) (comments of Rep. Charles T. Canady).

[46] *Id.* The House and Senate reports of RLUIPA are replete with references to RFRA's re-enactment. Representative Canady further states that RLUIPA "applies the RFRA standard to protect the religious exercise of persons residing in or confined to institutions defined in the Civil Rights of Institutionalized Persons Act, such as prisons and mental hospitals." *Id.*

[47] 42 U.S.C.A. § 2000cc-1 (West 2000).

[48] *Id.*

[49] *Id.* § 2000cc-2.

[50] 521 U.S. 507 (1997).

authority in violation of Section 5 of the Fourteenth Amendment.[51] The overbreadth of RFRA's mandates, the Supreme Court held, usurped the judiciary's exclusive authority to interpret the Constitution, thus offending separation of powers principles.[52] While the identical mandates of RLUIPA are based upon different congressional powers than those of RFRA, the result is the same: a significant and undue intrusion into the authority of the judiciary in violation of fundamental notions of separation of powers.[53]

Separation of powers principles prohibit Congress from interfering with the core functions of another branch.[54] In *Immigration and Naturalization Services v. Chadha*,[55] the Supreme Court defined core functions as duties that are central to a branch's ability to perform its constitutionally-assigned responsibilities.[56] In that case, the Court was faced with whether Congress could maintain a "legislative veto" over deportation decisions.[57] The Court invalidated Congress's unilateral deportation decisions, holding, *inter alia*, that deportation decisions were a core executive function because they were essential to the executive branch's ability to perform its constitutionally-assigned responsibilities.[58] Therefore, these deportation decisions were core functions of the executive, and separation of powers principles precluded Congress from abrogating executive authority to make such decisions.[59]

Under the delicate balance of power between the legislature and the judiciary, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary."[60] Where Congress enacts a statute that re-interprets a constitutional provision by changing the requisite standard of showing a constitutional violation, the statute is an impermissible usurpation of the

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[51] *Id.* at 532-34 (finding RFRA unconstitutional).

[52] *Id.*

[53] *See infra* notes 60-63 and accompanying text (arguing that RLUIPA is unconstitutional as violative of separation of powers principles).

[54] While the separation of powers doctrine is not specifically mentioned in the Constitution, courts hold that the Framers intended that the branches of government stay within their respective functions. *See, e.g.*, Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 942 (1983) (holding that separation of powers principles prohibit one branch from exercising constitutional powers of a coordinate branch); *see also* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996) (discussing separation of powers principles).

[55] 462 U.S. 919 (1983).

[56] *Id.* at 953 n.16 ("[c]learly, however, '[I]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker'") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587, (1952)).

[57] *Id.* at 952-54.

[58] *See id.* at 951-57.

[59] *See id.* (discussing functions of executive and legislative branches of government).

[60] City of Boerne v. Flores, 521 U.S. 507, 524 (1997).

powers of the judiciary in violation of separation of powers principles.[61] In RLUIPA, however, Congress has, once again, reinterpreted the Constitution by shifting the burden of proof in constitutional claims: RLUIPA states, "[i]f a plaintiff produces *prima facie* evidence to support a claim alleging a violation of the Free Exercise Clause . . . the government shall bear the burden of persuasion on any element of the claim . . . ."[62] RLUIPA thus *creates* constitutional rights in violation of the Supreme Court's explicit holdings in *City of Boerne* and *Chadha* that separation of powers principles preclude Congress from doing so.[63] RLUIPA's transparent re-interpretation of the judicial burden of proof in a constitutional claim under the First Amendment is a patent infringement on the powers of the judiciary under *City of Boerne* and *Chadha*.

IV. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 VIOLATES THE TENTH AMENDMENT

The remainder of RLUIPA purports to establish statutory rights for prisoners and wards that are greater than, and additional to, those of the First Amendment; *i.e.* strict scrutiny rather than reasonableness.[64] Congress's powers under the Commerce Clause and the Spending Clause, however, are manifestly inadequate to advance RLUIPA's sweeping mandate that state prison officials cannot infringe on prisoners' First Amendment rights unless the infringement is justified under strict scrutiny.

Under principles of federalism dating back to *Marbury v. Madison*,[65] "'powers of the legislature are defined and limited; and that those limits may

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[61] *Id.* (holding power to apply the Constitution rests exclusively with the judiciary); *see also* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 937 (Cal. 1996) (Mosk, J., concurring) (explaining that Congress lacks the authority to change the requisite standard of showing a constitutional violation); Joanne C. Brandt, *Taking the Supreme Court at Its Word: The Implications of RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 12-13 (1995) (arguing that RFRA undermines the judiciary's power to determine its own limitations).

[62] 42 U.S.C.A. § 2000cc-2 (West 2000).

[63] *See City of Boerne*, 521 U.S. at 508 (finding RFRA violated separation of powers principles); *see also supra* notes 54-63 and accompanying text (discussing core functions of the judiciary under separation of powers principles).

[64] 42 U.S.C.A. § 2000cc-1(a). Section 2000cc-1(a) provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution [*e.g.* a prison or hospital], . . . even if the burden results form a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling interest.

Id.

[65] 5 U.S. 137 (1803).

not be mistaken, or forgotten, the constitution is written.'"[66] The Tenth Amendment mandates that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[67] When Congress acts in excess of its constitutional authority, it upsets the delicate balance between state and federal power in violation of the fundamental concepts of federalism set forth in the Tenth Amendment.[68] In this case, Congress drew upon its Commerce Clause and federal spending powers in enacting RLUIPA,[69] both of which are woefully insufficient to justify the Act's sweeping intrusions into the operation of state prisons and hospitals, which have traditionally been the prerogative of the States.[70]

A. The Religious Land Use and Institutionalized Persons Act of 2000 is Not an Appropriate Legislative Action under the Commerce Clause

1. Background of the Commerce Clause

Under Article I, Section 8, Clause 3 of the United States Constitution, Congress has power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[71] Although in the years since the Supreme Court's 1935 decision in *NLRB v. Jones and Laughlin Steel Corp.*,[72] Congress had "considerably greater latitude in regulating conduct and transactions under the Commerce Clause,"[73] the Supreme Court has recognized

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[66] *City of Boerne*, 521 U.S. at 516 (quoting *Marbury*, 1 Cranch at 176, 2 L.Ed. at 60).

[67] U.S. CONST. amend. X.

[68] *City of Boerne*, 521 U.S. at 518 (discussing the Tenth Amendment limits on Acts of Congress).

[69] *See* 42 U.S.C.A. § 2000cc-2.

[70] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 405 (1974) (stating that "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities"); *see also* Cheryl Dunn Giles, Turner v. Safley *and Its Progeny: A Gradual Retreat to the "Hands-Off" Doctrine?*, 35 ARIZ. L. REV. 219 (1993) (discussing deferential standard of review for state prison regulations).

[71] U.S. CONST. art. I, § 8, cl. 3.

[72] 301 U.S. 1 (1937).

[73] United States v. Morrison, 529 U.S. 598, __, 120 S.Ct. 1740, 1748 (2000) (discussing Commerce Clause jurisprudence before *Jones & Laughlin Steel*).

significant restraints on the commerce power in recent years.[74] In *United States v. Lopez*,[75] the Supreme Court noted that:

> [E]ven these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In *Jones v. Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[76]

Setting forth specific constraints on Congress's ability to regulate pursuant to the Commerce Clause, the Supreme Court has recently noted that modern jurisprudence has identified three broad categories of activity that Congress may regulate under its Commerce power:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.[77]

Regarding the third category, the Supreme Court has held that where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.[78] However, the Court recognizes that boundaries of the "substantial effect" are limited and notes that "any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we [the Court] have not yet said the commerce power may reach so far."[79] Thus, in *Lopez*, the Court struck down a congressional act regulating gun possession near schools, since possession of a gun near a school

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[74] *See* Bradley A. Harsch, Brzonkala, Lopez, *and the Commerce Clause Canard: A Synthesis of Commerce Clause Jurisprudence*, 29 N.M. L. REV. 321 (1999); Nicole Huberfeld, *The Commerce Clause Post-*Lopez*: It's Not Dead Yet*, 28 SETON HALL L. REV. 182 (1997); Antony Barone Kolenc, *Commerce Clause Challenges After* United States v. Lopez, 50 FLA. L. REV. 867 (1998).

[75] 514 U.S. 549 (1995).

[76] *Id.* at 556-57 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).

[77] *Morrison*, 529 U.S. at __, 120 S.Ct. at 1749 (internal quotations and citations omitted); *see also Lopez*, 514 U.S. at 558 (discussing attributes of Congress's Commerce power).

[78] *Lopez*, 514 U.S. at 560.

[79] *Morrison*, 529 U.S. at __, 120 S.Ct. at 1750; *see also* Rachel Elizabeth Smith, United States v. Lopez*: Reaffirming the Federal Commerce Power and Remembering Federalism*, 45 CATH. U. L. REV. 1459 (1996) (discussing Congress's Commerce power after the Supreme Court's decision in *Lopez*).

was a *non-economic* activity that had no discernable impact on interstate commerce.[80] Significantly, the Court tersely rejected the government's argument that the repetition of a non-commercial activity could have a "substantial effect" on interstate commerce, stating "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police powers of the sort retained by the States."[81]

In *Morrison*, the Court struck down a congressional act prohibiting gender-motivated violence, since gender-motivated violence is a non-economic activity with no discernable impact on interstate commerce.[82] Significantly, in *Morrison*, as in *Lopez*, the Court rejected the argument that the aggregate effect of all the regulated activity, which was *non-economic* in nature, had a "substantial effect" on interstate commerce: "[w]e rejected these 'costs of crime' and 'national productivity' arguments because they would permit Congress to regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce."[83]

Further, where the regulated activity is one that is traditionally regulated by the states, the activity is less likely to be perceived by the Supreme Court as an activity that substantially affects interstate commerce.[84] As the *Lopez* Court stated, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."[85] Accordingly, in *Lopez* and *Morrison*, the Supreme Court struck down congressional acts that regulated crime, which is traditionally a prerogative of the states.[86]

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[80] *Lopez*, 514 U.S. at 567 (stating Commerce Clause does not give Congress "a general police power of the sort retained by the States").

[81] *Id.*

[82] *Morrison*, 529 U.S. at __, 120 S.Ct. at 1754.

[83] *Id.* at __, 120 S.Ct. at 1751 (striking down the Violence Against Women Act as a regulation on non-economic activity with no discernable effect on interstate commerce).

[84] United States v. Lopez, 514 U.S. 549, 577 (1995) (discussing due congressional restraint from areas traditionally regulated by the States); *see also* Michael J. Trapp, *A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal Power Under the Commerce Clause*, 64 U. CIN. L. REV. 1471 (1996) (discussing *Lopez*).

[85] *Lopez*, 514 U.S. at 577.

[86] *Morrison*, 529 U.S. at __, 120 S.Ct. at 1752-53 (holding that a statute regulating gender-motivated violence exceeded Congress's Commerce Clause power); *Lopez*, 514 U.S. at 567 (holding a statute regulating firearms in proximity of schools exceeded Congress's Commerce Clause Power).

2. The Religious Land Use and Institutionalized Persons Act of 2000

In this case, Congress did not provide any findings that the religious activities of an inmate or ward confined in a state prison or hospital substantially affect interstate commerce,[87] and common sense compels the conclusion that there is no effect. The religious activity of a state inmate or ward is not a "channel of interstate commerce"[88] nor an "instrumentality of interstate commerce"[89] under the plain meaning of those phrases. Further, the religious activities of state inmates or wards have no "substantial effect" on interstate commerce, as the Supreme Court has defined that phrase.[90] Like possessing a gun near a school or committing gender motivated violence, the religious activities of a state inmate or ward are not an "economic activity."[91]

Further, the non-economic activity of a state inmate or ward practicing religion, like the non-economic activities of possessing a gun in school and committing gender-motivated violence, have no discernable impact on interstate commerce.[92] The patent lack of any effect of the religious activities of a state inmate or ward of interstate commerce cannot be cured by resort to the "aggregate effects" the religious activities on all state inmates or wards may have on interstate commerce, since the Supreme Court has, in recent years, repeatedly rejected the notion that the repetition of a *non-economic* activity could have a "substantial effect" on interstate commerce.[93] Such conclusions require the piling of "inference upon inference . . . in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police powers of the sort retained by the States."[94] Thus, just as the Supreme Court has twice rejected such a "substantial effects"

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[87] *See* 42 U.S.C.A. § 2000cc (West 2000). Significantly, in *Lopez*, the Supreme Court noted the absence of any findings that possession of a gun near school substantially affected interstate commerce, and considered the absence, in part, as a substantive indication that there was no substantial effect. *Lopez*, 514 U.S. at 562-63.

[88] *See* McLeod v. Threlkeld, 319 U.S. 491, 493 (1943).

[89] *Id.*

[90] *See Morrison*, 529 U.S. at ___, 120 S.Ct. at 1752-53 (discussing requisite "substantial effect" on interstate commerce).

[91] *See Lopez*, 514 U.S. at 567 (holding that possessing firearms in proximity of schools does not substantially affect commerce); *Morrison*, 529 U.S. at ___, 120 S.Ct. at 1754 (holding that gender-motivated violence does not substantially affect commerce).

[92] *See Morrison*, 529 U.S. at ___, 120 S.Ct. at 1752-53 (gender-motivated violence); *Lopez*, 514 U.S. at 567 (possessing firearms in the proximity of schools).

[93] *See Morrison*, 529 U.S. at ___, 120 S.Ct. at 1752-53 (discussing "substantial effect"). For other discussions on the Court's "substantial effect" analysis, see *Lopez*, 514 U.S. at 567; Steven Rosenberg, *Just Another Kid with a Gun?* United States v. Michael R.: *Reviewing the Youth Handgun Safety Act Under the* United States v. Lopez *Commerce Clause Analysis*, 28 GOLDEN GATE U. L. REV. 51 (1998).

[94] *Lopez*, 514 U.S. at 567.

argument in *Lopez* and *Morrison*, the argument fails to salvage RLUIPA as well. A contrary result "would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.'"[95] As the *Morrison* Court aptly stated, "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far."[96] Like the repetition of possessing a gun or committing gender-motivated violence, the repetition of the religious activity of a state inmate or ward has no discernable impact on interstate commerce.[97]

Further, the running of state prisons and state hospitals has always been an area of state regulation rather than that of the federal government; indeed, the Supreme Court has explicitly and repeatedly affirmed that the regulation of state penal institutions is the prerogative of the states.[98] Accordingly, RLUIPA intrudes upon matters that have traditionally been the prerogative of the states, in violation of the Supreme Court's explicit admonition that the Commerce Power does not justify intruding on exclusive State prerogatives.[99] Thus, the same words that rang the death knell for the Gun-Free School Zones Act of 1990[100] in *Lopez* ring true here: "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."[101] RLUIPA, too, blurs this distinction by invading an exclusive State prerogative where there is no economic activity, thus exceeding the outer limits of Congress's Commerce power.

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[95] *See id.* at ___, 120 S.Ct. at 1751 (quoting *Lopez*, 514 U.S. at 564).

[96] *Id.* at ___, 120 S.Ct. at 1750 (quoting *Lopez*, 514 U.S. at 580).

[97] *Cf. Lopez*, 514 U.S. at 561 (possession of a gun in a local school zone not an economic activity that might, in aggregate, substantially affect any sort of interstate commerce).

[98] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 405 (1974) (stating that "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities").

[99] *Morrison*, 529 U.S. at ___, 120 S.Ct. at 1752-53.

[100] 18 U.S.C.A. § 922 (q) (West 2000).

[101] *Lopez*, 514 U.S. at 577; *see also* Alan T. Dickey, United States v. Lopez*: The Supreme Court Reasserts the Commerce Clause as a Limit on the Powers of Congress*, 70 TUL. L. REV. 1207 (1996) (discussing Commerce Clause jurisprudence after the Supreme Court's decision in *Lopez*).

B. *The Religious Land Use and Institutionalized Persons Act of 2000 is Not an Appropriate Legislative Action Under the Federal Spending Power*

1. *Congress's federal spending power*

Under Article I of the United States Constitution, "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[102] The Supreme Court has interpreted Congress's power to provide for the common defense and general welfare of the United States to afford Congress the power "to authorize expenditure of public monies for public purposes [which] is not limited by the direct grants of legislative power found in the Constitution."[103]

Accordingly, acts of Congress that conditionally spend for the general welfare have been upheld even when the condition, absent the expenditure, would have been beyond Congress's authority. In *Massachusetts v. Mellon*,[104] for example, the Supreme Court upheld the federal Maternity Act, in which Congress attempted to reduce infant mortality by attaching regulations to federal spending, because the focus of the Act was to spend in an attempt to reduce maternal and infant mortality, not to use the expenditure as an excuse for regulation.[105] Likewise, in *Charles Steward Machine Co. v. Davis*,[106] the Supreme Court upheld unemployment insurance provisions of the Social Security Act of 1935,[107] in which Congress required a payment of a federal tax in income to fund unemployment insurance, on grounds that the regulation was conditioned to the grant of funds, which the States were free to reject.[108] In *Oklahoma v. United States Civil Service Commission*,[109] the Supreme Court upheld the federal Hatch Act's[110] conditioning of an award of federal highway funds upon state compliance with the Act's prohibition against state officials taking "any active part in political management or in political campaigns" because the condition was related to the grant, which the states were free to reject.[111]

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[102] U.S. CONST. art. I., § 8, cl. 1.

[103] United States v. Butler, 297 U.S. 1, 66 (1935).

[104] 262 U.S. 447 (1923).

[105] *Id.* at 479, 482 (upholding conditional congressional expenditure law within Congress's spending power).

[106] 301 U.S. 548 (1937).

[107] 42 U.S.C.A. §§ 1101-1110 (West 2000).

[108] *Davis*, 301 U.S. at 574, 589-90 (upholding conditional congressional expenditure law within Congress's spending power).

[109] 330 U.S. 127 (1947).

[110] 18 U.S.C.A. § 611 (1948) (repealed 1966).

[111] *U.S. Civil Service Comm'n*, 330 U.S. at 129, 143 (citation omitted).

Congress's authority to conditionally spend for the general welfare, however, is not without limitations. A congressional authority to conditionally spend for the amorphous purpose of providing for the general welfare would, if unfettered, bring Congress's power dangerously close to the sweeping general police power constitutionally possessed only by the states. The federal spending power cannot be read so broadly as to eviscerate the distinction between the delegated and reserved powers set forth in the Tenth Amendment. On the contrary, although Congress has the power to spend for the general welfare, it has the power to regulate only for delegated purposes.[112] This is a crucial distinction to preserve the delicate balance of reserved and delegated powers set forth in the Tenth Amendment.

This distinction is shown in *United States v. Butler*,[113] in which the Supreme Court struck down the taxing and spending scheme Congress adopted in the Agricultural Adjustment Act of 1933[114] that increased the price of certain farm products by paying farmers to let their land lay fallow for a period of time.[115] The Act further levied a tax on the processing of commodities derived from the farm products being regulated in order to provide money to pay the farmers.[116] The Act authorized the Secretary of Agriculture "to make agreements with individual farmers for a reduction of acreage or production upon such terms as he may think fair and reasonable."[117] The Court held that the tax was a "mere incident" to a program designed to regulate agricultural production, not to merely spend for the general welfare, which was beyond Congress's enumerated powers.[118]

To be sure, the *Butler* Court reiterated that concepts of federalism underlying the Tenth Amendment were not necessarily violated by a conditional grant of money to the states by Congress, even when Congress lacked authority to enact the conditions independently.[119] Thus, the same principles that upheld the Maternity Act in *Mellon* were noted by the Supreme Court in *Butler*: "[i]f Congress enacted [the Act] with the ulterior purpose of tempting [states] to yield [a right reserved by the Tenth Amendment], that purpose may be effectively frustrated by the simple expedient of not yielding."[120] However, unlike *Mellon*, the Act in *Butler* served the purpose of

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[112] *See* discussion *infra* section IV.B.1 (discussing limitations on federal Spending power).

[113] 297 U.S. 1 (1935).

[114] 7 U.S.C.A. §§ 609, 616 (West 2000).

[115] *Butler*, 297 U.S. at 54-55.

[116] *Id.* at 55.

[117] *Id.*

[118] *Id.* at 61 (striking down conditional expenditure by Congress).

[119] *Id.* at 65-66; *see also* Massachusetts v. Mellon, 262 U.S. 447, 480 (1923) (stating that "the powers of the State are not invaded, since the statute imposes no obligation but imply extends an option which the State is free to accept or reject").

[120] *Mellon*, 262 U.S. at 482.

regulating, not spending. Striking down the Act, the *Butler* Court held that when a conditional grant of money to a state required conditions that had nothing to do with the reason for the grant, the condition is outside Congress's authority to spend for the "general welfare" and therefore unconstitutional.[121] Thus, the *Butler* Court maintained the critical distinction between Congress's power to spend for the general welfare and its power to regulate only for delegated purposes, noting that the Constitution gave Congress no power to directly regulate agricultural production, and concluding that the Tenth Amendment precluded Congress from enacting conditional spending legislation in order to achieve that regulatory end.[122] A contrary result would have rendered meaningless the Tenth Amendment distinction between the reserved police power of the states and the delegated power of Congress by transforming the federal spending power into a vast constitutional loophole through which Congress may enact whatever legislation it wished, for any purpose it desired.[123]

2. *South Dakota v. Dole*

In *South Dakota v. Dole*,[124] the most recent of the Supreme Court's decisions addressing the federal spending power, the Court addressed Congress's conditional spending that directly regulated the states' laws

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[121] *Id.* at 68-75 (striking down provisions of the Agricultural Adjustment Act as beyond federal spending power).

[122] *Id.*; *see also* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1927 (1995) (discussing United States v. Butler, 297 U.S. 1, 73 (1935), for the proposition that the "obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced").

[123] *See* Baker, *supra* note 122, at 1927. Baker notes that:

> If, in lieu of compulsory regulation of subjects within the states' reserved jurisdiction, which is prohibited, the Congress could invoke the taxing and spending power as a means to accomplish the same end, clause 1 of § 8 of Article I would become the instrument for total subversion of the governmental powers reserved to the individual states.

Id. The language allowing Congress to spend for the "general Welfare," did not provide a Congressional loophole around the Tenth Amendment.

> It does not help to declare that local conditions throughout the nation have created a situation of national concern; for this is but to say that whenever there is a widespread similarity of local conditions, Congress may ignore Constitutional limitations upon its own powers and usurp those reserved to the states.

Butler, 297 U.S. at 74-75; *see also* Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869 (1998) (discussing paradox of federal spending power and Commerce Clause after the Supreme Court's decision in *Lopez*).

[124] 483 U.S. 203 (1987).

concerning possession of alcohol by minors by conditioning the award of a percentage of federal highway funds on a state's adoption of a twenty-one year-old drinking age minimum.[125] South Dakota challenged the Act, claiming that under the Twenty-First Amendment, States have "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[126]

Restating the well established principles that "'the power of Congress to authorize expenditures of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution,'"[127] the *Dole* Court articulated that the spending power is limited by four "general restrictions articulated in our cases."[128] First, the congressional expenditure must be "in pursuit of 'the general welfare.'"[129] Second, the conditioning of federal funds by Congress must be unambiguous so as to enable "'the States to exercise their choice knowingly, cognizant of the consequences of their participation.'"[130] Third, and very significantly, the *Dole* Court admonished that the congressional conditions on spending "might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[131] Fourth, the *Dole* Court held "that other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[132]

Because of the importance of the national interest in preventing teenage drivers from crossing state lines to obtain alcohol and driving home while intoxicated, the Court curtly found that South Dakota had not "seriously" challenged the ability of the Act to meet the first three factors.[133] The federal drinking age, the Court held, was clearly designed to serve the general welfare, the conditions on federal spending were clearly stated, and South Dakota "'has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment.'"[134] The Court, however, took more issue with the fourth criterion, stating, at the outset, "we think that the language in our earlier opinions stands for the unexceptionable proposition that the power may not be used to induce the States to engage in

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[125] *Id.* at 205; 23 U.S.C.A. § 158 (West 2000).

[126] *Dole*, 483 U.S. at 205 (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 110 (1980)).

[127] *Id.* at 207 (quoting United States v. Butler, 297 U.S. 1, 66 (1936)).

[128] *Id.*

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

[130] *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[131] *Id.* at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).

[132] *Id.* at 208 (citations omitted).

[133] *Id.*

[134] *Id.*

activities that would themselves be unconstitutional."[135] Significantly, however, the Court also noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[136]

The *Dole* Court found that the fourth criterion was met for two reasons. First, the Court found that the Act was justified in light of the compelling need for a uniform drinking age to prevent teenagers from crossing state lines to obtain alcohol and drive home while intoxicated.[137] Second, the Court emphasized that a state's failure to comply with the federal drinking age would result in it losing only five percent of the funds otherwise available under the federal highway grant programs.[138] Accordingly, the Court held the Act was a "relatively mild encouragement to the States," which allows those states to retain their prerogative over their drinking age.[139]

Thus, the *Dole* Court's decision upholding Congress's conditional expenditure rested on its finding that the threat of losing five percent of the allocable highway funds, compared to the significant national interest in preventing intoxicated teenagers from driving across state lines, did not amount to Congress regulating "those purposes which are within the exclusive province of the states."[140] Justice O'Connor, however, dissented based on her disagreement with the majority's application of *Butler*.[141] Opining that the regulation of states' drinking age was outside Congress's power because it falls "within the scope of . . . the Twenty-First Amendment,"[142] Justice O'Connor concluded that the conditional grant was beyond Congress's constitutional authority because it regulated the consumption of alcohol, which was an area of exclusive state regulation:[143]

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[135] *Id.* at 210.

[136] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)); *see also* James V. Corbelli, *Tower of Power,* South Dakota v. Dole *and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097 (1988) (discussing outer limits of Congress's spending power); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987) (discussing limits of federal spending power under the Supreme Court's decision in *Dole*).

[137] *Dole*, 483 U.S. at 209 (discussing challenged Act's important national purpose).

[138] *Id.* at 211.

[139] *Id.*

[140] Butler v. United States, 297 U.S. 1, 69 (1935) (citing Gibbons v. Ogden, 9 Wheat. 1, 199, 6 L.Ed. 23 (1807)); Terry W. Dorris, *Constitutional Law—*South Dakota v. Dole*: Federal Constitutional Spending is Subjected to a Multi-Pronged Analysis*, 18 MEM. ST. U. L. REV. 741 (1988).

[141] *Dole*, 483 U.S. at 216-18 (O'Connor, J., dissenting) (discussing necessary limits on federal spending power).

[142] *Id.* at 218 (O'Connor, J., dissenting) (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 716 (1984)).

[143] *Id.* (O'Connor, J., dissenting).

> If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self imposed."[144]

3. *Post-Dole decisions*

Since *South Dakota v. Dole*, the Supreme Court has drastically changed course with respect to issues of federalism and the extent to which Congress may regulate. This change of course, which is depicted most dramatically in the Supreme Court's decisions in *New York v. United States*,[145] *United States v. Lopez*,[146] *Printz v. United States*,[147] and *United States v. Morrison*,[148] likely signals a change in how the High Court will construe the federal spending power, and may lead to a reversal of the principles announced in *Dole* in favor of Justice O'Connor's dissent in that case.[149] This issue will likely be brought to a head when the Supreme Court addresses Congress's far reaching use of the federal spending power in RLUIPA.

In *New York v. United States*,[150] the Supreme Court struck down the portion of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985

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[144] *Id.* at 217 (O'Connor, J., dissenting) (citing *Butler*, 297 U.S. at 78). Justice O'Connor further stated that "Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent," stressing that, "[t]he immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a government of enumerated powers." *Id.* at 216, 218 (O'Connor, J., dissenting) (quoting McCulloch v. Maryland, 17 U.S. 316 (1819)).

[145] 505 U.S. 144 (1992).

[146] 514 U.S. 549 (1995).

[147] 521 U.S. 898 (1997).

[148] 529 U.S. 598 (2000).

[149] *See* Kristian D. Witten, *Conditional Federal Spending and the States' "Free Exercise" of the Tenth Amendment*, 21 CAMPBELL L. REV. 5, 21-24 (1998); Baker, *supra* note 123, at 1988 (stating "[w]ith its decision in *Lopez*, the Rehnquist Court made clear that the Commerce Clause does not grant Congress 'a plenary police power.' . . . [T]he Court should now reinterpret the Spending Clause to work in concert, rather than in conflict, with its reading of the Commerce Clause"); Note, *Federalism, Political Accountability and the Spending Clause*, 107 HARV. L. REV. 1419, 1435-36 (1994) (explaining that Justice O'Connor's majority opinion in *New York*, together with her dissent in *Dole*, suggest federal government's continuing efforts to force states into policy decisions that serve federal objectives may be beyond Congress's power under the Spending Clause). *But see* Kimberly Sayers-Fay, *Conditional Federal Spending: A Back Door to Enhanced Free Exercise Protection*, 88 CAL. L. REV. 1281 (2000) (arguing that Congress may use federal spending power to establish substantive provisions of RFRA).

[150] 505 U.S. 144 (1992).

imposing an obligation on the states to enact laws providing for the disposal of radioactive waste generated within their borders.[151] To encourage the states to enact such laws, the Act provided for "take title" incentives, under which any state that does not provide for the disposal of all internally generated radioactive waste was required to "take title" and become liable for all damages suffered as a result of that waste.[152] Striking down the "take title" incentives, the Supreme Court, in a majority opinion by Justice O'Connor, admonished Congress that it may not simply "'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[153] The Court found that, in the "take title" incentives, Congress had "held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction."[154] "A choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program . . . .'"[155] Justice O'Connor concluded that Congress's attempt to enact "incentives" that were, in truth, strong-arm demands for the States to enact laws, exceeded Congress's delegated authority under the Constitution:

> Some truths are so basic that, like the air around us, they are easily overlooked. . . . But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," . . . reserved explicitly to the States by the Tenth Amendment.[156]

Three years later, in *Lopez*, the Court held that Congress had legislated beyond its commerce power when it criminalized the act of carrying a gun in the proximity of a school.[157] As noted above, the Court concluded that the

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[151] *Id.* at 150-51 (discussing provisions of the Low Level Radioactive Waste Policy Amendments Act).

[152] *Id.* at 153-54.

[153] *Id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 288 (1981)).

[154] *Id.* at 176.

[155] *Id.* (quoting *Hodel*, 452 U.S. at 288).

[156] *Id.* at 187-88 (internal citation omitted).

[157] United States v. Lopez, 514 U.S. 549, 567 (1995); *see also supra* section IV.A.1

statute at issue "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[158] Two years later, in *Printz*, the Supreme Court struck down provisions of the Brady Hand Gun Violence Prevention Act which commands State chief law enforcement officers to perform background checks and file reports concerning prospective handgun purchasers.[159] Noting its holding in *New York*, the Court in *Printz* found that Congress had exceeded its authority because the Federal Government may not "compel the States to enact or enforce a federal regulatory program."[160]

Most recently, the Supreme Court, in *Morrison*, struck down provisions of the Violence Against Women Act,[161] which provided for liability for victims of gender-motivated violence.[162] Relying on its holding in *Lopez*, the Court concluded that the Violence Against Women Act exceeded Congress's authority, stating "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur."[163]

Read together, the Supreme Court's decisions in *New York*, *Lopez*, *Printz*, and *Morrison* clearly indicate the Supreme Court's change of course in the sphere of the balance of federal and state powers under the Tenth Amendment.[164] Significantly, the decisions in *New York*, *Lopez*, *Printz*, and *Morrison* all explicitly emphasize the Court's concerns that the power to regulate for the general welfare belongs exclusively to the states, not to the federal government, and that Congress cannot blur the distinction by exercising a police power.[165] In the context of the federal spending power, where Congress has the power to spend for the amorphous purpose of providing for the general welfare, and may arguably attach certain regulatory conditions, these concerns carry particular weight.

(discussing Commerce Clause jurisprudence after Supreme Court's decision in *Lopez*).

[158] *Lopez*, 514 U.S. at 561; *see also supra* section IV.A.1 (discussing *Lopez*).

[159] Printz v. United States, 521 U.S. 898, 935 (1997).

[160] *Id.*

[161] 42 U.S.C.A. § 13981 (West 2000).

[162] United States v. Morrison, 529 U.S. 598, __, 120 S.Ct. 1740, 1759 (2000).

[163] *Id.* at __, 120 S.Ct. at 1750 (citing *Lopez*, 514 U.S. at 577).

[164] *See* Kristian D. Witten, *supra* note 149, at 21-25 (synthesizing recent Commerce Clause cases in context of federal Spending power); *see also* A. Raymond Randolph & Edward A. Zelinsky, *Accountability and Mandates: Redefining the Problem of Federal Spending Conditions*, 4 CORNELL J.L. & PUB. POL'Y 482 (1995).

[165] *See* Baker, *supra* note 123, at 1988 (stating "[w]ith its decision in *Lopez*, the Rehnquist Court made clear that the Commerce Clause does not grant Congress 'a plenary police power'").

Thus, Justice O'Connor's dissent in *Dole*, which gives careful consideration to these concerns and accordingly finds that Congress cannot use the federal spending power as a constitutional loophole to regulate for the general welfare,[166] is consistent with the Supreme Court's recent emphasis on the exclusive power of the states to regulate for the general welfare. The majority in *Dole*, which finds that Congress may attach regulatory conditions to provide for the general welfare so long as certain criteria are met,[167] does not recognize that emphasis, and thus blurs "the boundaries between the spheres of federal and state authority."[168] Thus, the dissent in the Supreme Court's decision in *Dole* has now likely become the majority after *Lopez*.[169]

4. The Religious Land Use and Institutionalized Persons Act of 2000

Whether the Supreme Court were to apply RLUIPA to the majority's criteria in *Dole* or to Justice O'Connor's dissent may be irrelevant, since RLUIPA would likely fail either approach. Unlike the Act at issue in *Dole*, RLUIPA does not serve any discernable national interest, nor does it clearly state what congressional expenditure of funds upon which it is conditioned, nor could it be called a "relatively mild encouragement to the States"[170] by any stretch of the imagination. Further, like the Act at issue in *Butler*, RLUIPA's purpose is regulation, not spending.[171] RLUIPA's sweeping, ambiguous, and unqualified provisions cast the Act well beyond Congress's delegated authority, and into the area of general welfare regulations that belong exclusively to the states.

It is true that state prisons often receive federal funds for various programs, but RLUIPA does not specify what specific federal funds upon which it is conditioned; the Act blithely states it applies to a "program or activity that

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[166] *See supra* notes 141-44 and accompanying text (discussing Justice O'Connor's dissent in *Dole*).

[167] *See supra* notes 124-40 and accompanying text (discussing majority's decision in *Dole*).

[168] United States v. Lopez, 514 U.S. 549, 577 (1995).

[169] According to Baker, the Supreme Court's *Lopez* decision renders Justice O'Connor's dissent in *Dole* the "most attractive alternative to date" for testing Congressional conditions on federal spending. Baker, *supra* note 123, at 1956. "[T]he Court should now reinterpret the Spending Clause to work in concert, rather than in conflict, with its reading of the Commerce Clause." *Id.* at 1988; *see also Federalism, Political Accountability and the Spending Clause*, *supra* note 149, at 1435-36 (asserting that Justice O'Connor's majority opinion in *New York*, together with her dissent in *Dole*, indicate the federal government's continuing efforts to force States into policy decisions that serve federal objectives may be beyond Congress's power under the Spending Clause).

[170] South Dakota v. Dole, 483 U.S. 203, 211 (1987).

[171] *See* discussion *infra* section IV.B.4 (arguing that RLUIPA is unconstitutional under the Tenth Amendment).

receives Federal financial assistance . . . ."[172] The fact that Congress provided no indication of what funds upon which RLUIPA's sweeping provisions are conditioned leads to the inescapable conclusion that RLUIPA's purpose is not to spend, but to regulate. Accordingly RLUIPA offends the Supreme Court's explicit admonition in *Butler* that the purpose of the conditioned expenditure must not be to regulate an area into which Congress otherwise lacks authority to venture.[173] Further, Congress has never allocated federal funds for the purpose of facilitating practice of religion of state inmates and wards, nor could it do so without violating the Establishment Clause.[174] Thus, RLUIPA also offends the Supreme Court's explicit admonition that the condition must be related to the expenditure.[175]

RLUIPA fares no better under the Supreme Court's four criteria in *Dole*. The attenuated connection between the existing federal grants to state prisons and the purpose of RLUIPA is insufficient to justify the Act's sweeping intrusion into the affairs of the states. With respect to the first criterion under *Dole*, that the exercise of the spending power must be "in pursuit of 'the general welfare,'"[176] the Act does not specify what aspect of the general welfare it purports to further, nor does it provide any legislative findings establishing how it will benefit the general welfare.[177] With respect to the second *Dole* criterion, that the conditioning of federal funds must be unambiguous, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation," the Act is woefully inadequate.[178] The Act does not specify the federal funds upon which it is contingent,[179] and the states cannot "exercise their choice knowingly, cognizant of the consequences of their participation."[180] RLUIPA thus does not provide the states an "option which the state is free to accept or reject,"[181] but rather imposes conditions on the states based on unspecified grants they have already accepted.[182] To allow Congress to condition regulations on

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[172] 42 U.S.C.A. § 2000cc-1(b)(1) (West 2000).

[173] United States v. Butler, 297 U.S. 1, 74-75 (1936) (discussing requirement that expenditure not be for purpose of regulating).

[174] *See* Agostini v. Felton, 521 U.S. 203, 222-23 (1997) (stating that government cannot act "with the purpose of advancing or inhibiting religion").

[175] *See Butler*, 297 U.S. at 73-75.

[176] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citing U.S. CONST. art I, § 8, cl. 2).

[177] *See* 42 U.S.C.A. § 2000cc.

[178] *Dole*, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[179] *See* 42 U.S.C.A. § 2000cc.

[180] *Dole*, 483 U.S. at 207 (quoting Pennhurst State Sch. & Hosp. V. Halderman, 451 U.S. 1, 17 (1981)).

[181] Massachusetts v. Mellon, 262 U.S. 447, 480 (1923).

[182] *See* 42 U.S.C.A. § 2000cc(1)(b).

expenditures that the States accepted before the conditions were contemplated would defy not only basic notions of federalism, but also fundamental concepts of equity and black letter contract law. Indeed, the fact that RLUIPA does not even attempt to specify what funds upon which it is conditioned defeats any notion that the Act was intended to spend for the general welfare, and confirms that the Act was designed to *regulate* for the general welfare in gross defiance of the Supreme Court's explicit holdings that Congress cannot do so.[183]

With respect to the third *Dole* criterion, that the conditions on spending "might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs,'"[184] RLUIPA completely fails. As noted above, RLUIPA's regulation of the religious freedom of incarcerated persons has no relation to any existing federal funds, since Congress has not–and cannot–allocate federal funds to facilitate the practice of religion.[185] Further, RLUIPA implicates absolutely no need for national uniformity. Unlike the need for a uniform drinking age to prevent teenagers from crossing state borders to obtain alcohol addressed by the Court in *Dole*,[186] there is absolutely no need for national uniformity in the running of state institutions such as prisons and hospitals; the notion that a state inmate or ward would attempt to escape and enter another state so that he could be incarcerated in a more comfortable institution is absurd. Thus, the need for national uniformity that justified the statute in *Dole* as an expenditure for the "general welfare" is not present in the running of state prisons and hospitals. Indeed, courts have traditionally left the states to run their own institutions.[187]

With respect to the fourth *Dole* criteria, "that other Constitutional provisions may provide an independent bar to the conditional grant of federal funds,"[188] the Supreme Court has noted that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[189] Here, again, the Act fails. Unlike the Act in *Dole*, in which the "relatively mild encouragement to the States" provided that a non-compliant state would lose only five percent of the grant of funds otherwise available,[190] RLUIPA provides that when a state institution

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[183] *See* discussion *supra* section IV.B.1-3 (discussing limits on Congress's spending power).

[184] *Dole*, 483 U.S. at 207 (quoting Masachussetts v. United States, 435 U.S. 444, 461 (1978)).

[185] *See supra* notes 172-75 and accompanying text (discussing lack of connection between RLUIPA's conditions and any congressional expenditure).

[186] *Dole*, 483 U.S. at 205.

[187] *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 405 (1974) (deference given to state in management of state prisons).

[188] *Dole*, 483 U.S. at 208.

[189] *Id.* at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1947)).

[190] *Id.*

accepts *any* federal funds, it must comply with the sweeping provisions of the Act.[191] The one hundred percent incentive under RLUIPA is "so coercive as to pass the point at which 'pressure turns into compulsion,'"[192] and thus beyond the power of Congress.

RLUIPA blurs the distinction between Congress's power to regulate under specific constitutional restraints and its powers to spend for the general welfare. This distinction is a crucial attribute of the constitutional balance of power between the federal and state governments, and, in overriding that distinction, RLUIPA impermissibly trespasses upon the exclusive power of the states in violation of the fundamental principles of federalism set forth in the Tenth Amendment.

V. CONCLUSION

Long ago, in the early days of the Republic, Chief Justice Marshall wrote that the "powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[193] Some argue that many of the ideas from the early Republic should be let to rest, but those that are enshrined in the black letter of our Constitution should not. Congress does not have a police power. Although Congress has the power to regulate commerce between the states, that power does not extend to non-economic activities that have no effect on interstate commerce.[194] Although Congress has constitutional authority to spend for the general welfare, it does not have the authority to regulate for that purpose.[195]

RLUIPA burdens state penal authorities, which have traditionally been subject to exclusive State regulation as long as a deferential reasonableness standard is met,[196] with the arduous burden of justifying prison regulations under strict scrutiny.[197] RLUIPA justifies its sweeping provisions under the Commerce and Spending powers,[198] without any explanation of how prison regulations implicate either commerce or federal spending, and

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[191] *See* 42 U.S.C.A. § 2000cc-1 (West 2000).

[192] *Dole*, 483 U.S. at 211 (citing *Davis*, 301 U.S. at 590).

[193] Marbury v. Madison, 5 U.S. 137 (1803).

[194] *See* discussion *supra* section IV.A (discussing limits on Congress's Commerce power).

[195] *See* discussion *supra* section IV.B (discussing limits on Congress's federal spending power).

[196] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) (explaining that prison regulation that burdens constitutional rights is valid if it is "reasonably related to legitimate penological interest"); *see also* Ellen Bigge, *Constitutional Law:* Turner v. Safley *Prisoners' First Amendment and Marriage Rights in Conflict with Prison Regulations*, 56 UMKC L. REV. 589 (1988).

[197] *See* 42 U.S.C.A. § 2000cc-1 (West 2000).

[198] *See id.* § 2000cc-2.

notwithstanding the incompatibility of RLUIPA's provisions with the plain meaning of those words.[199] The intent of the Framers did not contemplate such use of congressional power, and the decisions of the modern Supreme Court do not tolerate it.

The inevitable judicial review of RLUIPA will provide an opportunity to extend the principles of federalism the Supreme Court has emphasized in recent years to the context of the federal spending power. While it remains to be seen whether the Court goes so far as to disapprove of its 1987 decision in *Dole*, the Court will undoubtedly recognize that the Federal Spending power, like the Commerce power, is not limitless, and is offended by an Acts of Congress, such as RLUIPA, that blur the distinction between federal and state powers that has been enshrined in our Constitution since the birth of our Republic.

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[199] *See id.* § 2000cc.

Safe Harbor Agreements Under the Endangered Species Act: Are They Right for Hawai'i?*

I. INTRODUCTION

The Endangered Species Act ("ESA")[1] has been called "the pit bull of environmental laws."[2] The analogy is an apt one for environmentalists, many of whom consider the ESA the "crown jewel"[3] of environmental protection because of its often uncompromising restrictions on private land development. In addition to protecting endangered species on private land,[4] the ESA forbids government agencies from significantly harming both the species itself and its critical habitat.[5] Though some environmentalists contend it does not go far enough, the ESA has, at the very least, staved off extinction for the majority of its listed species.[6] In fact, the ESA has been so successful in some cases that several species' populations were deemed healthy enough to be delisted.[7]

Like the jaws of the infamous pit bull, however, the ESA can sometimes act as a vice grip, completely prohibiting landowners from developing their

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[1] 16 U.S.C. §§ 1531-1544 (1994).

[2] *See* Nathan Baker, *Water, Water, Everywhere, and at Last a Drop for Salmon?* NRDC v. Houston *Heralds New Prospects Under Section 7 of the Endangered Species Act*, 29 ENVTL. L. 607, 613 (1999) (quoting Donald Barry, Assistant Secretary for Fish, Wildlife, and Parks of the Interior Department, formerly of the World Wildlife Fund).

[3] *E.g.*, Duane J. Desiderio, *Sweet Home on the Range: A Model for As-Applied Challenges to the "Harm" Regulation*, 3 ENVTL. L. 725, 811 (1997) ("[T]he ESA will retain its dual personality and be lauded as the crown jewel of environmental statutes . . . ."); *see also* Donald A. Carr & William L. Thomas, *The Law and Policy of Endangered Species Act Reauthorization: Noah's Choices and Ecological Mandarins*, 25 ENVTL. L. 1281, 1281 (1995) (book review) ("From the embattled perspective of many environmentalists, the ESA is both the crown jewel and the last redoubt.").

[4] 16 U.S.C. § 1538 (1994).

[5] 16 U.S.C. § 1536 (1994). "Critical habitat" is defined in part as a geographical area "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A) (1994).

[6] *See* U.S. FISH & WILDLIFE SERV., ENDANGERED AND THREATENED WILDLIFE AND PLANTS: 50 CFR 17.11 and 17.12, at 56-57 (Special Reprint) (Nov. 31, 1999) (citing the amistad gambusia and the dusky seaside sparrow as the only listed species having gone extinct since the ESA was passed in 1973).

[7] *Id.* (listing four species whose recovery can reasonably be attributed to ESA: the brown pelican, the American alligator, the gray whale, and the Arctic peregrine falcon).

property.[8] Spotted owls, kangaroo rats, and red-cockaded woodpeckers have all been blamed for causing economic hardship in areas ranging from the pacific northeast to the eastern seaboard.[9] The ESA restrictions have brought fierce criticism from private landowners, who complained that it was unfair to subject them to liability for harming a listed species while engaging in activity that was otherwise legal.[10] In an attempt to assuage disgruntled landowners,[11] Congress amended the ESA in 1982 to be more flexible.[12] Landowners can now obtain a conditional "incidental take permit," which allows the holder to "take"[13] endangered species subject to certain mitigation requirements.[14]

In addition to the incidental take permit, the federal government has developed the "Safe Harbor" program.[15] First developed in 1995, Safe Harbor Agreements are arrangements between the government and private property owners in which the landowners voluntarily engage in activities beneficial to endangered species.[16] In return, the government promises not to impose further restrictions on the land, even if the population of the species covered by the agreement grows.[17] Under the Safe Harbor program,[18] landowners have

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[8] *See* Michael J. Bean, *The Endangered Species Act and Private Land: Four Lessons Learned From the Past Quarter Century*, 28 ENVTL. L. REP. 10,701, 10,701 (1998).

[9] *See* Rufus C. Young, Jr. et al., *1999 Update: The Endangered Species Act: Impacts on Land Use*, SE11 A.L.I.-A.B.A. 421, 427-28 (1999).

[10] *See* Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 273 (1998).

[11] *Id.*

[12] 16 U.S.C. § 1539(a) (1994).

[13] See *infra* note 35 for a detailed explanation of the term "take" as it applies to the ESA.

[14] 16 U.S.C. § 1539(a)(2)(A).

[15] Although not codified, Safe Harbors are nevertheless permitted by the 1982 addition of Section 10(a) to the ESA, which allows the Secretary of the Interior or the Secretary of Commerce to permit activity normally prohibited by Section 9 if such activity "enhance[s] the propagation or survival of the affected species[.]" 16 U.S.C. § 1539(a)(1)(A).

[16] *See* ENVTL. DEF. FUND, SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES 4-5 (1999) [hereinafter SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES].

[17] *See* Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,717 (June 17, 1999).

[18] A Safe Harbor *program* (as opposed to a Safe Harbor Agreement) is an overarching arrangement usually implemented on a statewide or countywide level (also known as an "umbrella" agreement). *See* ENVTL. DEF. FUND, *Safe Harbor Program Benefitting Endangered Species And Private Landowners Announced in South Carolina, News Release, at* http://www.edf.org/pubs/NewsReleases/1998/Mar/I_safeharbor.html (Mar. 26, 1998) (on file with author). "Safe Harbor program" also refers to the general policy extolled by the Clinton administration since the mid-1990s of providing incentives for conservation-minded private landowners to benefit endangered species. *See* Jacqueline Lesley Brown, *Preserving Species: The Endangered Species Act Versus Ecosystem Management Regime, Ecological and Political Considerations, and Recommendations for Reform*, 12 J. ENVTL. L. & LITIG. 151, 222-27 (1997).

agreed to do such things as maintain trees that endangered species depend on, actively restore prairies, or even reintroduce endangered species into areas the animals once inhabited.[19]

Hawai'i is on the verge of entering into its first Safe Harbor Agreement[20] to reintroduce its state bird, the Nene, or Hawaiian Goose, on Moloka'i.[21] This comment looks at Safe Harbor Agreements nationwide and concludes that, like a potent drug, they are beneficial when taken in small doses but can be dangerous if misused. Therefore, Hawai'i's first Safe Harbor Agreement, while generally sound, should include added safeguards to address this shortcoming. Part II provides an overview of the ESA and Safe Harbor Agreements. Part III looks at the policy reasons behind Safe Harbor Agreements and why their necessity as a legal tool is exaggerated. Part IV evaluates three of the earliest Safe Harbor Agreements to determine the effectiveness of the Safe Harbor concept, not only from the endangered species' point of view, but also from the perspectives of the government and the landowners. Part V assesses the value of the Safe Harbor concept in Hawai'i as applied to the endangered Nene, concluding that although the Nene would benefit from the proposed Safe Harbor Agreement, Hawai'i's unique geography and the particular needs of the Nene require the Agreement to ask more of Hawai'i landowners than has been done in previous Safe Harbor Agreements.

II. AN OVERVIEW OF THE ESA AND SAFE HARBOR AGREEMENTS

A. The Endangered Species Act

1. Overview

Congress passed the ESA in 1973, largely in response to concern over the dwindling numbers of such high profile animals as bald eagles, polar bears,

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[19] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 4-5.

[20] This should not be confused with an earlier, more informal arrangement between the government and Chevron dating back to the early 1980s to protect the Hawaiian Stilt. This so-called "Safe Harbor Agreement" was a Safe Harbor in name only and lacked many of the features commonly associated with the program today. Telephone Interview with Ian Sandison, Partner, Carlsmith Ball LLP (Feb. 8, 2000).

[21] Helen Altonn, *Endangered nene may be released on Molokai ranch*, HONOLULU STAR BULL., Feb. 12, 2000, at A3. Hawai'i's version of Safe Harbor Agreements, authorized by state law since 1997, allows the Department of Land and Natural Resources and landowners to cooperate to "create, restore, or improve habitats" or "maintain currently unoccupied habitats that threatened or endangered species can be reasonably expected to use," if two-thirds of the Board of Land and Natural Resources membership agree. HAW. REV. STAT. § 195D-22 (1993 & Supp. 2000).

whales, and whooping cranes.[22] It was a revolutionary piece of legislation that for the first time provided true protection for species threatened with extinction.[23] Section 7[24] and Section 9[25] give the ESA much of its bite. Section 7 compels all federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[26] This rather stoic language "absolutely prohibit[s] certain harmful federal agency actions."[27] The power of Section 7 was illustrated in the famous Supreme Court case *Tennessee Valley Authority v. Hill*.[28] The case involved a small, endangered fish, the snail darter, whose habitat was jeopardized by the impending completion of a $100 million dam.[29] In enjoining construction of the dam, the Court held the language of Section 7 was clear: no federal agency action can directly harm an endangered species or adversely affect its habitat.[30] This was true even when, as here, the federal agencies had already spent considerable amounts of money on a project.[31]

Predictably, in a case this controversial, the opinion was not unanimous. Justice Powell dissented, arguing that "Congress could [not] have intended [the ESA] to produce the 'absurd result' . . . of this case."[32] His view was echoed by many, including members of Congress and those within the agencies.[33]

In contrast to Section 7's exclusive application to federal agencies, Section 9's prohibition on the "taking" of endangered species affects both private landowners and federal agencies.[34] Section 9 is significant because "take" has

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[22] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 674 (1998).

[23] *Id.* at 672.

[24] 16 U.S.C. § 1536 (1994).

[25] 16 U.S.C. § 1538 (1994).

[26] 16 U.S.C. § 1536(a)(2).

[27] PLATER ET AL., *supra* note 22, at 673.

[28] 437 U.S. 153 (1978).

[29] *Id.* at 162.

[30] *Id.* at 173.

[31] *Id.* at 173-74.

[32] *Id.* at 196 (Powell, J., dissenting).

[33] *See* PLATER ET AL., *supra* note 22, at 683.

[34] Section 9 applies to "any person subject to the jurisdiction of the United States." 16 U.S.C. § 1538(a)(1) (1994). Section 3 defines "person" as:

> [A]n individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

16 U.S.C. § 1532(13) (1994).

been interpreted broadly to include prohibiting habitat changes that harm listed species.[35] Thus, if an endangered bird were found on an undeveloped piece of privately owned land, the owner of that land would be barred from doing anything that degraded its habitat enough to kill or injure the bird.

This clash between private property interests and conservation was plainly evident in the Supreme Court's 1995 decision *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*.[36] In *Sweet Home*, the Court reversed the lower court's holding that allowed logging in the habitat of the red-cockaded woodpecker and the northern spotted owl.[37] The Court did so despite the dissent's assertion that "preserv[ing] habitat on private lands imposes unfairness to the point of financial ruin--not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."[38] The majority recognized that the ESA "encompasses a vast range of economic and social enterprises and endeavors[,]"[39] but concluded that species extinction must be stopped "whatever the cost."[40]

This hard-line interpretation of the ESA could not last in the face of political reality.[41] By 1982, the ESA's strict prohibitions had upset enough private property owners that Congress was pushed to soften the ESA to include incidental take permits.[42] This permit essentially carves out an exception to Section 9, allowing private property owners to take listed species if the taking is not the purpose of the harmful activity and the owner "minimize[s] and mitigate[s]" his impacts.[43] This new Section 10, however, did little to reduce the controversy surrounding the ESA.

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[35] This interpretation of "take" is not in the ESA itself. The ESA only defines "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). It is the Department of Interior regulations implementing the ESA which expand the definition of "harm" to mean acts including "significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3 (1999).

[36] 515 U.S. 687 (1995).

[37] *Id.* at 694-95.

[38] *Id.* at 714 (Scalia, J., dissenting).

[39] *Id.* at 708.

[40] *Id.* at 699 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978)).

[41] *See* PLATER ET AL., *supra* note 22, at 703.

[42] *Id.*

[43] 16 U.S.C. § 1539(a) (1994).

2. The Endangered Species Act under fire

Section 9's restrictive effects on private development is by far the most controversial aspect of the ESA.[44] Predictably, environmentalists have embraced the ESA, "fervently support[ing] [its] mission of preventing the extinction of our country's fish, wildlife, and plants[.]"[45] Private landowners, on the other hand, bristle at the prospect of the government telling them what they can and cannot do with their land.[46] The anxiety of these landowners has resulted in a plethora of horror stories, with opponents recounting the plight of hapless ESA victims.[47] Among these are the homeowners who were barred from saving their property from a wildfire because of brush clearing restrictions, the farmers whose farm equipment was taken away by overzealous federal agents, and businesses going bankrupt because of endangered species.[48] While other environmental laws also interfere with private land development, the ESA often finds itself subjected to more than its share of criticism.[49] As one commentator put it, "[o]nly the ESA is still regularly subjected to plenary denunciations on the floor of Congress; only the ESA faces serious non-reauthorization initiatives; only the ESA was hit by a sweeping one-year listing moratorium; . . . it is the ESA that has sustained amendments undermining its fundamental goal, species recovery . . . ."[50]

The ESA is especially vulnerable to vilification because the utilitarian benefits of other environmental laws are much more apparent than those of the ESA.[51] The Clean Air Act[52] and the Clean Water Act,[53] for example, provide tangible benefits to society. Few would argue that the air we breathe and the water we drink are not important resources deserving of protection.[54] It is a much harder sell, however, to convince the general public and private landowners that the O'ahu tree snail[55] or the Hawaiian bluegrass[56] should be

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[44] *See* PLATER ET AL., *supra* note 22, at 697-98.

[45] Shi-Ling Hsu, Editors' Summary, *The Potential Pitfalls of Habitat Conservation Planning Under the Endangered Species Act*, 29 ENVTL. L. REP. 10,592, 10,592 (1999).

[46] Jeffrey J. Rachlinski, *Protecting Endangered Species Without Regulating Private Landowners: The Case of Endangered Plants*, 8 CORNELL J.L. & PUB. POL'Y 1, 1-2 (1998).

[47] Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 279-80 (1998).

[48] *Id.*

[49] *See* Hsu, *supra* note 45, at 10,592.

[50] PLATER ET AL., *supra* note 22, at 706.

[51] *See id.*

[52] 42 U.S.C. §§ 7401-7671 (1994).

[53] 33 U.S.C. §§ 1251-1387 (1994).

[54] *See* PLATER ET AL., *supra* note 22, at 706.

[55] 50 C.F.R. § 17.11 (1999).

[56] *Id.* § 17.12.

saved at the expense of job-creating commercial development projects. "The societal rationale for endangered species conservation . . . is generally characterized in terms of philosophy, emotions, and aesthetics – often regarded as heartfelt but not so substantially significant when weighed against the 'practical' world of production, payrolls, and profits."[57]

Of course, it is an oversimplification to characterize the issue as a clear-cut choice between endangered species and economic development. In fact, a strong utilitarian argument can be made for preserving biodiversity.[58] Some examples include:

> [T]he humble Pacific yew, once burned as a trash species in the old growth forests of the Northwest, later discovered to be the source of the cancer-fighting drug taxol, and now a $1.3 billion a year product for the Bristol-Meyers Squibb Company. Or the rosy periwinkle, a nondescript little pink-petaled plant in the tropical forests of Madagascar found to contain two alkaloids, vincristine and vinblastine, proven to be effective in the treatment of Hodgkin's disease and lymphocetic leukemia, two forms of childhood cancer. Aspirin, the most widely taken medicine in the world, comes from the bark of the willow; digitalis, the heart medicine, comes from foxglove; a popular drug for hypertension comes from the venom of a South American pit viper. And so on. The natural world is indeed a vast storehouse of potentially beneficial products.[59]

Despite these real-world benefits, many still see the ESA as more harmful to society than helpful.[60]

3. Perverse incentives for landowners harming endangered species

A commonly voiced flaw of the ESA is its creation of perverse incentives for some landowners to engage in activities harmful to listed species to avoid being subject to ESA restrictions.[61] An example of this is a practice known as "midnight bulldozing," which occurs when a landowner learns of a species' imminent listing and destroys that species' potential habitat *before* its listing.[62] Landowners who commit midnight bulldozing do not presently have any of the proposed listed species on their property; they simply have habitat for that

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[57] PLATER ET AL., *supra* note 22, at 706.

[58] *See* Parenteau, *supra* note 10, at 236-43.

[59] *Id.* at 243 (citations omitted).

[60] *See* Hsu, *supra* note 45, at 10,593 (explaining the public's long-held view that compliance with the ESA means losing jobs, prohibiting landowners to build on their property, and forcing ranches and farms to shut down).

[61] *See* Brown, *supra* note 18, at 216.

[62] *E.g.*, Jon Welner, *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 STAN. L. REV. 319, 348 (1995) (citing as an example the destruction of the gnatcatcher's habitat just prior to the deadline for its listing).

species. These landowners fear this habitat will attract the soon-to-be listed species to their property and trigger ESA land restrictions. Worse yet, some landowners have also killed the species itself before the species' listing under the ESA for similar reasons.[63]

Some landowners have gone so far as to kill listed species to conceal their existence from the Fish and Wildlife Service ("FWS"), the primary agency responsible for implementing the ESA.[64] Macabrely termed "shoot, shovel, and shut up,"[65] landowners kill listed species for several reasons. Some are fully aware of the endangered status of the species that live on their land, but kill them in blatant violation of the law. These landowners rightfully believe that the FWS lacks the resources to properly enforce the ESA.[66] Others have no listed species on their land and are therefore unaffected by ESA restrictions. To avoid being bound by what they see as an ESA straightjacket, these landowners simply kill any endangered species that happen to come onto their land, fearful that the government will discover the animal.[67] Thus, some ESA critics contend, the ESA's unbending and sometimes harsh prohibitions can ironically lead to more, not fewer, threats to endangered species, a charge some commentators have characterized as exaggerated.[68]

All of this has made the FWS paranoid of the precariousness of the ESA's existence and fearful of what anti-ESA landowners might do to listed species.[69] To placate the public and Congress, both of which the FWS perceived as being hostile towards the ESA, the FWS decided it needed to be more flexible.[70] Out of this climate came the Safe Harbor concept.

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[63] *E.g.*, Hsu, *supra* note 45, at 10,596 (explaining that a developer destroyed one of the San Diego mesa mint's three remaining populations shortly before its listing).

[64] *See* Steven Cribb, *Endangered Species Act, Section 10(j): Special Rules to Reestablish the Mexican Wolf to its Historic Range in the American Southwest*, 21 ENVIRONS ENVTL. L. & POL'Y J. 49, 54-55 (1998).

[65] *Id.* at 55 (citing Robert Nelson, *Shoot, Shovel and Shut-up*, FORBES, Dec. 4, 1995, at 82).

[66] *See* Hsu, *supra* note 45, at 10,596 (recounting that grizzly bears were killed by ranchers afraid the bears would wipe out their livestock).

[67] *See* Parenteau, *supra* note 10, at 281 (giving as an example Ross Perot, who reportedly destroyed habitat in Texas for the golden cheeked warbler and black-capped vireo to prevent them from inhabiting land owned by one of his companies).

[68] *Id.*

[69] *See* Hsu, *supra* note 45, at 10,596.

[70] *Id.* (noting that the FWS "was in desperate need of engaging landowners in some form of voluntary compliance").

B. Safe Harbor Agreements

1. Overview

Safe Harbor Agreements are the FWS's answer to ESA critics who argue the ESA unfairly penalizes private landowners. Under the Safe Harbor concept, landowners voluntarily use their property to benefit listed species.[71] In return, the FWS provides the landowners with a "safe harbor," guaranteeing that no additional conservation measures will be required and no additional land, water, or resource use restrictions will be imposed if the number of listed species grows as a result of the landowner's actions.[72] Thus, landowners who fulfill their Safe Harbor obligations can "take" covered species, without violating Section 9 of the ESA, until reaching the "baseline," i.e., the number of covered species on the landowner's property at the time the agreement is made.[73]

The FWS, along with the Environmental Defense Fund and other agencies, organizations, and state foresters, developed the first Safe Harbor Agreement in North Carolina in 1995 to protect the red-cockaded woodpecker.[74] Although the Safe Harbor concept is a relatively recent one, its origins go back to 1982, when Congress amended the ESA by creating a new Section 10[75] to "shield certain private [property owners] from the § 9 roadblock."[76] Section 10 was designed to add flexibility to the ESA, allowing certain exceptions to the take prohibitions where previously there had been none.[77] The first manifestation of this new policy was the Habitat Conservation Plan ("HCP").[78] Also known as "incidental take permits," HCPs allow the government to "permit . . . any taking otherwise prohibited by [Section 9(a)(1)(B)] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[79] HCPs are authorized by Section 10(a)(2)(A), which

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[71] Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,717 (June 17, 1999).

[72] *Id.*

[73] *Id.* at 32,718.

[74] *See* Robert Bonnie, *Safe Harbor for the Red-Cockaded Woodpecker*, J. FORESTRY, Apr. 1997, at 20.

[75] 16 U.S.C. § 1539 (1994).

[76] *See* PLATER ET AL., *supra* note 22, at 703 (explaining that the new Section 10 was added in response to "the reaction to the marketplace caricature of the snail darter case as proof of the ESA's irrational extremism . . .").

[77] *See* 16 U.S.C. § 1539.

[78] Parenteau, *supra* note 10, at 273.

[79] 16 U.S.C. § 1539(a)(1)(B). HCPs were supposed to add a measure of flexibility to the ESA, making the ESA more palatable to private property interests. *See* U.S. FISH & WILDLIFE SERV., MAKING THE ESA WORK BETTER: IMPLEMENTING THE 10 POINT PLAN . . . AND BEYOND 9 (Sept. 1998) [hereinafter FWS 10 POINT PLAN]. In reality, HCPs' first decade saw very little

provides, in part, that "[n]o [incidental take] permit may be issued by the Secretary . . . unless the applicant therefore submits . . . a conservation plan that specifies . . . the impact which will likely result from such taking . . . [and] what steps the applicant will take to minimize and mitigate such impacts."[80] In short, a landowner may take a listed species under an HCP as long as the taking is only incidental to an activity that is otherwise legal.[81]

HCPs are especially important for landowners who wish to develop their property now but are prohibited from doing so by ESA Section 9 restrictions. With an HCP, landowners can apply for an incidental take permit, allowing the "taking" of protected endangered species under certain conditions.[82] The landowner must: (1) demonstrate that the activity does not significantly reduce the chances of survival and recovery of species in the wild;[83] and (2) "minimize and mitigate" the adverse impacts their activities have on the covered species.[84] Although landowners are theoretically free to engage in a variety of mitigation practices, the FWS has made it clear that "first and foremost, mitigation strategies should compensate for habitat lost . . . by establishing suitable habitat for the species that will be held in perpetuity, if possible."[85] For HCPs that have a negligible effect on habitat, for example, the mitigation requirement could be "to restore or enhance existing habitat so that it better meets the species' survival needs."[86]

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interest from landowners. *Id.* In fact, by 1992 only fourteen HCPs were in place. *Id.* The relative dearth of HCPs in this period was perhaps the result of several factors, including high standards landowners had to meet, the costs involved, and the uncertainty of the process. *See* Parenteau, *supra* note 10, at 273 (explaining that, among other things, the high standard for HCPs was set by the first HCP, which required landowners in San Bruno, California to set aside about ninety percent of the mission blue butterfly's habitat as a reserve and allowed revocation of the permit if the government's scientific assumptions were found to be incorrect). The single largest factor, however, seems to have been landowners' concern over future restrictions should unforeseen circumstances arise. *See* J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 397-98 (1998).

[80] 16 U.S.C. § 1539(a)(2)(A).

[81] *See* Notice of Final Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 61 Fed. Reg. 63,854, 63,855 (1996) [hereinafter HCP Handbook]. The types of actions that have qualified as incidental take activities run the gamut from the building of a single family home on a 1/2 acre subdivision lot to the logging of timber in a 170,000 acre forest. *See* U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLANS: THE QUIET REVOLUTION 10, 20 [hereinafter THE QUIET REVOLUTION].

[82] *See* 16 U.S.C. § 1539(a).

[83] THE QUIET REVOLUTION, *supra* note 81, at 4.

[84] 16 U.S.C. § 1539(a)(2)(A)(ii).

[85] HCP Handbook, 61 Fed. Reg. at 63,855.

[86] *Id.* Research alone is disfavored as a mitigation strategy, since the type of mitigation should ideally relate directly to correcting the effect of the action. Research, however, may be an integral part of a mitigation strategy. *Id.*

At first glance, the Safe Harbor concept is strikingly similar to HCPs because each represents a compromise on the part of both landowners and the government.[87] Safe Harbor Agreements, however, were developed under a different Section 10 provision, implementing Section 10(a)(1)(A), which states that "[t]he Secretary may permit . . . any act otherwise prohibited by [Section 9] for scientific purposes *or to enhance the propagation or survival of the affected species*[.]"[88] Thus, the fundamental difference between HCPs and Safe Harbor Agreements is that HCP landowners are involved in the process by the necessity of having to obtain an incidental take permit; Safe Harbor participants are involved by choice. Therefore, Safe Harbor Agreements seek to proactively benefit covered species.

The environmental goals of the Safe Harbor program mesh well with those of the ESA. The ESA seeks to bring endangered species to the point where they no longer need protection and can be delisted.[89] Reflecting this policy, Safe Harbor Agreements aim for "the conservation *and recovery* of species."[90] To achieve this, the FWS will enter into an agreement only if the agreement provides a "net conservation benefit" to all covered species.[91] Net conservation benefits must directly or indirectly contribute to the recovery of covered species,[92] and include, but are not limited to:

> [R]eduction of habitat fragmentation rates; the maintenance, restoration, or enhancement of habitats; increase in habitat connectivity; maintenance or increase of population numbers or distribution; reduction of the effects of catastrophic events; establishment of buffers for protected areas; and establishment of areas to test and develop new and innovative conservation strategies.[93]

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[87] The differences between HCPs and Safe Harbor Agreements are not always clear. Many mistakenly assume the two are synonymous. *See* U.S. FISH & WILDLIFE SERV., "NO SURPRISES" MYTHS (1999) [hereinafter "NO SURPRISES" MYTHS].

[88] 16 U.S.C. § 1539(a)(1)(A) (emphasis added).

[89] 16 U.S.C. § 1532(3) (1994) (defining "conserve," "conserving," and "conservation" as "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary").

[90] Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,721 (June 17, 1999) (emphasis added).

[91] *Id.* at 32,723 (explaining that, before entering into any Safe Harbor Agreement, the FWS must: (1) make a written finding that the covered species will receive a "net conservation benefit;" (2) clearly identify the expected net conservation benefits; and (3) describe how the FWS reached its conclusion).

[92] *Id.*

[93] *Id.*

Safe Harbor Agreements must last long enough to achieve the hoped-for net conservation benefit for the covered species.[94] The length of time landowners are obligated to perform net conservation benefits can vary greatly depending on the covered species, the type of habitat it requires, and the planned improvements to its habitat.[95] Based on these variables, Safe Harbor Agreements can last a single season to restore certain types of wetlands, fifteen years for some prescribed burning of habitat, or, if the situation requires, much longer.[96]

Similarly, the land area Safe Harbor Agreements cover can also differ. Safe Harbor Agreements have been used for properties as small as 2.5 acres and have covered much larger areas, making them appropriate for both small landowners and large corporations.[97] The average Safe Harbor Agreement covers about 1,000 acres.[98]

Safe Harbor Agreements come in two forms.[99] One arrangement is between individual landowners and the federal agency charged with protecting the species, usually the FWS.[100] The other type of Safe Harbor is called an "umbrella" agreement.[101] Under umbrella agreements, an intermediary such as the FWS or a private conservation organization[102] develops a Safe Harbor program for a certain area.[103] The covered area can be a county or a group of counties.[104]

In addition to its environmental goals, the Safe Harbor program's other major challenge was to placate worried landowners who feared government restrictions on their property.[105] The FWS's answer was to give landowners Safe Harbor assurances that guarantee their good deeds in protecting endangered species would not be punished by added restrictions on their

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[94] *Id.* at 32,719.

[95] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 13.

[96] *Id.*

[97] *See* FWS 10 POINT PLAN, *supra* note 79, at 18.

[98] *Id.*

[99] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 4.

[100] *Id.* For marine and anadromous fish, certain salmon and rainbow trout species, marine plants and mammals, and sea turtles, the National Marine Fisheries Service is the responsible agency. *See* 50 C.F.R. §§ 222.102, 223.102 (1999).

[101] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 4.

[102] For instance, The Peregrine Fund, a nonprofit conservation group working to conserve birds of prey, works with private landowners to administer a captive breeding program for the Northern Aplomado Falcon in Texas. *Id.* at 4, 6.

[103] *Id.* at 4.

[104] *Id.*

[105] Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,721 (June 17, 1999).

land.[106] These assurances allow participants to take the number of covered species created by their voluntary conservation measures, as long as their take does not fall below the baseline.[107] For example, a landowner may enter into a Safe Harbor Agreement and restore native Hawaiian forest on her land that presently contains two 'Alala (Hawaiian Crows). Because of the reforestation, five additional 'Alala have come onto her land. After her obligations under the Safe Harbor Agreement are complete, the FWS assures her that she can take five 'Alala if she chooses, but at least two must stay, since this is the number she started with. This "you scratch my back, I'll scratch yours"-type arrangement was central to the program's success from the very beginning.[108] Safe Harbor assurances, however, only apply to covered species specified in the agreement.[109] Therefore, if a non-covered species is found on the property, two scenarios are possible. First, if the FWS concludes that the non-covered species is on the property as a direct result of the landowner's conservation activities, the FWS will amend the agreement at the request of the property owner and review and revise the permit.[110] Second, if the non-covered species' presence cannot be directly attributable to the landowner's activities or the participating landowner specifically requested that the non-covered species be excluded, the Safe Harbor assurances do not apply.[111] In this case, a separate Safe Harbor Agreement would need to be negotiated using a baseline determined when the new agreement is signed.[112] This revised baseline could be higher than the original one (if, for example, the landowner's Safe Harbor activities under the first agreement indirectly result in an increased population or a small population where there was none before) or lower (the endangered

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[106] *Id.* at 32,721-22.

[107] *Id.* at 32,723.

[108] *See* U.S. FISH & WILDLIFE SERV., SAFE HARBOR AGREEMENTS FOR PRIVATE PROPERTY OWNERS: QUESTIONS AND ANSWERS (Sept. 1999) [hereinafter SAFE HARBOR AGREEMENTS FOR PRIVATE PROPERTY OWNERS: QUESTIONS AND ANSWERS] (explaining the necessity of assuring landowners they would face no further restrictions by stating "[l]andowners have been hesitant to manage their lands for the benefit of existing populations of listed species, to restore degraded habitat areas, to restore historic populations, or to strive to improve the status of populations within their lands because of fear of [sic] we could impose future additional regulations").

[109] Announcement of Final Safe Harbor Policy, 64 Fed. Reg. at 32,724.

[110] *Id.*

[111] *Id.*

[112] Telephone Interview with Gina Shultz, Program Leader: Habitat Conservation Plans, Safe Harbor/Candidate Conservation Agreements, Recovery Permits-U.S. Fish and Wildlife Service, Pacific (Region 1), Ecological Services (Apr. 14, 2000).

species is naturally declining).[113] Hence, landowners roll the dice by excluding species from coverage.[114]

III. Benefits of Safe Harbor Agreements: Exaggeration or Reality?

A. *Arguments For and Against Safe Harbor Agreements*

Critics and proponents of Safe Harbor Agreements both have compelling arguments to support their positions. Taken as whole, however, it is clear Safe Harbor Agreements are no panacea. In fact, a prominent environmental group contends that the Safe Harbor concept is "still in the experimental stage and should be approached with caution."[115]

1. Safe Harbor incentives

Perhaps the most convincing argument in favor of the Safe Harbor concept is that it provides incentives for landowners to protect endangered species. In theory, landowners have good reason to prevent endangered species from occupying their land by preemptively destroying either the species' habitat or the species itself. In practice, however, this kind of activity is probably "the exception, not the norm."[116]

One commentator has listed four factors that must be present before landowners will likely resort to harming endangered species to avoid ESA restrictions.[117] First, existing habitat is disappearing in spite of the ESA's land-use restrictions.[118] This may occur either because the habitat is in a natural state of transition or, more disturbingly, because landowners do not fear the penalties for violating the ESA and illegally destroy species or their habitat.[119] Second, landowners whose property is in "danger" of attracting a listed species must have a clear technique to keep their land inhospitable to that species.[120] Third, this technique must be less costly than the ESA

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[113] *Id.*

[114] *Id.* (noting that any benefit a landowner may receive in the form of a lower baseline is offset by the uncertainty he faces by not having a species covered under a Safe Harbor Agreement).

[115] Nat'l Wildlife Fed'n, Safe Harbor Agreements and the ESA: Improving Conservation on Private Lands (1997) [hereinafter NWF Endangered Species Act Fact Sheet].

[116] Rachlinski, *supra* note 46, at 7.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

restrictions they are designed to avoid.[121] This is an especially relevant factor for large property owners who, for example, may have hundreds or thousands of acres to keep clear. Such landowners, aware that it would be nearly impossible to ensure there were no listed species on their vast property, would very likely take their chances, hoping the FWS never finds the species on their land. Fourth, landowners must be widely aware of these circumstances.[122]

While all four factors do sometimes coincide and create unwanted incentives, it is unclear how often this actually takes place.[123] At the very least, it seems reasonable to conclude that, more often than not, the four factors do not simultaneously occur. If they do not, the strongest justification for the Safe Harbor program loses much of its credibility.

Moreover, this argument tends to stereotype landowners, lumping them together as a homogeneous group out to destroy endangered species. Just as some studiously avoided alcohol during Prohibition, some landowners almost certainly complied with all ESA regulations to the letter, even before the 1982 flexibility amendments. These landowners may not have agreed with ESA policy, but probably obeyed the law nonetheless.

Other landowners are actually conservationists.[124] Those who fall into this category actively manage their property for the benefit of endangered species, regardless of the ESA or the Safe Harbor program. Examples of these kinds of landowners range from environmental groups like The Nature Conservancy[125] to ranchers who simply appreciate and desire to help endangered species.[126]

With this in mind, a rethinking of the conventional wisdom that landowners are anti-ESA may be in order. Combining the number of landowners who (1) wish to destroy endangered species or their habitat but do not because of one of the four factors listed above; (2) follow all ESA restrictions because they feel they must; and (3) are partial to endangered species and would protect

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[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *See* SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 1 (commenting that many landowners "embrace" conservation practices both for their own economic benefit and because they "love the land").

[125] *See* THE NATURE CONSERVANCY, *Who We Are* (explaining that The Nature Conservancy's mission is to "preserve plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive"), *at* http://www.tnc.org/who_we_are/index.html (last visited Mar. 9, 2001) (on file with author).

[126] One of the landowners profiled in this article, Frank Yturria, falls into this category. He has voluntarily engaged in activities beneficial to the endangered ocelot cat, including allowing the Cesar Kleberg Wildlife Foundation onto his land to tag ocelot males for tracking purposes. Mr. Yturria does not have Safe Harbor assurances with regards to the cat. Telephone Interview with Cathleen Hoover, Office Manager, Yturria Ranch (Mar. 3, 2000).

them even if there were no ESA, it is clear the validity of characterizing private landowners as a group that routinely violates the ESA is questionable.

2. The ESA's political status in Congress

Another apparently powerful argument supporting Safe Harbor Agreements is that Congress is hostile to the ESA and will weaken or eliminate it unless the ESA is kept flexible.[127] Without Safe Harbor and HCPs, the argument goes, public antagonism towards the ESA would force Congress to pass extreme legislation unfriendly to endangered species. Indeed, the 104th Congress, whose election in 1994 coincided with the adoption of the "No Surprises" policy, did try and pass legislation watering down the ESA.[128] It was this Congress, dominated in both houses by Republicans for the first time in forty years, that adopted the so-called "Contract With America."[129] Part of their legislative agenda included constitutional takings legislation which would compensate landowners if federal regulation would result in a diminution in property value beyond a specified amount.[130] Having an agency pay for the economic effects of its regulations would naturally make it unfeasible for the government to effectively protect the environment. Other legislative attempts to weaken the ESA included mandating that economic impacts and private property rights be considered when protecting species,[131] changing the definition of "take" to mean only physical harm to the species,[132] curtailing citizen suits,[133] and requiring a peer review process for new listing decisions.[134]

That Congress in 1995 tried to cripple the ESA is not in dispute. What is at issue, however, is whether the public supported such a policy and whether the ESA is truly in danger of Congressional evisceration now. As to the first question, a recent poll shows that fully 84% of Americans support the current

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[127] *See* Sheldon, *supra* note 47, at 280-81 (explaining that Department of the Interior Secretary Bruce Babbitt and the FWS created policies like the Safe Harbor concept to "lessen the likelihood of drastic legislative surgery" on the ESA).

[128] Nancy Kubasek et al., *It Takes an Entire Village to Protect an Endangered Species: Individualism, Overlapping Spheres, and the Endangered Species Act*, 10 FORDHAM ENVTL. L.J. 155, 194 (1999). The "No Surprises" policy provides economic and regulatory assurances to landowners as incentive to cooperate in safeguarding endangered species. *See* "NO SURPRISES" MYTHS, *supra* note 87.

[129] Christopher H. Schroeder, *Third Way Environmentalism*, 48 U. KAN. L. REV. 801, 801-02 (2000).

[130] *See* Hsu, *supra* note 45, at 10,595 n.29 (citing proposed legislation which sought compensation for landowners if federal regulations caused a diminution of property value more than a specified amount).

[131] H.R. 2275, 104th Cong. § 3(a)(2) (1995).

[132] *Id.* § 202.

[133] *Id.* § 201(b)(7).

[134] *Id.* § 302.

ESA.[135] Of those, 49% actually want the ESA strengthened.[136] Another poll shows public support at 70% for the statement, "Protection of the environment should be given priority, even at the risk of curbing economic growth," a figure which has held steady from 1990 to 2000.[137] Skeptics will rightfully point out that poll respondents are much more likely to support a cause when the economic costs of doing so will not affect the respondents themselves. But when asked how willing they would be to pay higher taxes to protect and restore endangered species, 58.9% of adults nationwide said they would be willing to do so.[138] These results can hardly be construed as a Congressional mandate to radically weaken the ESA.

Likewise, Congress's willingness and ability to undermine the ESA are now in question. Recall that in 1995, Congress boldly and visibly introduced measures attacking the ESA. Yet, despite the euphoria that accompanied the Republican majority into power,[139] despite the very overt threats to the ESA by some Republicans,[140] and despite the Republican majority in both houses of Congress, the ESA survived intact. Congressional opponents of the ESA, perhaps realizing the untenability of their stance and the low public support their views carry, now limit themselves to backdoor riders to sneak ESA-adverse legislation pass unsuspecting lawmakers.[141] With the ESA prevailing against a determined Congressional onslaught and public opinion so clearly in favor of species protection, the ESA is not on as shaky ground as many claim.

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[135] ENDANGERED SPECIES COALITION, *Latest Poll Says 84% of Americans Support Current or Stronger ESA* (citing B. Czech & P.R. Krausman, *Public Opinion on Endangered Species Conservation and Policy*, J. SOC'Y AND NATURAL RES., 12:469-79 (1999)) [hereinafter *Latest Poll Says 84% of Americans Support Current or Stronger ESA*], *at* http://www.stopextinction.org/poll.html (July 26, 1999) (on file with author).

[136] *Id.*

[137] THE POLLING REPORT, *Health of the Environment* (citing a Jan. 13-16, 2000 Gallup/CNN/USA Today Poll of 1,027 adults nationwide with a margin of error of +/- 3%), *at* http://www.pollingreport.com/enviro.htm#Environment (last visited Feb. 24, 2000) (on file with author).

[138] THE UNIV. OF N.C. AT CHAPEL HILL, *Survey Collection: Harris/951102, IRSS Study Number: S951102* (posing the question, "How willing would you be to pay somewhat higher Federal income taxes if you knew the money would be spent to protect and restore endangered species—very willing, somewhat willing, not very willing, or not willing at all?"), *at* http://www.irss.unc.edu/tempdocs/23:11:19:5.htm (Apr. 1995) (on file with author).

[139] *See* Hsu, *supra* note 45, at 10,594 (describing the newly elected members as a "wave of reform-minded freshman Republicans").

[140] *Id.* at 10,595 (quoting Republican Representative Richard Pombo of California as saying that after years of having the debate "stacked" against opponents of the ESA, it was now "their turn" for retaliation).

[141] *Latest Poll Says 84% of Americans Support Current or Stronger ESA*, *supra* note 135 (summarizing the three riders that sought to undermine the ESA in 1999).

Pushing Safe Harbor Agreements simply to protect the ESA from Congress is unnecessary and unwise.

3. Safe Harbor benefits to endangered species

Proponents of Safe Harbors tout the program's projected benefits to endangered species, including the reduction of habitat fragmentation, the maintenance, restoration, or enhancement of existing habitats, and the increase in habitat connectivity.[142] Indeed, these activities are essential to most, if not all, endangered species' recovery.[143] The counter argument is that these benefits to endangered species may not be permanent.[144] The FWS acknowledged the potentially "transitory" nature of the benefits in the first Safe Harbor Agreement it entered into.[145] This could happen, for example, if landowners decide to exercise their option of returning the population to the baseline. Safe Harbor supporters would argue that even if this did happen, at least the landowner's actions provided temporary habitat for the covered species. This is true in theory, of course, but in practice, the argument loses much of its appeal.

An obvious problem is the way "returning to the baseline" is characterized as an exact science. This dilemma is easily illustrated by an example. An owner of a large tract of land has 30% of the remaining population of an endangered bird on his property and decides to enter into a Safe Harbor Agreement. At the time the agreement is made, the baseline is determined to be 400 birds. Because of the landowner's Safe Harbor measures, the number of birds increases to 600. After the landowner fulfills all of his Safe Harbor obligations, he decides to build a restaurant and notifies the FWS of his plans. The FWS estimates that the construction and management of this restaurant will take about 200 birds, returning the bird population to the baseline. Initially, the FWS is correct. The trees that needed to be cleared for the

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[142] SAFE HARBOR AGREEMENTS FOR PRIVATE PROPERTY OWNERS: QUESTIONS AND ANSWERS, *supra* note 108.

[143] *See* Michael Bender et al., *Turning the Corner Towards Recovery*, 23 ENDANGERED SPECIES BULL. 4-5 (Mar.-June 1998).

[144] *See* Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,719 (June 17, 1999).

[145] U.S. FISH & WILDLIFE SERV., A HABITAT CONSERVATION PLAN TO ENCOURAGE THE VOLUNTARY RESTORATION AND ENHANCEMENT OF HABITAT FOR THE RED-COCKADED WOODPECKER ON PRIVATE AND CERTAIN OTHER LAND IN THE SANDHILLS REGION OF NORTH CAROLINA BY PROVIDING "SAFE HARBOR" TO PARTICIPATING LANDOWNERS 4 [hereinafter NORTH CAROLINA RCW SAFE HARBOR AGREEMENT], *available at* http://www.environmentaldefense.org/programs/Ecosystems/SafeHarbor/hinene.html. (last visited Mar. 6, 2001) (on file with author). This document is part of the actual Safe Harbor Agreement given to and signed by participating landowners. *See id.*

restaurant, the accompanying parking lot, and the disturbances caused by its construction results in a loss of about 200 birds. Unfortunately, the bird population keeps dropping. This is later found to be due to the smoke from the open flame grill suffocating the birds downwind from the restaurant. The population decline is also being caused by the increased number of rats in the area. The rats are attracted to the nightly trash left outside and have a tendency to raid bird nests and steal eggs. Another problem is the noise and exhaust from the increased number of cars. This drives off the birds from areas frequented by humans and their vehicles to the more remote areas of the property. These outlying areas, however, have already reached their carrying capacity and can support no more birds. The total bird population on the land drops from the original 400 to 200.

At this point, the FWS has several options, none of which are appealing. It can let the landowner keep running his restaurant as he likes, reasoning that "a deal is a deal." This is unacceptable from a conservation point of view since the bird's population in the covered area has been cut in half. The FWS could swoop back in and claim it has the right to help the covered species. This would also have undesirable consequences, reinforcing skeptical landowners' fears and mistrust of the government. Lastly, the FWS could try and stabilize the remaining population by negotiating a new Safe Harbor Agreement using a baseline of 200 birds, reasoning it is better to maintain the existing 200 than to allow a further population drop. These possibilities are a stark illustration of how a return to the baseline is neither simple nor risk-free.

Another obstacle to species recovery under Safe Harbors is the lack of quality scientific data underlying some agreements.[146] A worrisome example of this, Safe Harbor critics say, is the inadequate baselines on which many agreements are based.[147] Erroneous baseline determinations can be blamed on the FWS's scientific oversight,[148] or on something as innocuous as a naturally fluctuating population.[149] Even some at the FWS feel as though they were "giving away the farm" by granting landowners too-generous Safe Harbor assurances resulting from artificially low baseline estimates.[150] A FWS

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[146] *See* Parenteau, *supra* note 10, at 292.

[147] *Id.* at 287 n.410; *see also* Daniel A. Hall, *Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests: Common Problems and Promising Precedents*, 27 ENVTL. L. 803, 812-13 (1997); THE NAT'L AUDUBON SOC'Y, *Report of the National Audubon Society Task Force on Habitat Conservation Plans* [hereinafter AUDUBON SOCIETY REPORT] (urging the FWS to establish a credible scientific process for determining the baseline of covered species), *at* http://www.audubon.org/campaign/esa/task_force.html (last visited Mar. 13, 2001) (on file with author).

[148] *See* Hall, *supra note* 147, at 812.

[149] *See* Announcement of Final Safe Harbor Policy, 64 Fed. Reg. at 32,719.

[150] Telephone Interview with Peter Jenny, Vice President, Peregrine Fund (Mar. 3, 2000) (relating his personal communication with FWS employees unhappy with the Safe Harbor

biologist at the field office in Texas claims this attitude is shared by many biologists who fear Safe Harbor Agreements are not the best way to help endangered species.[151] The biologist, involved in the Texas Northern Aplomado Falcon Reintroduction Safe Harbor Agreement, worried that important decisions were being based on insufficient data, at least in that agreement.[152] Even the FWS and NMFS admit there are potential holes in their data collecting ability, acknowledging "the concept of baseline determination needs further clarification."[153] The disastrous consequences a too-low baseline determination would bring are obvious. A landowner whose baseline was set at 100 when it should have been 150 will be able to take fifty more of the species than he should, even if it were discovered after the fact that the baseline was incorrect.

A related problem may occur when it is unclear if a landowner is at fault for a species' population drop below the baseline. Although the FWS's Safe Harbor literature gives a perfunctory explanation of a return to the baseline,[154] the process is not so simple.[155] A landowner may be unfairly condemned for causing the population of a covered species to fall below the baseline when, in reality, the baseline was set too high to begin with.[156] This can occur when a species' population varies greatly from year to year or between seasons and the baseline is set when the population is peaking.[157] The FWS claims that this will not be a problem since baseline conditions are mutually agreed upon by the landowner and the government.[158] In theory, of course, landowners are on an equal footing with the government in baseline negotiations and can object to unrealistically high baseline determinations. In practice, however, it is far more likely that the FWS, with its team of experienced biologists and vast economic resources will hold the upper hand in baseline negotiations. Some conservationists may fail to see the problem with a high baseline that benefits endangered species. But considering that the Safe Harbor program seeks to benefit listed species *and* foster cooperation between landowners and the

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program); *see also* David Bidwell, National Center for Environmental Decision-Making Research: Case Studies-Habitat Conservation Plans, *The Peregrine Fund's Aplomado Falcon Safe Harbor*, *at* http://www.ncedr.org/casestudies/hcp/peregrine.htm (last visited Mar. 6, 2001) (on file with author).

[151] Bidwell, *supra note* 150.

[152] *Id.*

[153] Announcement of Final Safe Harbor Policy, 64 Fed. Reg. at 32,718.

[154] SAFE HARBOR AGREEMENTS FOR PRIVATE PROPERTY OWNERS: QUESTIONS AND ANSWERS, *supra* note 108 (explaining only that "the participating landowner may use the property in any otherwise legal manner that doesn't move it below baseline conditions").

[155] *See* Brown, *supra* note 18, at 227 (noting it is difficult to know whether the landowner caused the species to drop below the baseline).

[156] Announcement of Final Safe Harbor Policy, 64 Fed. Reg. at 32,719.

[157] *Id.*

[158] *Id.*

government, any conservation gains would be more than offset by increased landowner ill will and suspicion.

There are several scenarios possible for landowners locked into an unrealistically high baseline. If the landowner realizes the error before the species drops below the baseline, the FWS may review the baseline determination for accuracy.[159] If the baseline is found to be too high, the FWS will amend the agreement to reflect the correct baseline number.[160] The FWS, however, would be far less accommodating if the landowner informed them of the mistake *after* the species had declined to a point below the baseline.[161] In this situation, the baseline is presumed to be accurate and the burden is now on the landowner to show it is not.[162]

4. Leading environmental groups harbor reservations about the program

How environmental groups judge Safe Harbors can be a useful measure of the efficacy of the program. These groups are intimately familiar with the problems facing endangered species and can offer a useful perspective on how beneficial Safe Harbors have been to covered species. A review of how the major environmental organizations view the Safe Harbor program reveals a level of discernible skepticism, even among those that support Safe Harbors generally.

The Audubon Society, for example, is "generally supportive" of Safe Harbor Agreements, but recommends that a number of safeguards be added to the program.[163] Likewise, the National Wildlife Federation ("NWF") generally favors the Safe Harbor program, calling it "a valid attempt to produce conservation benefits from private lands that otherwise might not have been managed for the benefit of species."[164] The NWF is concerned, however, that Safe Harbor Agreements do not always promote recovery of the species they cover.[165] Finally, Defenders of Wildlife ("DOW") contend that Safe Harbors "have not been widely tested" and "[h]ow well they work remains to be seen."[166]

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[159] Interview with Gina Shultz, Program Leader: Habitat Conservation Plans, Safe Harbor/Candidate Conservation Agreements, Recovery Permits-U.S. Fish and Wildlife Service, Pacific (Region 1), Ecological Services (Apr. 18, 2000).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] AUDUBON SOCIETY REPORT, *supra* note 147.

[164] NWF ENDANGERED SPECIES ACT FACT SHEET, *supra* note 115.

[165] *Id.*

[166] DEFENDERS OF WILDLIFE, FRAYED SAFETY NETS: CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT 8 (1998) [hereinafter CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT].

These groups share many of the same concerns about the Safe Harbor program. All three, for example, find troubling the possibility of inaccurate baseline determinations. The Audubon Society urges the government to institute "a scientifically credible process for determining the baseline population of enrolled property."[167] Similarly, DOW asserts that, of all the possible shortcomings of Safe Harbor Agreements, how the baseline is determined is perhaps the most important.[168] DOW worries that baseline negotiations will be influenced more by the economic concerns of landowners than by the biological demands of the species.[169] The NWF also realizes the importance of an accurately determined baseline, contending that "[s]cientifically defensible and measurable baseline data, including the number of species present on the land and indicators of habitat quality, must be the foundation of any [S]afe [H]arbor [A]greement."[170]

Another potential problem the three groups point out is the idea of the "biological sink."[171] Biological sink is described as follows: "[A] landowner creates habitat for a listed species; the species is attracted to the temporary new habitat and abandons old habitat; the old habitat, now unoccupied, is developed; and then the Safe Harbor habitat is developed, leaving the species worse off than before."[172] The biological sink problem, DOW echoes, could leave covered species "worse off than without an agreement."[173] To avoid this, the NWF recommends that baseline determinations include surveys of adjacent habitats[174] and maintains that Safe Harbor Agreements "should only be entered into when the Secretary of Interior has ruled out the possibility that a biological sink effect will cause a net loss of habitat."[175]

Another assertion among some environmental groups is that Safe Harbors should not be used "in conjunction with" HCPs because a landowner currently

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[167] AUDUBON SOCIETY REPORT, *supra* note 147.

[168] *See* CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT, *supra* note 166, at 8.

[169] *Id.*

[170] *See* NWF ENDANGERED SPECIES ACT FACT SHEET, *supra* note 115.

[171] AUDUBON SOCIETY REPORT, *supra* note 147; *see also* CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT, *supra* note 166, at 8 (providing a brief explanation of the biological sink problem).

[172] AUDUBON SOCIETY REPORT, *supra* note 147.

[173] CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT, *supra* note 166, at 8.

[174] Barbara Loe, NAT'L WILDLIFE FED'N, *Safe Harbor Agreements Breakout Session*, *at* http://www.nwf.org/nwf/endangered/hcp/brkout.html (last visited Apr. 18, 2000) (on file with author).

[175] Letter from John Kostyack, Counsel, National Office, National Wildlife Federation, to Buzz Fawcett, Office of Senator Kempthorne and Jimmy Powell, Senate Environment and Public Works Committee (Feb. 24, 1997), *at* http://www.wws.princeton.edu/~wws402h/resources/kostyack.txt (on file with author).

under an HCP may have lowered the baseline through his incidental take of the species.[176] This scheme would allow landowners to purposely reduce their baseline for the covered species, then use the Safe Harbor program to "lock in" the lower figure.[177] Already, the NWF charges, some landowners have demonstrated an interest in the Safe Harbor program solely to circumvent ESA restrictions in this way.[178] The Audubon Society concludes that if a landowner is found to have reduced the baseline population of a species prior to applying for a Safe Harbor Agreement, the landowner should not be eligible to participate in the program.[179] DOW shares these concerns.[180]

Finally, the Audubon Society believes Safe Harbor Agreements should be used as little as possible, especially when other successful programs such as Partners for Wildlife and the Conservation Reserve Program are working without the additional Safe Harbor incentives.[181] "These programs are working without any guarantees regarding ESA enforcement, and are providing benefits to other, unlisted, wildlife that should not be lost through linkage with the Safe Harbors program."[182]

IV. ANALYSIS OF THREE SAFE HARBOR AGREEMENTS

While the views of biologists, environmentalists, and conservation groups provide a useful starting point with which to gauge the effectiveness of the Safe Harbor program, their analyses largely amount to speculation at this point. With the earliest Safe Harbor Agreements a mere six years old, even the most astute observer is limited to making educated guesses as to the program's ultimate impact on endangered species. Perhaps because Safe Harbors are still in their infancy, the analysis up to now has been more theoretical than practical. That is, most commentators have limited their inquiry to Safe Harbors as a concept instead of evaluating actual agreements already in force. Indeed, focusing on individual Safe Harbor Agreements and how well they have achieved their twin goals of species preservation and improved relations between the government and private landowners arguably produces the most constructive critique of the program.

The Safe Harbor Agreements analyzed here were chosen because they were the first three developed, the longer time frame painting a more accurate

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[176] AUDUBON SOCIETY REPORT, *supra* note 147.

[177] *Id.*

[178] NWF ENDANGERED SPECIES ACT FACT SHEET, *supra* note 115.

[179] *Id.*

[180] *See* CONSERVATION PLANNING UNDER THE ENDANGERED SPECIES ACT, *supra* note 166, at 8.

[181] AUDUBON SOCIETY REPORT, *supra* note 147.

[182] *Id.*

picture of their effectiveness. The North Carolina Sandhills Safe Harbor Agreement for protection of the red-cockaded woodpecker and the Texas Coastal Prairie agreement for the attwater prairie chicken were both developed in 1995.[183] The Texas northern aplomado falcon Reintroduction Safe Harbor Agreement was approved in 1996.[184]

Although the covered species are all birds, the differences between the three make analysis of their Safe Harbor Agreements meaningful. For example, the red-cockaded woodpecker is nonmigratory,[185] while the aplomado falcon travels long distances when it is not mating.[186] Fewer than fifty attwater prairie chickens[187] are left in the wild, compared to more than 10,000 red-cockaded woodpeckers.[188] The aplomado falcon and attwater prairie chicken Safe Harbor Agreements seek to reintroduce the species to their traditional habitat.[189] The red-cockaded woodpecker, by contrast, has had its habitat severely reduced but has always lived on what little habitat remains.[190]

Each agreement will be evaluated based on the following criteria: (1) the improvement in the population of the covered species, if any (to gauge whether the agreement has achieved its fundamental goal of improving the

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[183] For the red-cockaded woodpecker, see Availability of an Environmental Assessment and an Application for an Incidental Take Permit to Implement the Red-cockaded Woodpecker "Safe Harbor" Program in the Sandhills Region of North Carolina, 60 Fed. Reg. 10,400 (Feb. 24, 1995). For the attwater prairie chicken, see Availability of an Environmental Assessment, Habitat Conservation Plan, and Receipt of an Application for an Incidental Take Permit for the Sam Houston Resource Conservation & Development Areas, Inc., Native Gulf Coast Prairie Restoration Project, 60 Fed. Reg. 40,853 (Aug. 10, 1995).

[184] Availability of an Environmental Assessment and Receipt of Application for Incidental Take Permit for The Peregrine Fund's Aplomado Falcon Reintroduction Program in Texas, 61 Fed. Reg. 37,488 (July 18, 1996).

[185] Bonnie, *supra* note 74, at 17.

[186] U.S. FISH AND WILDLIFE SERV., *Endangered Species Information: Data sheet for Northern aplomado falcon* [hereinafter *Data sheet for Northern aplomado falcon*], *at* http://ifw2es.fws.gov/EndangeredSpecies/lists/SpeciesInfo.cfm?SpeciesID=90 (last visited Mar. 6, 2001) (on file with author).

[187] U.S. FISH AND WILDLIFE SERV., *Regional News and Recovery Updates* (reprinting The Endangered Species Bulletin, Vol. XXI, No. 3) [hereinafter *Regional News and Recovery Updates*], *at* http://endangered.fws.gov/esb/96/maynews.html (last visited Mar. 6, 2001) (on file with author).

[188] U.S. FISH AND WILDLIFE SERV., *Red-Cockaded Woodpecker* [hereinafter *Red-Cockaded Woodpecker*], *at* http://endangered.fws.gov/i/b/sab4a.html (last visited Mar. 6, 2001) (on file with author).

[189] For the Aplomado Falcon, see Availability of an Environmental Assessment and Receipt of Application for Incidental Take Permit for The Peregrine Fund's Aplomado Falcon Reintroduction Program in Texas, 61 Fed. Reg. 37,488 (July 18, 1996). For the Attwater Prairie Chicken, see Steven D. Arey et al., *A Team Approach to Coastal Prairie Conservation*, 23 ENDANGERED SPECIES BULL., Sept.-Oct. 1998, at 12, 13.

[190] *Red-Cockaded Woodpecker*, *supra* note 188.

species' population); (2) participants' satisfaction with the process (to ascertain if the agreement is reaching its other goal of reducing fear and distrust of the government and the ESA); and (3) the incidence of endangered species not on Safe Harbor land at the time the agreement is made but attracted to the land as a direct result of the landowner's Safe Harbor activities, and whether landowners have yet opted to exercise their right to "take" covered species back to the baseline (these two criteria being useful in determining the validity of criticism that says Safe Harbor benefits are transitory).

A. The North Carolina Sandhills Safe Harbor Agreement for the Red-cockaded Woodpecker

The North Carolina Sandhills Safe Harbor Agreement was the first ever Safe Harbor Agreement.[191] This groundbreaking arrangement was developed in 1995, primarily by the FWS and the Environmental Defense Fund, with assistance from other agencies, organizations, and state foresters.[192] It is an umbrella agreement, covering more than 20,000 acres over several counties.[193] The overarching agreement lasts ninety-nine years and is not scheduled to expire until December 31, 2094.[194]

The FWS chose the North Carolina Sandhills for a Safe Harbor program in large part because a "significant portion" of the Red-cockaded woodpecker ("RCW") "groups" (family units consisting of up to nine birds) in the area are on privately-owned land.[195] In fact, of the fifteen RCW populations across the country that the FWS considers essential for the recovery of the species, only the North Carolina Sandhills population has such a high percentage of RCW groups on private land (about 30%).[196] The participating North Carolina landowners have a combined baseline population of about fifty groups on their property.[197] Because of the large proportion of RCWs on private land in the Sandhills, "the recovery of the RCW in [the area] is likely to be influenced significantly by the land management decisions of private landowners."[198]

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[191] FWS 10 POINT PLAN, *supra* note 79, at 18.

[192] Bonnie, *supra* note 74, at 20.

[193] *Id.*

[194] Telephone Interview with Mark Cantrell, Biologist, Federal Project Review and Endangered Species Act Section 7 Consultation, Fish and Wildlife Service Southeast (Region 4) Field Office, Ecological Services (Mar. 3, 2000). Thus, the first landowners to enroll in the program have the full ninety-nine year obligation while those who enter later, in 2004 for instance, will only be committed for ninety years. *Id.*

[195] NORTH CAROLINA RCW SAFE HARBOR AGREEMENT, *supra* note 145, at 1.

[196] *Id.*

[197] Bonnie, *supra* note 74, at 20.

[198] NORTH CAROLINA RCW SAFE HARBOR AGREEMENT, *supra* note 145, at 1.

Participants may opt out of the program at any time but, depending on when they opt out, may lose the privilege of returning to the baseline as determined at the time that particular landowner entered into the Safe Harbor Agreement.[199] For example, imagine a landowner whose land is inhabited by twenty RCW groups and is not yet enrolled in a Safe Harbor Agreement. This landowner can neither take any birds under Section 9 of the ESA, nor does she have an affirmative duty to maintain the RCW habitat. In other words, Section 9 allows landowners to sit back and do nothing.[200] If this landowner decides to participate in a Safe Harbor Agreement, her baseline will be twenty groups. If she opts out before she has completed *any* of her Safe Harbor obligations, the landowner gains no benefit from the agreement and is subject to Section 9 take prohibitions as if she had never been involved in the program.[201] However, if the landowner completes only some of her obligations and then opts out and the number of RCW groups increases to twenty five because of her Safe Harbor activities, she will be able to take up to five groups.[202] As for the twenty original groups, the landowner is now obligated to actively manage her habitat for the remainder of the agreement, something the landowner was not required to do before her involvement in the Safe Harbor program.[203] Thus, covered species benefit even when landowners prematurely end their involvement in the program.[204] Landowners who stay with the program will continue to enjoy the lower baseline of twenty groups if they do not opt out, even until the agreement expires in 2094.[205] To date, no landowner has opted out.[206]

The RCW is a seven to eight-inch bird of the *Picidae* family.[207] RCWs live in cavities in longleaf pines; they avoid dense hardwood stands.[208] The RCW's historic range once stretched from East Texas and Oklahoma, to Florida, and north to New Jersey.[209] Now, only "isolated, island populations" remain.[210] The species' decline is primarily attributed to the loss of pine forests with trees

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[199] Telephone Interview with Peter Campbell, North Carolina Sandhills Red Cockaded Woodpecker Recovery Coordinator, Fish and Wildlife Service Southeast (Region 4) Field Office, Ecological Services (Apr. 19, 2000).

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] Telephone Interview with Mark Cantrell, *supra* note 194.

[206] *Id.*

[207] *Red-Cockaded Woodpecker*, *supra* note 188.

[208] *Id.*

[209] *Id.*

[210] *Id.*

over eighty years old[211] and to fire suppression.[212] To complicate matters, RCWs require trees infected with a fungus that produces a condition known as red-heart disease.[213] Trees with red-heart disease are easier for RCWs to excavate cavities in.[214]

Forty landowners have enrolled in the North Carolina Sandhills RCW Safe Harbor program since its inception, with three more in negotiations at the time of this writing.[215] According to the FWS, the program is so popular among eligible landowners that "demand is outstripping supply (i.e., economic and personnel resources)."[216] Landowners participating in the program have agreed to do such things as prescribed burns, artificial nest cavity drilling, hardwood undergrowth removal, and forest rotation lengthening.[217] In addition, some landowners have begun to reforest their pastureland with longleaf pine.[218] The reforestation serves two important purposes. First, the new growth provides important foraging ground for RCWs.[219] Secondly, the reforested areas can be used by the RCWs as a roosting area after about eighty years, when cavities can be excavated in the trees.[220]

1. Red-cockaded Woodpecker population increases

Using the first evaluative criteria, whether the North Carolina Sandhills RCW Safe Harbor program has helped to increase the population of the species it is supposed to benefit,[221] the answer seems to be a cautious "yes," at least for the short term.

Before the development of the North Carolina Sandhills RCW Safe Harbor program, the RCW population on private land was falling 9% annually.[222] Since then, the decline has been reversed,[223] the latest count showing an

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[211] *Id.*

[212] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 3.

[213] *Red-Cockaded Woodpecker*, *supra* note 188.

[214] *Id.*

[215] Telephone Interview with Peter Campbell, *supra* note 199.

[216] *Id.*

[217] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 3.

[218] Telephone Interview with Mark Cantrell, *supra* note 194.

[219] *Id.*

[220] *Id.*

[221] Evan L. Preisser & Jennifer R. Yelin, *Attwater's Prairie Chicken: The Conservation Challenge and Recommendation*, 16 ENDANGERED SPECIES UPDATE at 2, 3 (1999) (arguing that "the overarching goal of species recovery needs to be the first and major criterion by which any program is evaluated").

[222] Telephone Interview with Mark Cantrell, *supra* note 194.

[223] *Id.*

estimated increase of three new groups, which may be equivalent to as many as twenty-seven birds.[224] Despite the improvement, the population is increasing at a rate slower than the FWS had initially hoped for. The FWS estimated in 1996 that the RCW population in the covered areas "could as much as double in eight to 15 years," which could total as many as 100 groups.[225] Because the baseline was determined to be fifty groups in 1995, it is unlikely the current recovery rate will improve enough to allow the RCW population to reach 100 groups anytime soon.

2. Landowners satisfied with their participation in the Safe Harbor program

The second criterion looks at the response of landowners whose land is enrolled in the North Carolina Sandhills RCW Safe Harbor program. Though no surveys of the forty or so participating landowners have been done, the available evidence suggests they are generally pleased with the newfound flexibility of the FWS and the deals they have negotiated for themselves. A good example is Dougald S. McCormick, whose family owns about 5,000 acres of forestland.[226] His license plate once read, "I EAT RCWS."[227] Now, after enrolling his land in the Sandhills, North Carolina Safe Harbor program, McCormick says he "want[s] to see this [Safe Harbor Agreement] succeed."[228]

Another participant, Jerry Holder, is president of the North Carolina Pine Needle Producer Association.[229] He harvests pine needles for a living on his 100-acre longleaf pine forest.[230] Because fallen leaves from hardwood trees interfere with his raking of the straw, Holder clears out scrub oaks and other trees to keep the area free of leaves.[231] The problem, of course, is that by clearing the forest, Holder is attracting RCWs.[232] He said that before the Safe Harbor program, the presence of RCWs on his property was "a definite threat

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[224] *Id.*

[225] Bonnie, *supra* note 74, at 20 (citing a personal communication with Mark Cantrell, a biologist with the FWS's Southeast Field Office, Region 4).

[226] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 2.

[227] *Id.*

[228] *Id.*

[229] *Id.* at 9.

[230] David Sinclair, *Landowners Give Woodpeckers a Home*, FAYETTEVILLE ONLINE: A SERVICE OF THE FAYETTEVILLE (NC) OBSERVER (reprinting an article originally published in the Fayetteville (NC) Observer-Times, Dec. 12, 1997), *at* http://www.fayettevillenc.com/foto/news/content/1997/tx97dec/n12wood.htm (last visited Mar. 4, 2000) (on file with author).

[231] *Id.*

[232] *Id.*

to [his] livelihood and security."[233] Now, by contrast, "[W]e can live in harmony."[234] "It is a great thing for the landowner and the birds."[235] In addition to helping RCWs, Safe Harbor activities have actually *increased* financial returns for landowners, Holder said.[236] With the hardwoods cleared away, the quantity of pine straw has significantly increased.[237] And because the pine straw is much cleaner without debris from other tree species, it has a higher value.[238]

This anecdotal evidence, along the program's apparent popularity and the absence of any opt-outs, strongly suggests Safe Harbors are good for landowners. Furthermore, only two landowners have so far chosen not to participate.[239] One of them is a conservation group whose activities are more beneficial to the RCW than those of the North Carolina Sandhills Safe Harbor program.[240] The other landowner had planned on entering into the Safe Harbor Agreement, but later decided against it.[241] Despite choosing not to participate, the landowner still plans to use his land on behalf of the RCW.[242]

3. No other endangered species attracted to the RCW Safe Harbor land

The FWS's procedures for determining whether non-covered endangered species are on Safe Harbor land depend greatly on the specific habitat involved.[243] The more likely the habitat is to attract such species, the greater the need for thorough monitoring.[244] Since the habitat covered by this particular Safe Harbor Agreement is all but inhospitable to any listed species besides the RCW, the FWS feels there is little chance of habitation by other species and only minimal monitoring is necessary.[245] To date, the FWS has not observed any non-covered species on land currently under the RCW Safe Harbor program in the Sandhills region of North Carolina.[246] At least for this

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[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] AM. FARM BUREAU FED'N, *With 'Safe Harbor,' Landowners Helping Species, at* http://www.fb.com./annual/amnews/nr/nr0105.html (Jan. 12, 1998) (on file with author).

[237] *Id.*

[238] *Id.*

[239] *See* Telephone Interview with Peter Campbell, *supra* note 199.

[240] *Id.*

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.* Mr. Campbell did note that the RCW Safe Harbor habitat in South Carolina was probably more suitable to non-covered species and therefore required more extensive monitoring. *Id.*

[246] *See* Telephone Interview with Mark Cantrell, *supra* note 194.

Safe Harbor program, the risk of non-covered species coming onto Safe Harbor land appears negligible.

Judging from the modest increase of RCW groups, the positive landowner response to the program, and the exceedingly small chance of habitation by a non-covered species, this Safe Harbor Agreement appears to be fulfilling its goals. Despite the apparent success of the North Carolina RCW program, however, it is still too early to know how lasting these achievements will be.

B. The Texas Coastal Prairie Safe Harbor Agreement for the Attwater Prairie Chicken

The Attwater Prairie Chicken ("APC") is one of the most endangered species in the United States, with an estimated population of fifty as of April 2000.[247] Although the APC population once totaled over a million birds, the loss of 97% of its suitable habitat has brought the APC to the brink of extinction.[248] Other reasons for the APC's decline are predation, disease, genetic problems, and abnormal weather conditions over the last ten years.[249] The APC, a member of the grouse family, is about the size of a domestic chicken.[250] A little over a hundred years ago, the APC roamed across approximately six million acres of coastal prairies in Texas and southwestern Louisiana.[251] Now, less than 200,000 acres of available habitat remain.[252] APCs live an average of two to three years.[253] They nest once a year, producing an average of about twelve eggs.[254] APCs need open prairie with tall grass for roosting and nesting, as well as patches of bare ground or very short grass for performing their pre-nuptial display.[255]

APCs live primarily on two refuges.[256] One is the government-run Attwater Prairie Chicken National Wildlife Refuge with twenty APCs.[257] The other is

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[247] Telephone Interview with Nancy Morrissey, Assistant Refuge Manager, Fish and Wildlife Service Southwest (Region 2) Field Office (Apr. 20, 2000).

[248] *See* Preisser & Yelin, *supra* note 221, at 2.

[249] Arey et al., *supra* note 189, at 13.

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] Telephone Interview with Nancy Morrissey, Assistant Refuge Manager, Fish and Wildlife Service Southwest (Region 2) Field Office (Mar. 1, 2000).

[254] *Id.*

[255] THE DALLAS MUSEUM OF NATURAL HISTORY, *Wildlife Diorama: Attwater Prairie Chicken Exhibit, at* http://www.dallasdino.org/permanent/wildlife_dioramas/attwater_prairie_chicken.cfm (last visited Mar. 6, 2000) (on file with author).

[256] Preisser & Yelin, *supra* note 221, at 3. In addition to the these two refuges, APCs also live on a single piece of private land. *Id.*

[257] *See* Telephone Interview with Nancy Morrissey, *supra* note 247.

the Nature Conservancy's Texas City Prairie Preserve with thirty.[258] Interestingly, the Nature Conservancy refuge is among the parcels of land enrolled in the Safe Harbor program.[259]

The Safe Harbor Agreement for the APC, established in 1995, is an umbrella agreement involving fifteen landowners and covering over 46,750 acres.[260] Of the fifteen, only the Nature Conservancy's refuge contains APCs.[261] The other Safe Harbor participants maintain the APC habitat on their land for the day when APCs recover to the point where the two refuges reach their carrying capacity and extra habitat is needed.[262] All APC Safe Harbor Agreements also cover the Houston Toad and Texas Prairie Dawn-flower, two endangered species which utilize the same habitat as the APC.[263] Participants are required to maintain pastures or prairies, restore native plant species to the area, and conduct controlled burnings.[264] Landowners are held to ten-year commitments,[265] though the FWS expects the benefits of their range improvements to continue for a longer period.[266] In addition to restoring and preserving habitat for APCs already on the land, the APC Safe Harbor Agreement provides for reintroduction of the species through captive breeding programs.[267] In 1999, 100 birds were released onto the two refuges.[268] Since

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[258] *Id.*

[259] *Id.* The Nature Conservancy is a private non-profit conservation group whose activities include purchasing land as habitat for endangered species. It is not the typical participant in the Safe Harbor program since it will, in all likelihood, never take the species back to the baseline. *See Who We Are*, *supra* note 125. In fact, the Nature Conservancy has enrolled its land in the Safe Harbor program largely to set a good example for other landowners to follow. Telephone Interview with Terry Rossignol, Attwater Prairie Chicken Refuge Manager, Fish and Wildlife Service (Apr. 21, 2000).

[260] *See* Telephone Interview with Nancy Morrissey, *supra* note 247. The FWS places priority on securing Safe Harbor Agreements with landowners adjacent to, or within a five-mile radius of, one of the refuges containing APCs. *See* Availability of an Environmental Assessment, Habitat Conservation Plan, and Receipt of an Application for an Incidental Take Permit for the Sam Houston Resource Conservation & Development Areas, Inc., Native Gulf Coast Prairie Restoration Project, 60 Fed. Reg. 40,853, 40,854 (Aug. 10, 1995).

[261] *See* Telephone Interview with Nancy Morrissey, *supra* note 247.

[262] *Id.*

[263] *See* U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLAN FOR CONSERVATION OF ENDANGERED SPECIES ON PRIVATE LAND IN THE GULF COAST PRAIRIES OF TEXAS: A "SAFE HARBOR" FOR PRIVATE LANDOWNERS 1-2 (1995) [hereinafter ATTWATER PRAIRIE CHICKEN SAFE HARBOR AGREEMENT], *available at* http://www.environmentaldefense.org/programs/Ecosystems/SafeHarbor/hinene.html (on file with author). This document is part of the actual Safe Harbor Agreement given to and signed by participating landowners. *See id.*

[264] *See* Telephone Interview with Nancy Morrissey, *supra* note 253.

[265] *Id.*

[266] *See* Preisser & Yelin, *supra* note 221, at 4.

[267] *See* Telephone Interview with Nancy Morrissey, *supra* note 253. Four captive breeding programs are currently operating in Texas by the Fossil Rim Wildlife Center, the Houston Zoo,

1996, the survival rate for reintroduction has averaged about 36% per year.[269] This seemingly low success rate is deceptive, however, since the survival rate of wild birds is about 50%,[270] and the FWS views the captive breeding program as essential for maintaining the existing wild population on the refuges.[271]

The extremely small number of APCs, along with the fact that 97% of the State of Texas is in private ownership, makes the cooperation of private landowners especially critical.[272] According to Terry Rossignol, APC Refuge Manager, "Without the help of private landowners, the bird is doomed to extinction."[273]

1. Attwater Prairie Chicken population drops

Looking at the raw numbers, it is easy to conclude that the APC Safe Harbor Agreement is a failure. The bird's population in the wild dropped from an estimated sixty-eight in 1995[274] to only fifty in 2000.[275] Though discouraging, the figures are not totally unexpected given the wild fluctuations in the APC population in years past. For example, the number of APCs nose dived from sixty-eight in 1995 to forty-two in 1996.[276] Two years later, in 1998, the population rebounded to fifty-seven.[277] The drop in population to fifty birds

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the San Antonio Zoo, and the Small Upland-bird Research Facility at Texas A&M University. TEXAS A&M UNIV., *Texas A&M University Captive Propagation Facility*, *at* http://apc.tamu.edu/index/research.htm (last visited Mar. 6, 2001) (on file with author). Once chicks are capable of independent survival, they are taken to release sites, given a medical check, and fitted with transmitters. U.S. FISH & WILDLIFE SERV., *Attwater Prairie Chicken National Wildlife Refuge*, *at* http:southwest.fws.gov/refuges/texas/apc.html#Meet%20the%20Attwater's%20Prairie-Chicken (last visited Mar. 5, 2000) (on file with author). The chicks then live in an acclimation pen for the next two weeks to adjust to the prairie. *Id.*

[268] *See* Gary Woods, *Prairie Chickens*, Citizens' Environmental Coalition Newsletter, *at* http://www.cechouston.org/newsletter/nl_10-99/chickens.htm (last visited Mar. 6, 2001) (on file with author).

[269] *See* Preisser & Yelin, *supra* note 221, at 2, 4 (citing a personal communication with Terry Rossignol, Attwater Prairie Chicken Refuge Manager). The main reason for the low survival rate is predation. *See* Telephone Interview with Nancy Morrissey, *supra* note 247. In 1999, four APCs were killed by snakes and two by skunks. *Id.*

[270] *See* Telephone Interview with Terry Rossignol, *supra* note 259.

[271] Preisser & Yelin, *supra* note 221, at 4.

[272] *See* Arey et al., *supra* note 189, at 13.

[273] Ben Ikenson, *Texas Ranchers Help Recover Birds, Toads, Flowers*, WEEKLY ALIBI (Dec. 9-15, 1999), *at* http://www.alibi.com/alibi/current/treehuggers.html (on file with author).

[274] *See Regional News and Recovery Updates*, *supra* note 187.

[275] *See* Telephone Interview with Nancy Morrissey, *supra* note 247.

[276] *See Regional News and Recovery Updates*, *supra* note 187.

[277] *See* Arey et al., *supra* note 189, at 13.

in 2000, therefore, is a significantly smaller loss than the 1996 decline and may not be as alarming a setback as it first appears.

Given that many other factors could be the cause of the decline, it is difficult to assess the impact of this Safe Harbor Agreement on APCs. One could conclude that the numbers speak for themselves and that the Safe Harbor program fails this criterion. On the other hand, the FWS itself warned in 1995 that unless something was done, APCs could be extinct by the year 2000.[278] That APCs still survive in the wild may be interpreted to mean this particular Safe Harbor Agreement has been successful. In any case, no one can dispute that the APC is just as close to extinction, if not more so, than before the start of the Safe Harbor program.

2. Whether participants satisfied with the Safe Harbor program unclear

According to Rossignol, "you couldn't say 'ESA' and 'private landowner' in the same sentence" prior to Safe Harbors.[279] Rossignol, who works closely with Safe Harbor participants, has seen "a 180° turn" from the pre-Safe Harbor years.[280] Landowners' minds have been so changed, in fact, that some participants are actually asking the FWS to reintroduce the APC on their land.[281]

John Elick, whose ranch covers 1,800 acres of prairie along the San Bernard River, participates in the APC Safe Harbor program.[282] Unlike oft-stereotyped landowners who supposedly kill listed animals before they are discovered on their land, Elick is partial to endangered species.[283] In an article in the *Weekly Alibi*, Elick explained he wanted to do something positive for wildlife because "what is good for the ecology of the land is good for me and my ranch."[284] Before the Safe Harbor program, Elick had been concerned that the federal government would infringe on his property rights if listed species were found on his land.[285] When he heard about the Safe Harbor program, Elick took it upon himself to contact the FWS and get involved.[286] Elick has no regrets, explaining that "[b]oth the government and private landowner benefit without any negative drawback to either party."[287]

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[278] *See* ATTWATER PRAIRIE CHICKEN SAFE HARBOR AGREEMENT, *supra* note 263, at 2.
[279] *See* Telephone Interview with Terry Rossignol, *supra* note 259.
[280] *Id.*
[281] *Id.*
[282] *See* Ikenson, *supra* note 273.
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*

Unfortunately, the Southwest Field Office in charge of the APC Safe Harbor program would not release the identities of other participating landowners when requested by this author. Alternate methods of contacting landowners were similarly unsuccessful.[288] Besides Rossignol's comments and Mr. Elick's experience, the only other indication of landowner satisfaction is that no one has yet opted out of the program.[289] Additionally, the fact that four more Safe Harbor Agreements are being negotiated as of this writing[290] suggests that the current participants are pleased with their involvement and have generated strong word-of-mouth praise. This is not too surprising when one considers the very small area of land the FWS has given priority to for enrollment in the Safe Harbor program.[291]

3. No other endangered species attracted to APC Safe Harbor land

Because no other endangered species inhabit the area, the FWS is confident the three species included in this Safe Harbor Agreement adequately provide for the possibility of a non-covered endangered species being attracted to Safe Harbor land.[292] This reassuring conviction is borne out by the fact that the FWS has not observed any non-covered endangered species on APC Safe Harbor land.[293] Consequently, the FWS only conducts inspections to ensure that the agreed-upon habitat practices are being carried out and to assist landowners with technical advice.[294]

Given the decline of the wild APC population since the start of the program, it is hard to claim the APC is benefiting from this Safe Harbor Agreement. The situation is even more dire in light of the fact that all APCs are currently on two refuges managed exclusively for APC recovery. If the species is struggling under these ideal conditions, it will fare even worse if reintroduced onto Safe Harbor land not specially dedicated to APCs. On the other hand,

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[288] In lieu of giving out landowners' names, the FWS agreed in March 2000 to forward surveys the author prepared to the Safe Harbor participants. These surveys asked landowners how they felt about the Safe Harbor program, the Endangered Species Act, and the federal government both before and after their involvement in the Safe Harbor program. Unfortunately, no landowner has yet responded.

[289] *See* Telephone Interview with Nancy Morrissey, *supra* note 247.

[290] *Id.*

[291] *See* Telephone Interview with Nancy Morrissey, *supra* note 247. Although the priority area is relatively small, it is important to note that the program encompasses a nineteen-county area along the Texas coast from the Texas-Louisiana state line to Corpus Christi, Texas, which is roughly the historic range of the APC. Telephone Interview with Terry Rossignol, *supra* note 259.

[292] *See* Telephone Interview with Terry Rossignol, *supra* note 259.

[293] *See* Telephone Interview with Nancy Morrissey, *supra* note 253.

[294] *See* Telephone Interview with Terry Rossignol, *supra* note 259.

landowners seem extremely satisfied with their participation in the program. However, any Safe Harbor Agreement that falls short of its species recovery goals, no matter how successfully it meets its other goals, is simply not fulfilling its overall purpose. Thus, until the APC population improves, one can only conclude that the Texas Coastal Prairie Safe Harbor Agreement for the Attwater Prairie Chicken is a disappointment.

C. The Texas Northern Aplomado Falcon Reintroduction Safe Harbor Agreement

Of the three species this article highlights, the Texas Northern Aplomado Falcon ("AF") is perhaps the most dramatic, both in terms of aesthetics and its heroic rebound from the brink of extinction. As the rarest falcon in North America,[295] AFs are "mediagenic"[296] creatures, having been described as "a beautiful and important part of a rich wildlife community" of the American Southwest.[297] Once fairly common throughout the grasslands of the southwestern United States and Mexico, "by 1930, it had all but disappeared from the United States[.]"[298] The AF's sharp decline was blamed primarily on the loss and degradation of coastal and desert grasslands in its habitat.[299] Like RCWs, AFs suffered as a result of fire suppression.[300]

AFs grow to about eighteen inches long with wingspans of up to a yard.[301] They chiefly feed on small-to-medium sized birds, but can also eat insects, small snakes, lizards and rodents.[302] AFs favor open terrain with widely scattered trees and low-growing vegetation.[303] Current populations of AFs

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[295] SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 5.

[296] *See* PLATER ET AL., *supra* note 22, at 674 (using the term "mediagenic" to refer to such animals as the bald eagle, the polar bear, whales, and whooping cranes based on their sentimental value, remoteness from market considerations affecting most people, and drama and beauty); *see also* U.S. FISH & WILDLIFE SERV., NORTHERN APLOMADO FALCON: FACILITATING RECOVERY ON PRIVATE LANDS THROUGH THE SAFE HARBOR PROGRAM [hereinafter FWS: NORTHERN APLOMADO FALCON] (noting that the TNAF is the ninth most sought after bird by American bird watchers).

[297] THE PEREGRINE FUND, *Aplomado Falcon Restoration*, *at* http://www.peregrinefund.org/conserv_aplomado.html (last visited Mar. 6, 2001) (on file with author).

[298] FWS: NORTHERN APLOMADO FALCON, *supra* note 296.

[299] *Id.*

[300] *See* SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 5.

[301] *See* FWS: NORTHERN APLOMADO FALCON, *supra* note 296.

[302] *Id.*

[303] *Id.*

generally prefer cattle ranch land, because the grazed pastures allow for easier access to prey.[304]

The AF Safe Harbor program was established in 1996 and is unusual in that it is jointly administered by the FWS and the Peregrine Fund,[305] a nonprofit organization "working to conserve wild populations of birds of prey."[306] The arrangement was necessitated in large part by the landowners' strong distrust of the federal government.[307] The situation is highly charged and the only contact landowners have with anyone connected with the Safe Harbor program is with Peregrine Fund employees.[308] The level of suspicion is so high, in fact, that FWS employees are barred from entering participating landowners' property.[309] Currently, six landowners, all ranchers, are participating in the program.[310] Collectively, their property encompasses 1.24 million acres.[311] Like participants in the RCW Safe Harbor program, landowners here have a ninety-nine year commitment but can opt out at any time.[312]

In a predicament similar to the one faced by the APC, 97% of suitable habitat for the AF is on privately-owned land.[313] Since landowners in Texas were distrusting from the start, "future hopes of cooperation [were] dim."[314] The FWS believed the only way to gain landowner support was to establish a Safe Harbor program.[315]

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[304] *Id.*

[305] *See* Telephone Interview with Peter Jenny, *supra* note 150; *see also* Vincent Pontello & James Watkins, University of Tennessee, Knoxville, *Review of the Habitat Conservation Plan for the Northern Aplomado Falcon*, *at* http://web.utk.edu/~buehler/endspp/aplomado.html (last visited Mar. 6, 2001) (noting that it was unusual for a non-profit conservation group to be the permittee in an HCP) (on file with author).

[306] THE PEREGRINE FUND, *Working to Conserve Wild Populations of Birds of Prey*, *at* http://www.peregrinefund.org (last visited Mar. 6, 2001) (on file with author).

[307] *See* Telephone Interview with Peter Jenny, *supra* note 150; *see also* SAFE HARBOR: HELPING LANDOWNERS HELP ENDANGERED SPECIES, *supra* note 16, at 6 (noting that Texas ranchers were "scared to death" of the land-use restrictions they could incur if the federal government released AFs on their land; Pontello & Watkins, *supra* note 305 (remarking that there is "strong animosity" among landowners in Texas towards the ESA).

[308] *See* Telephone Interview with Peter Jenny, *supra* note 150.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *See* U.S. FISH & WILDLIFE SERV., HABITAT CONSERVATION PLAN FOR THE REINTRODUCTION OF THE APLOMADO FALCON INTO SOUTH TEXAS: A "SAFE HARBOR" FOR PRIVATE LANDOWNERS 4 (1996) [hereinafter APLOMADO FALCON SAFE HARBOR AGREEMENT], *available at* http://www.environmentaldefense.org/programs/Ecosystems/SafeHarbor/hinene.html (on file with author). This document is part of the actual Safe Harbor Agreement given to and signed by participating landowners. *See id.*

[313] Pontello & Watkins, *supra* note 305.

[314] *Id.*

[315] *Id.*

Landowners who choose to enter into this Safe Harbor Agreement have few obligations compared with those in the RCW and the APC programs. In fact, all the participants need to do is allow Peregrine Fund employees to enter upon their property for the release of falcons or for monitoring purposes.[316] Affirmative acts such as reforestation or brush clearing are not required.[317]

1. Aplomado Falcon population makes extraordinary turnaround

Of the three species analyzed in this article, the AF has benefited the most from its Safe Harbor program. From a baseline of zero in 1996, the AF population now totals nineteen nesting pairs,[318] which is almost a third of the sixty pairs needed for downlisting from "endangered" to "threatened."[319] Part of this success story undoubtedly lies with the high survival rate for reintroduced AFs, which was a healthy 83% in 1996.[320] Moreover, the AF's mobility[321] arguably puts it in a better position than either the RCW or APC to adapt to the loss of Safe Harbor habitat should landowners decide to take it back to the baseline. Another advantage the AF has over other species is its gregariousness: AFs do not need as much space to themselves as other falcons do, especially the Peregrine.[322] Because of this, more birds can be released into a smaller area at one time.[323] This is advantageous in two ways: it reduces cost and increases the likelihood of establishing an adult pair.[324]

2. The Safe Harbor program has transformed attitudes among landowners

Depending on whom you ask, the Safe Harbor program for the AF either seems to have made more than a few converts among Texas landowners,[325] or has failed to dispel the suspicions of a sizable group of eligible participants.[326]

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316 *See* Telephone Interview with Peter Jenny, *supra* note 150.

317 *Id.*

318 *Id.*

319 Pontello & Watkins, *supra* note 305 (citing U.S. FISH & WILDLIFE SERV., NORTHERN APLOMADO FALCON RECOVERY PLAN (1990)).

320 *See* THE PEREGRINE FUND, *Recovery of the Aplomado Falcon, 1996, at* http://www.peregrinefund.org/pdf_files/aplomado/aplo96.html (last visited Mar. 10, 2001) (on file with author). The Peregrine Fund began the captive breeding and reintroduction programs in the mid-1980s. *See* FWS: NORTHERN APLOMADO FALCON, *supra* note 296.

321 *See Data sheet for Northern aplomado falcon*, *supra* note 186 (noting that, within a few months of birth, falcon movements appear to be "exploratory," with some captive-bred falcons traveling as far as eighty five miles from their release point).

322 *See* APLOMADO FALCON SAFE HARBOR AGREEMENT, *supra* note 312, at 1.

323 *Id.*

324 *Id.*

325 *See* Bidwell, *supra* note 150.

326 Telephone Interview with Peter Jenny, Vice President, Peregrine Fund (Apr. 21, 2000).

"[W]ith millions of acres of private lands being enrolled in the plan and birds having been released on major private properties," David Bidwell, Research Associate at the National Center for Environmental Decision-Making Research asserts that the goal of landowner cooperation certainly seems to have been achieved.[327] This assessment is supported by other commentators, who conclude that since the agreement went into effect, disputes between landowners on one hand and the government and endangered species on the other have gone down.[328] As with participants enrolled in the other Safe Harbor Agreements in this article, none has yet opted out.[329]

A less rosy picture is painted by Peter Jenny, Vice President of the Peregrine Fund, who maintains the program is working, but not as well as it could be.[330] Jenny says "a real mistrust" of the federal government persists among landowners in Texas, and that getting them involved in the Safe Harbor program is sometimes like "fighting an uphill battle."[331] Jenny blames the lingering ill-will on poor implementation of the ESA by the FWS.[332] It is perhaps unsurprising that this rather pessimistic assessment of landowner satisfaction comes from someone other than a FWS employee.

Regardless, at least one landowner is happy.[333] Frank Yturria, owner of the large Yturria Ranch in south Texas,[334] is one of this Safe Harbor program's major participants.[335] Yturria, who lists his occupation as both rancher and banker, is descended from a long line of Texas Yturrias going back to the 1800s.[336] According to Cathleen Hoover, Yturria's long-time office manager, Yturria is "very satisfied" with his involvement in the Safe Harbor program and feels "very positively" about endangered species in general.[337] As further evidence of the Safe Harbor program's success, Yturria feels "fairly positively" about the ESA.[338]

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[327] *See* Bidwell, *supra* note 150.

[328] *See* Pontello & Watkins, *supra* note 305.

[329] *Id.*

[330] *See* Telephone Interview with Peter Jenny, *supra* note 326.

[331] *Id.*

[332] *Id.*

[333] The author was unable to contact any of the other five participants.

[334] *See* Telephone Interview with Cathleen Hoover, *supra* note 126. Yturria's office manager, when asked about the size of the ranch, replied that in Texas, a question of that nature is just as personal as one asking a middle-aged woman her age. *Id.*

[335] Telephone Interview with Peter Jenny, *supra* note 150.

[336] Telephone Interview with Cathleen Hoover, *supra* note 126.

[337] *Id.* (choosing "very positive" when asked how Mr. Yturria felt about endangered species in general; the other choices were "fairly positive," "neither positive nor negative," "a little negative," and "very negative"). Yturria himself was unavailable for comment.

[338] *Id.* (choosing "fairly positive" when asked how Mr. Yturria felt about the ESA; the other choices were "very positive," "neither positive nor negative," "a little negative," and "very negative").

As with John Elick, the landowner participating the APC Safe Harbor Agreement, Yturria seems to have a great deal of appreciation for nature. Yturria reportedly enjoys watching the AFs living on his land.[339] Moreover, much in the same way he allows the Peregrine Fund onto his land, Yturria lets the Cesar Kleberg Wildlife Foundation study the endangered ocelot cat on his ranch.[340] The ocelot Cat, however, is not covered by a Safe Harbor Agreement. Just as he agreed to allow a private conservation group onto his land to monitor the ESA-protected ocelot without any Safe Harbor assurances, he may very well have agreed to the Peregrine Fund's request to release and monitor the AF without Safe Harbor. In this way, Safe Harbors may be "preaching to the converted," at least with regards to landowners like Elick and Yturria.

3. No reports of non-covered listed species on Aplomado Falcon Safe Harbor land

Because the FWS is barred from entering onto any AF Safe Harbor land, only Peregrine Fund employees are in a position to know if any non-covered species have been attracted to Safe Harbor land. So far, they have not detected any,[341] a fact which makes sense considering the landowners are not engaged in any restoration or maintenance activities but are simply allowing the Peregrine Fund to release and monitor AFs. This finding must be taken with a grain of salt, however, since Peregrine Fund biologists are well aware of the sensitive relationship between landowners and the government and would keep any information about newly discovered endangered species under their hats.[342]

D. Conclusions

The three agreements evaluated thus far in this article offer but a glimpse of the whole Safe Harbor picture. Like the proverbial blind men touching the different parts of the elephant, each coming away with a different understanding of the animal, observers' opinions are shaped by what aspect of the Safe Harbor program they focus on. Nevertheless, some tentative conclusions can be drawn.

Safe Harbors can help increase a covered species' population, at least in the short term. In some circumstances, the improvement can be quite dramatic,

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[339] *Id.*

[340] *Id.*

[341] *See* Telephone Interview with Peter Jenny, *supra* note 150.

[342] *See* Telephone Interview with Peter Jenny, *supra* note 326 (acknowledging an unspoken understanding between the Peregrine Fund and Safe Harbor participants that the Peregrine Fund will not reveal to the FWS any information detrimental to the participating landowners).

as the AF Safe Harbor program has shown. In other contexts, the gain is modest, as in the North Carolina Sandhills RCW Safe Harbor Agreement. By contrast, the failure of the APC program in benefiting its covered species is largely irrelevant to this analysis. In that agreement, the only participating Safe Harbor landowner with APCs on its property is a conservation group which does not need Safe Harbor assurances to engage in activities beneficial to the APC. The unknown variable, of course, is how enduring these benefits are likely to be. The good news is that in none of the three Safe Harbor Agreements have any landowners exercised their legal right to take species. Six years, however, is not a very long time, considering these agreements can last nearly a century.

Safe Harbor advocates will likely seize upon the achievements of the AF Safe Harbor Agreement and deploy them as ammunition in their campaign to gain widespread acceptance for the program. While the biological accomplishments of the AF Safe Harbor program are certainly encouraging, a few caveats must be noted. A large part of the success of this particular program lies with the AF itself. The high survival rate of reintroduced birds, the excellent mobility of AFs, and the relatively low acreage requirements per individual bird perhaps represent a rare convergence of qualities, ones which other endangered species may not possess. If so, this is probably an unusual success story, unlikely to reoccur with other endangered species.

Perhaps more than its biological objectives, the Safe Harbor goal of converting landowners from ESA-hating outlaws into born-again conservationists seems to have been achieved. But here too, conclusions must be drawn with caution. For all the Jerry Holders and Dougald S. McCormicks who were strongly anti-ESA before the Safe Harbor program was established,[343] there are the John Elicks and Frank Yturrias who were predisposed to preserving endangered species.[344] These conservation-minded landowners may not need the generous Safe Harbor assurances that other, more recalcitrant ones may. Safe Harbor's "one-size-fits-all" assurances may, in fact, be an example of the criticism that Safe Harbors too often grant overly generous concessions to landowners.

On the other hand, perhaps it is precisely these landowners the Safe Harbor program should be targeting. Recall that a major criticism of Safe Harbors is that covered species will suffer in the long run should participants choose to return to the baseline. Consider also that two distinct types of landowners can enroll their property in a Safe Harbor Agreement: (1) those who wish to support endangered species but want Safe Harbor assurances just in case they elect to develop their property in the future; and (2) those who care little about

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[343] *See supra* notes 226-38 and accompanying text.

[344] *See supra* notes 282-87, 333-40 and accompanying text.

species conservation and participate with the full intention of taking the covered species back to the baseline as soon as their Safe Harbor obligations are fulfilled. Promoting Safe Harbors to the latter type of participants is obviously a risky venture, possibly resulting in harm to the species or financial burden to the FWS or both. Yet, it is these landowners the FWS aims to recruit. A much better strategy would be to focus on species-friendly landowners since they are the ones most inclined to manage their property for the benefit of endangered species after the Safe Harbor Agreement ends. Differentiating between the two types of landowners could be done by looking at the past conservation activities of prospective participants. Those like Frank Yturria, with a demonstrable record of environmentalism, would be given preference with an expedited "fast-track" negotiation process. Conversely, landowners who are likely to return to the baseline would find it more difficult, if not impossible, to gain Safe Harbor approval from the FWS. Those who did would have to settle for less generous assurances. Thus, landowners would see Safe Harbor participation as a privilege worth striving for.

The ideal Safe Harbor Agreement, therefore, would cover a species like the AF that is easily reintroduced, fairly mobile, and able to thrive with a limited amount of space. Additionally, prudent Safe Harbor Agreements would target landowners with an inclination towards conservation. Fortunately, both the Nene and the prospective Safe Harbor participant in Hawai'i appear to possess the qualities that make for a successful Safe Harbor program.

V. THE PROPOSED SAFE HARBOR AGREEMENT FOR THE NENE REINTRODUCTION PROGRAM ON MOLOKA'I

A. Background

1. The Nene

The Nene (*Branta sandvicensis*) is Hawai'i's state bird.[345] A close relative of the Canadian Goose, the Nene measures between twenty-two and twenty-six inches long[346] and has adapted to its environment by losing much of the webbing on its feet to better navigate its mostly rocky habitat.[347] In addition to the rugged lava fields on the Big Island (the island of Hawai'i),[348] the Nene

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[345] *See* HAWAII AUDUBON SOC'Y, HAWAII'S BIRDS 49 (1997). The Nene is also known as the Hawaiian Goose. *Id.*

[346] *Id.*

[347] *See* 50STATES.COM, *State Bird of Hawai'i* [hereinafter *State Bird of Hawai'i*], *at* http://www.50states.com/bird/nene.htm (last visited Mar. 6, 2001) (on file with author).

[348] U.S. FISH AND WILDLIFE SERV., *Hawaiian Goose/Branta sandvicensis/Nene* [hereinafter *Hawaiian Goose*], *at* http://pacific.fws.gov/pacific/wesa/nene.html (last visited Apr. 22, 2000)

can also inhabit scrublands, grasslands, sparsely vegetated slopes, and open lowland country.[349] Some have even been found on golf courses.[350] Though it can wander around quite a bit foraging for food,[351] the Nene is incapable of migrating[352] due to its modified wing structure, which has evolved to better enable shorter flights.[353] The Nene is generally a social bird, joining in flocks in the winter, though it turns territorial during nesting season.[354]

Historically found on all main Hawaiian Islands, the Nene now inhabits only the Big Island, Maui, and Kaua'i,[355] the latter two populations being products of reintroduction programs.[356] The Nene population is believed to have numbered about 25,000 birds on the Big Island before the arrival of Europeans in the late 1700s.[357] Their decline is blamed on predation by introduced animals such as rats, dogs, cats, mongooses, and pigs.[358] The problem was possibly exacerbated by the introduction of alien plants, which crowded out the native ones and provided a less nutritious diet for the Nene.[359] After reaching a low of thirty birds in 1951,[360] the Nene population has since rebounded to a combined wild population of about 1,000.[361] This dramatic increase was a result of captive breeding and reintroduction efforts by both public and private organizations such as the State of Hawai'i, the National Park Service, the Wildfowl Trust in England, and the Peregrine Fund.[362] Biologists have also attributed the Nene's population improvement to its adaptability to a variety of terrain[363] and its good sociability, which allow the

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(on file with author). Although the Nene tends to inhabit rocky terrain, lava fields are probably not the Nene's preferred habitat but instead the only place they have survived. *Id.*

[349] *Id.*

[350] *Id.*

[351] *Id.*; *see also* Altonn, *supra* note 21, at A3 (quoting Michael Buck, State Forestry and Wildlife Division Administrator involved in negotiating the Pu'u O Hoku Ranch Safe Harbor Agreement for the Nene, as saying that the ranch's neighbors should get involved in the program since "the birds move around").

[352] *See* THE ZOOLOGICAL SOC'Y OF PHILA., *Hawaiian Goose or NeNe* [hereinafter *Hawaiian Goose or NeNe*], *at* http://www.phillyzoo.org/pz0081.htm (last visited Mar. 6, 2001) (on file with author).

[353] *See State Bird of Hawai'i*, *supra* note 347.

[354] *See Hawaiian Goose or NeNe*, *supra* note 352.

[355] *See Hawaiian Goose*, *supra* note 348.

[356] *Id.*

[357] *Id.*

[358] *Id.*

[359] *Id.*

[360] *Id.*

[361] *See* Altonn, *supra* note 21, at A3. The breakdown of Nene population by island is as follows: 400 on the Big Island, 260 on Maui, and 340 on Kaua'i. *Id.*

[362] *See Hawaiian Goose*, *supra* note 348.

[363] *See* ALOHA FROM HAWAI'I, *The Nene, or Hawaiian Goose (Branta sandwicensis)*, *at* http://www.aloha-hawaii.com/a_nene.shtml (last visited Mar. 6, 2001) (on file with author).

Nene to be released on a wider range of habitat, both in terms of type and size, than it otherwise would be.[364]

2. *The proposed Safe Harbor Agreement*

The reintroduction of the Nene to Moloka'i is a joint endeavor among the State of Hawai'i, the FWS, and Pu'u O Hoku Ranch ("POHR"),[365] a privately-owned enterprise whose owner approached the State offering her land for Nene reintroduction.[366] As with its counterparts on the mainland, POHR does not want added restrictions on its land as a result of its good deeds.[367] Thus, POHR indicated that before it would agree to participate in any Nene reintroduction program, the State would need to provide Safe Harbor protection.[368] The goal is to eventually have seventy-five Nene on Pu'u O Hoku Ranch and 200 for the whole of Moloka'i.[369]

The POHR agreement, if approved, would be the first application of a 1997 Hawai'i state law, Hawai'i Revised Statutes ("H.R.S.") § 195D-22, authorizing Safe Harbors.[370] Largely identical to the federal Safe Harbor program, the state law nevertheless contains some important differences that could make it a much harder sell to prospective participants. Unlike the agreements profiled in Part IV of this article, which do not involve their respective state governments, Hawai'i's Safe Harbor Agreements require state approval.[371] Before granting approval, the State must hold a public hearing on the island affected by the proposed Safe Harbor Agreement, and the State's Board of Land and Natural Resources must vote to approve any agreement by a two-thirds

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An estimated 1,000 Nene live outside of Hawai'i in zoos and private collections. *Id.* A small group of Nene has even established itself at St. James Park in front of Buckingham palace in London. *Id.*

[364] *Id.* (noting that the Nene "rapidly adapted" to grassy, lowland habitat and providing a map of the small area of land on Kaua'i's Na Pali Coast on which reintroduced Nene have established themselves).

[365] *See Draft Safe Harbor Agreement (SHA) and Incidental Take Permit (ITP) for Nene at Pu'u O Hoku Ranch*, THE ENVIRONMENTAL NOTICE (Office of Environmental Quality Control, Honolulu, Haw.) Feb. 8, 2000, at 19 [hereinafter *Draft Safe Harbor Agreement for the Nene*].

[366] Michael Buck, Presentation to Wildlife and Natural Resources Law Class at the William S. Richardson School of Law, University of Hawai'i at Manoa (Feb. 10, 2000) [hereinafter Michael Buck Presentation]. Mr. Buck is the State Forestry and Wildlife Division Administrator involved in negotiating the Pu'u O Hoku Ranch Safe Harbor Agreement for the Nene.

[367] *Id.*

[368] *Id.*

[369] *See Draft Safe Harbor Agreement for the Nene*, *supra* note 365, at 19.

[370] *See* Altonn, *supra* note 21, at A3.

[371] HAW. REV. STAT. § 195D-22(a) (1993 & Supp. 2000).

majority of the Board's authorized membership.[372] Some other major differences include, but are not limited to: (1) requirements that incidental takes be based on the "best scientific and other reliable data"[373] (not specified for federal Safe Harbor program); (2) any habitat creation, restoration, maintenance, or improvement continue for at least five years[374] (federal policy only requires "sufficient duration");[375] (3) any incidental take occur only in the habitat created, restored, maintained, or improved[376] (federal policy only mandates that the baseline be maintained);[377] and (4) the State shall "suspend or rescind"[378] any Safe Harbor Agreement if the state runs out of funds[379] (no such right for the government under federal law). The role of the FWS in the POHR Safe Harbor negotiations is to review the state agreement to ensure consistency with federal policy.[380]

While the extra hoops the State makes applicants jump through may initially seem prudent, especially in endangered-species rich Hawai'i, their benefits to covered species are probably negligible. It probably makes little difference to the recovery of a covered species whether it is the old or new habitat that is destroyed. It really does not matter much that Safe Harbor obligations in Hawai'i must last for at least five years when landowners on the mainland routinely sign ninety-nine year agreements. Instead of improving upon the Federal Safe Harbor model, these added conditions may needlessly scare off landowners who would otherwise have entered into a Safe Harbor Agreement. Under the proposed agreement, POHR is obligated for seven years to (1) maintain open, short grass habitat; (2) allow and aid in the release of Nene by assisting the Department of Land and Natural Resources ("DLNR") in establishing and maintaining Nene release sites; and (3) assist DLNR in controlling predators around breeding and release sites[381] on its 14,000 acre ranch.[382]

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[372] *Id.*

[373] *Id.* § 195D-22(b).

[374] *Id.* § 195D-22(b)(3).

[375] *See* Announcement of Final Safe Harbor Policy, 64 Fed. Reg. 32,717, 32,719 (June 17, 1999).

[376] *Id.* § 195D-22(b)(6).

[377] *See* Announcement of Final Safe Harbor Policy, 64 Fed. Reg. at 32,719.

[378] *Id.* § 195D-22(c).

[379] *Id.* § 195D-22(c)(2).

[380] *See* Altonn, *supra* note 21, at A3 (citing Gina Shultz, Program Leader: Habitat Conservation Plans, Safe Harbor/Candidate Conservation Agreements, Recovery Permits-U.S. Fish and Wildlife Service, Pacific (Region 1), Ecological Services).

[381] *See Draft Safe Harbor Agreement for the Nene*, *supra* note 365, at 19.

[382] *See* PU'U O HOKU RANCH, *The Lodge at Pu'u O Hoku Ranch*, *at* http://puuohoku.com (last visited Mar. 6, 2001) (on file with author).

B. Analysis of the Pu'u O Hoku Safe Harbor Agreement

Based on the three agreements considered in this comment, one can conclude that Safe Harbor Agreements may be particularly worthwhile for species with traits like the Aplomado Falcon, i.e., those with high survival rates when reintroduced into the wild, good mobility, and a level of gregariousness such that it can thrive with others of its species nearby. In addition to a suitable species, a sensible Safe Harbor Agreement with long-term conservation goals requires a participating landowner that does not see Safe Harbor participation simply as a way to evade ESA constraints.

Applying these lessons to Hawai'i and the Nene produces guarded optimism. Like the AF, the Nene survives well when reintroduced into the wild.[383] This has repeatedly been the case, as the successful reintroductions on Maui and Kaua'i have shown. As with the AF, the Nene is receptive to being in close proximity to others of its species, creating territory in breeding season but joining in flocks in the winter. Mobility is the biggest stumbling block. Nene geese do not migrate nor do they have anywhere to go should their future Safe Harbor habitat be destroyed.

Likewise, POHR appears to be the type of landowner best suited to the Safe Harbor program. It has volunteered its land for Nene reintroduction for conservation, not self-serving reasons.[384] Additionally, POHR has stated it does not intend to return the Nene population to the baseline after its seven-year obligations end.[385]

Looked at as a whole, the Safe Harbor Agreement for the Nene on Moloka'i should proceed, but with fewer assurances to the landowner than we have seen nationally. One idea would be for the state to set a baseline above zero. This would allow POHR to develop the land, but not to the point where it will result in a total take of the Nene or an expensive relocation effort by the state. The draft Safe Harbor Agreement attempts to address this potential problem by indicating a take back to the baseline is not expected to occur.[386] This seems more like wishful thinking than good Safe Harbor policy. If POHR ends up being the only Safe Harbor participant on Moloka'i and it decides to exercise its take option, the State could claim it lacks the funds to relocate the Nene and rescind the agreement under H.R.S. Section 195D-22(c)(2).[387] This would only cause trauma for the Nene, embarrassment for the State, and resentment among landowners.

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[383] *See Hawaiian Goose or NeNe*, *supra* note 352 (calling the Nene a "[c]onservation [s]uccess [s]tory" because of its captive-bred rebound from the brink of extinction).

[384] *See* Michael Buck Presentation, *supra* note 366.

[385] *Id.*

[386] *See Draft Safe Harbor Agreement for the Nene*, *supra* note 365, at 19.

[387] HAW. REV. STAT. § 195D-22(c)(2) (1998).

Another possibility would be for the State to insist that, while POHR can be developed in the future, it can only be done on a parcel by parcel basis. This would allow the Nene to move or be moved to the area of the ranch not slated for development. This solution is a feasible one since the Nene are fairly adaptable to various terrain when not nesting. In any case, it is clear the State should not be hasty and simply jump on the Safe Harbor bandwagon. Rather, Hawai'i should approach the Safe Harbor concept cautiously and implement each agreement on a case-by-case basis, taking into account the covered species' needs, landowner motives, and Hawai'i's unique geography.

VI. CONCLUSION

The ESA is the United States' premier law for species protection. Although it has been reasonably successful at preventing the extinction of threatened and endangered species, critics condemn the ESA for unfairly burdening property owners with its inflexible restrictions on private land. True or not, the ESA's vocal opposition has convinced the government that the ESA needed to be more flexible. The government's answer was the Safe Harbor Agreement.

The goal of the Safe Harbor program is to appease two seemingly disparate masters – endangered species and private landowners. It attempts to do so by exempting landowners from additional ESA restrictions should they engage in activities beneficial to endangered species. Environmentalists, however, worry that Safe Harbor Agreements shortchange endangered species in the long run by allowing participating landowners to "take" the additional species their activities create. With the Safe Harbor program only six years old, conclusions are hard to draw. This article looked at three of the first Safe Harbor Agreements to assess the merits of the program and apply the lessons learned to Hawai'i's first Safe Harbor Agreement for the endangered Nene on Moloka'i.

Safe Harbor programs should not be used simply to gain the cooperation of ESA-adverse landowners or as a way of quelling a perceived hostility in Congress towards the ESA. Nor should they be employed after a landowner has already taken endangered species under a HCP incidental take permit. To do so would invite purposeful lowering of the baseline prior to participating in a Safe Harbor program.

Safe Harbor Agreements can, however, be beneficial in narrowly defined situations. The covered species should have good mobility and adaptability in case it needs to move or be relocated to another area because a participating landowner has opted to return the land to baseline conditions. Covered species in reintroduction programs should have high survival rates when reintroduced into the wild. They should also be able to live in relatively close proximity to others of its species. This allows for more frequent releases in smaller areas.

In addition, participating landowners should not be taking advantage of Safe Harbors to thwart the ESA's conservation goals.

The Nene possesses enough of these qualities to make it an encouraging Safe Harbor candidate. It lacks the mobility to fly interisland, but does well in reintroduction programs and is generally a social bird. Likewise, the participating landowner is predisposed to conservation measures and is on record as saying it has no plans to return to the baseline. In light of these factors, Hawai'i's first Safe Harbor Agreement should go forward, but with additional safeguards from the landowner to account for the limited available habitat on Moloka'i and the Nene's particular needs.

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VAWA 2000's Retention of the "Extreme Hardship" Standard for Battered Women in Cancellation of Removal Cases: Not Your Typical Deportation Case

I. INTRODUCTION

"He always humiliated me in front of our friends. During every fight he would throw heavy objects at me, chase me with kitchen knives, choke me, kick me, slap me, and even while driving he would keep hitting me for apparently no reason. He also abused me sexually all the time . . . . The night I left him, it was the worst beating . . . . I knew if I stayed here, next time I would be dead."[1]
"He said, 'If it's not for me, you couldn't come to the U.S. You should be thankful.'"[2]

Immigrating to the United States can be a difficult path to travel. The language, the culture, and the people can be unfamiliar and frightening, the result being isolation and despair for the immigrant. When the only person you know in your new country is also your tormentor, your oppressor, your prison guard, and your husband,[3] the experience can be overwhelming. This is particularly true when the laws of your adopted country purport to help you, but in fact add to your burden.

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[1] Bernice Yeung, *The Land of Blood & Money; Foreign Workers Coming into the Country for High-paying Tech Jobs Often Bring Wives with Them. When These Women are Beaten and Abused, They Have Nowhere to Run*, SF WKLY., May 3, 2000, LEXIS, News Group File.

[2] *Id.*

[3] Although this Comment identifies the victims of domestic violence as "women" and the abusers as "men," this usage is for convenience primarily and is not meant to imply that domestic violence is perpetrated solely by men against women. However, this is the most common abuser/victim combination. In domestic violence situations, batterers are overwhelmingly male and victims are predominantly female. Karin Wang, *Battered Asian American Women: Community Responses from the Battered Women's Movement and the Asian American Community*, 3 ASIAN L.J. 151, 154 n.14 (1996). "In 90% of cases where a spouse or ex-spouse was assaulted, the abuser was male." *Id.* Although women are not the sole beneficiaries of the Violence Against Women Act of 1994's provisions, women are in the vast majority of battered aliens who seek relief under VAWA. Maurice Goldman, *The Violence Against Women Act: Meeting Its Goal in Protecting Battered Immigrant Women?*, 37 FAM. & CONCILIATION CTS. REV. 375, 375 n.1 (1999). Relationships in which the abuser is female and the victim is male, however, are beyond the scope of this Comment. This Comment also does not address same-gender battery, as currently same-gender marriage does not confer spouse status under the Immigration and Naturalization Act (INA) § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (amended 2000), which defines "immediate relatives" allowable under family-sponsorship. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).

Prior to the Violence Against Women Act of 1994 ("VAWA 1994"),[4] the U.S. immigration policy clashed violently with the lives of many battered immigrant women. In this pre-VAWA world, the Immigration and Naturalization Act ("INA")[5] required the cooperation of the citizen spouse in order to secure lawful status for the alien[6] spouse.[7] This cooperation, however, was not always forthcoming. Some citizen or lawful permanent resident spouses employed this requirement as another weapon against their alien spouses. Instead of providing help securing continuing status, some husbands threatened their immigrant wives with deportation in an effort to control the alien spouse. Unfortunately, this was not an idle threat. Women in the United States illegally who dared to leave their husbands or refused to submit to their husband's wishes were reported to the Immigration and Naturalization Service ("INS") by their abusive husbands, and placed into deportation proceedings. Given the choice between their own safety and the threat of deportation, many women remained with their husbands, hoping that the situation would improve.

With the 1994 passage of VAWA 1994, Congress began revamping the U.S. immigration policy to provide protections for battered immigrant women. Among other provisions, VAWA 1994 allowed a waiver for the requirement that the citizen or lawful permanent resident petition for the alien spouse by allowing some battered immigrants to self-petition for legal permanent resident status, eliminating the need for cooperation from their abusers.[8] Additionally, VAWA 1994 provided for modified, less stringent, requirements for cancellation of removal, a discretionary relief granted to those for whom removal (or deportation) would be too heavy a burden.[9] There were, however, strings attached to these less stringent allowances for battered spouses. In order to qualify for the special self-petitioning or cancellation of removal

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[4] VAWA is a part of the 1994 Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8 U.S.C., 16 U.S.C., 28 U.S.C., and 42 U.S.C.).

[5] The INA has been codified as title 8 of the United States Code (8 U.S.C.). STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY xv (2d ed. 1997). "The INA and 8 U.S.C., however, use different sequences of section numbers, and there is no systematic conversion formula." *Id.* The convention is to cite to the INA, primarily because Immigration and Naturalization Service ("INS") regulations, as published in the Code of Federal Regulations, correspond with the INA section numbers that they interpret.

[6] The INA defines an alien as "any person not a citizen or national of the United States." Immigration and Naturalization Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2000) (amended 2000).

[7] *See* discussion *infra* section III.B.

[8] *See* INA § 204(a)(1), 8 U.S.C. § 1154(a)(1) (2000) (amended 2000); *see also* discussion *infra* section III.B.

[9] *See* INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2000) (amended 2000).

remedies, a number of evidentiary requirements needed to be fulfilled. Among these was the requirement that the petitioner show "extreme hardship" to herself or her children should she be removed to her native country.[10] Although this showing was required for those requesting cancellation of removal, it was not required when a spouse petitioned for his alien wife.

Problems with the new procedures soon began to emerge. While VAWA 1994 initially brought the hope that the immigration laws would no longer allow abusers to hold immigrant women hostage, the intervention of time, subsequent laws, and the interpretations of VAWA 1994 requirements took some of the shine from VAWA 1994. Two years after VAWA 1994 was passed, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"),[11] which curtailed some of VAWA 1994's remedies. Additionally, some provisions of VAWA 1994 expired,[12] removing certain vital protections and programs. Furthermore, the enforcement and implementation of VAWA 1994 and IIRIRA by the INS narrowed the

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[10] "Extreme hardship" is one of the elements of proof required in order for a battered spouse or child to obtain relief of cancellation of removal. This threshold of proof is very high, and it is often the most difficult element to prove. Interview with Bow Mun Chin, Staff Attorney of Na Loio, Immigrant Rights and Public Interest Legal Center, in Honolulu, Haw. (Apr. 19, 2000) [hereinafter Chin Interview].

[11] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified in scattered sections of 8 U.S.C.) [hereinafter IIRIRA]. Most of the provisions of IIRIRA became effective on April 1, 1997. Francesco Isgro, *New immigration law raises many questions and uncertain future for aliens residing illegally in the United States*, MIGRATION WORLD MAG., Mar. 13, 1997, at 35, 1997 WL 10938857. Of particular concern to undocumented aliens was whether to return to their native countries. Before IIRIRA tightened immigration controls, an illegal alien who lived in the United States had the opportunity to attain legal status; under IIRIRA, however, stricter controls on aliens illegally in the United States make continuing illegal residence an increasing barrier to obtaining legal status. *Id.*

[12] Shawn Foster, *Law's Demise Puts Immigrant Wives at Risk; Non-citizen victims of spousal abuse may lose sources of help*, SALT LAKE TRIB., Jan. 25, 1999, at B1, 1999 WL 3344058; *see also* Jan Erickson, *VAWA Programs to Expire Without Re-Authorization*, NAT'L NOW TIMES, Oct. 1, 1999, 1999 WL 16986195. One of the expired provisions allowed some abused women to stay in the United States while they applied for a green card. Gov't Press Release, Federal Document Clearing House, Schakowsky to Introduce Bill to Expand Rights and Protect Immigrants from Domestic Abuse (Oct. 11, 1999), 1999 WL 28845810. After VAWA re-authorization hearings in the Senate Judiciary Committee were canceled twice, U.S. Representative Jan Schakowsky (D-IL) introduced the Battered Immigrant Women Protection Act of 1999, a bipartisan bill aimed at expanding the protections available for battered immigrant women. *Id.* This bill proposed to continue funding of shelters and domestic violence programs, make improvements to VAWA 1994, and soften the impact of the 1996 changes to VAWA 1994. Yeung, *supra* note 1. Later, this bill formed the basis for a provision in the Trafficking Victims Protection Act of 2000 ("VAWA 2000"), Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C., 8 U.S.C., 18 U.S.C., 42 U.S.C., and 20 U.S.C.) (passed in Oct. 2000).

protections available and erected unnecessary obstacles that contravened the intent of VAWA.

Because of these shortcomings, Congress began to look for ways to remedy these problems. In October of 2000, Congress passed the Trafficking Victims Protection Act of 2000 ("VAWA 2000")[13] which included the Battered Immigrant Women's Protection Act. This Act not only reauthorized funding for VAWA 1994 programs,[14] but also filled in gaps in the law for some battered women who were ineligible for relief. VAWA 2000 loosened the requirements for both self-petitioners and for those seeking cancellation of removal. VAWA 2000, however, retained the most difficult element for cancellation of removal cases: the "extreme hardship" requirement.[15]

The extreme hardship requirement is tedious and represents an extremely high threshold. Originally a standard used in suspension of deportation cases,[16] the requisite showing of extreme hardship was cut and pasted into the original VAWA requirements, and remains in the cancellation of removal requirements even after the passage of VAWA 2000. With the use of the standard comes a loaded judicial interpretation more suited to cases of suspension of deportation where no abuse has taken place. As it currently stands, the hardship that must be demonstrated by the alien is "a degree of hardship beyond that typically associated with deportation."[17] The purpose of the hardship requirement in suspension of deportation cases is to allow relief when deportation would be too great a burden on the alien.[18] Suspension is an exceptional remedy only available for "unique extenuating circumstances."[19] Unfortunately, many hardships experienced by battered immigrants are not unique, although the circumstances are usually beyond those typically associated with deportation.

Due to the inappropriate use of the settled interpretation of extreme hardship in cases of abuse, following the passage of VAWA 1994, the INS promulgated additional factors ("VAWA factors") to be considered in abuse cases.[20] To

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[13] Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 22 U.S.C., 8 U.S.C., 18 U.S.C., 42 U.S.C., and 20 U.S.C.).

[14] *See* 146 CONG. REC. S10,190 (daily ed. Oct. 11, 2000) (statement of Sen. Hatch).

[15] *See* discussion *infra* section IV. B.

[16] *See* discussion *infra* section V. A. IIRIRA renamed the originally titled "suspension of deportation." The remedy is now called "cancellation of removal."

[17] 8 C.F.R. § 240.58(b) (2000).

[18] *See In re* L-O-G, File A28-862 064, 1996 BIA LEXIS 18, at *7 (BIA Interim Decision 3281, June 14, 1996) (noting the remedial intent of the extreme hardship standard); *see also* note 235 and accompanying text.

[19] Ramirez-Durazo v. INS, 794 F.2d 491, 499 (9th Cir. 1986).

[20] Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061 (interim rule proposed Mar. 26, 1996) (to be codified at 8 C.F.R. pts. 103, 204, 206 and 216); Suspension of Deportation and Special Rule Cancellation of Removal for Certain

some degree, these new factors were more tailored for those seeking relief under VAWA. Layering new factors onto the standard, however, does not adequately overcome the established case law, nor the requirement that the hardship be beyond that typically associated with deportation. Retaining the extreme hardship requirement, even though modified by the VAWA factors, is inappropriate for several reasons. First, the term itself is still somewhat ambiguous.[21] Both the courts and Congress have grappled with the term, and have reached very different definitions. Due to this ambiguity, the INS, and reviewing courts have read requirements into the showing which are neither in the language of the statute, nor within the legislative history.[22] Second, the repercussions of the abuse itself, such as the physical and emotional scars, along with the social and economic consequences of returning to the native country, are difficult to evaluate under the settled judicial interpretation of extreme hardship. Third, although the promulgation of the VAWA factors allows a more tailored description of extreme hardship on the alien or her children, she must still demonstrate that her hardship is beyond that typically associated with deportation. Extreme hardship for battered immigrants facing removal is qualitatively distinct from that of other suspension of deportation applicants. Therefore, due to the conflict between the settled judicial interpretation of "extreme hardship" in suspension of deportation cases and the need for a more sensitive and compassionate view of the remedy intended by

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Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 64 Fed. Reg. 27,856, 27,864 (proposed May 21, 1999) (to be codified at 8 CF.R. pts. 103, 208, 240, 246, 274a, 299) [hereinafter Suspension of Deportation II].

[21] *See* Memorandum from Paul W. Virtue, General Counsel, Immigration and Naturalization Service, to Terrence M. O'Reilly, Director, Administrative Appeals Office (HQAAO) (Oct. 16, 1998) *reprinted in* 76 No. 4 INTERPRETER RELEASES 162, 167 (1999) (on file with author) [hereinafter Virtue Memorandum] ("There is no 'scorecard' that can be provided to determine whether a particular alien's removal from the United States would lead to extreme hardship.").

[22] One such "requirement" is the "uniqueness" requirement. For example, the Ninth Circuit has read into the statute a requirement that the alien seeking relief show "unique or extenuating circumstances." *See, e.g.*, Ordonez v. INS, 137 F.3d 1120, 1123 (9th Cir. 1998) ("Suspension of deportation is an 'exceptional' remedy, only available for 'unique extenuating circumstances.'"); Ramirez-Durazo v. INS, 794 F.2d 491, 499 (9th Cir. 1986) (finding the case "devoid of those unique extenuating circumstances necessary to demonstrate 'extreme hardship' consistent with the 'exceptional nature of the suspension remedy'"). The basis of this new threshold is not the statute, but the Supreme Court's language in *INS v. Jong Ha Wang*, 450 U.S. 139, 145 (1981) (referring to the "exceptional nature" of the suspension remedy). *See Ramirez-Durazo*, 794 F.2d at 499. Other courts have not extended *Wang* this far. *See In re* L-O-G, File A28-862 064, 1996 BIA LEXIS 18, at *13 (BIA Interim Decision 3281, June 14, 1996) "[W]e do not accept the Service contention in this case that the motion should fail because no 'unique or extenuating circumstances' have been shown. The word 'extreme' should not be equated with 'unique,' and hardship for suspension purposes need not be unique to be extreme.").

VAWA, the requirement of an "extreme hardship" showing for battered immigrants seeking cancellation of removal should be eliminated or revised. It is this inappropriate use of an old standard in a new and distinctly different context that is the subject of this paper.

Part II introduces the issue of domestic violence and explores the reasons battered immigrant women require special consideration. Part III looks at VAWA 1994, the changes made to the immigration law, and subsequent successes and shortcomings. Part IV examines VAWA 2000's removal of the extreme hardship requirement for self-petitioners and the retention of the standard in the amended cancellation of removal requirements. Part V introduces the "extreme hardship" standard, the legislative history of its use in suspension of deportation cases, and settled judicial interpretation that has been inappropriately grafted onto VAWA 1994, and retained in VAWA 2000. Part VI illustrates the more substantial hardships faced by a battered immigrant than a typical cancellation of removal applicant, through select factors pertaining to "extreme hardship" under the traditional view and under the new VAWA formulation. Examples of potential hardships sustained by battered immigrants being returned to South Korea,[23] the Philippines,[24] Japan,[25] and Malaysia,[26] four countries from which an increasing number of immigrants come to the United States,[27] furnish an illustration of what can await a battered alien when she returns home. Part VII concludes by arguing that the "extreme hardship" standard is inappropriately required for battered immigrants. Requiring a battered immigrant to show that her hardship would be more extreme than the next battered immigrant spouse not only fails to take into consideration the complexity of legal and cultural issues facing a removed immigrant, but also minimizes the impact that domestic violence has upon those affected. Because a battered immigrant faces hardships that are unique

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[23] In 1998, 14,268 Korean-born immigrants were admitted to the United States. U.S. DEP'T OF JUST., ANN. REP.: LEGAL IMMIGRATION, FISCAL YEAR 1998 8 (1998) [hereinafter ANNUAL REPORT].

[24] In 1998, 34,466 immigrants born in the Philippines were admitted to the United States. *Id.*

[25] A total of 219,696 immigrants were admitted to the United States in 1998 from Asia (this total is undifferentiated). *Id.*

[26] *See supra* note 25.

[27] "Foreign-born Asians and Pacific Islanders increased 39.2 percent, from 4.6 million in 1990 to an estimated 6.4 million in 1998. They now outnumber the 4.1 million native Asians and Pacific Islanders by 2.3 million. Foreign-born Hispanics, who can be of any race, grew 34.1 percent from 8 million in 1990 to an estimated 10.7 million in 1998." Russell Ben-Ali, *Census: Foreign-born residents are outpacing native population*, STAR-LEDGER (Newark, N.J.), Sept. 17, 1999, at 012, 1999 WL 24199711. A recent Census Bureau report confirmed that currently, immigrants to the United States come mainly from Latin America (51% in 1997) and Asia (27% in the same period). Robert Samuelson, *U.S. Needs More Educated Immigrants*, DETROIT NEWS, May 5, 2000, at 13.

and atypical of most aliens facing deportation, Congress should craft a new standard for determining hardship, without the settled judicial interpretation the current "extreme hardship" standard brings.

II. SPECIAL PROBLEMS FACED BY BATTERED IMMIGRANT WOMEN

Until recently, immigration law made large and, in the case of marriages plagued by domestic abuse, unfounded assumptions. These laws assumed that *first*, there was cooperation and general good will between all spouses and *second*, that a citizen or lawful permanent resident spouse in a legitimate marriage would help the alien spouse to attain legal status within the United States. Immigration laws were based upon these assumptions. When there was domestic violence in a relationship, however, these laws were used as leverage and tools of control by abusive spouses. Battered immigrant women were often forced to choose between deportation and abuse. Leaving an abusive relationship is difficult enough without the added complication immigration status brings. For undocumented battered spouses, leaving the relationship meant deportation. Staying in the relationship could mean that deportation was only a phone call away.

The hardship associated with abusive relationships is much greater for immigrant women, who often must deal with such issues as language barriers, isolation from friends and family, precarious immigration status, religious and cultural upbringing, lack of knowledge about the U.S. legal system, and fears about whether they will be able to support themselves or their children without their abusers' help. Further, leaving the relationship, and risking deportation, adds to the incentive to stay. In this way, the assumption of marital harmony in immigration law and policy had devastating consequences for battered immigrant women.

A. The Domestic Violence Context

The influx of alien spouses into the United States every year is no small part of the overall immigrant population. U.S. citizens and permanent residents marry aliens every year, and then seek a way for the alien spouse to legally come to or remain in the United States. In 1998, 151,172 spouses of U.S. citizens immigrated to the United States under the family-sponsored preference provisions.[28] Among those in this class of immigrants are mail-order brides found through international match-making organizations,[29] the alien wives of

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[28] ANNUAL REPORT, *supra* note 23, at 7.

[29] The INS has recently expressed concern over the burgeoning mail-order bride industry. Immigration and Naturalization Service, *International Matchmaking Organizations: A Report to Congress*, http://www.ins.usdoj.gov/graphics/aboutins/repsstudies/mobrept.html (last

U.S. servicemen stationed overseas,[30] and spouses chosen by citizens or lawful permanent residents who simply prefer foreign-born spouses,[31] or permanent residents who may prefer spouses from their native countries.[32]

With this wave of immigration has come problems of domestic violence. Some of the violence is brought here from the native countries of the immigrants. Some of it began here due to the pressures of immigrating. And some of the violence is simply a continuing U.S. problem finding an immigrant target. Although the rate of domestic violence perpetrated on immigrant spouses is unknown, it is estimated that there are four million American women being battered each year by their husbands or partners.[33] The rate within the immigrant community is doubtlessly underreported.[34]

1. Domestic violence

Domestic violence is an enormous and often misunderstood problem both in the United States, and in other countries. Within the United States, domestic violence is "an unacknowledged epidemic."[35] Every fifteen seconds in the United States, a woman is battered by someone who tells her he loves her.[36] Far from being a uniquely American problem, the violence extends past

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modified Jan. 21, 1999) (recognizing "a potentially vulnerable subset of the U.S. population [are] immigrant women who marry U.S. citizens or lawful permanent residents as a result of meeting through an international matchmaking organization (IMO).").

[30] *See* Ross W. Branstetter, Captain, *A Legal Assistance Symposium—Section I Family Law: Military Constraints upon Marriages of Service Members Overseas, Or, If the Army Had Wanted You To Have A Wife . . .*, 102 MIL. L. REV. 5, 5 (1983) ("As many as one out of every seven single U.S. soldiers stationed in the Republic of Korea, for example, marries a Korean national during a tour in that country.").

[31] "Between 1972 and 1979, 366,691 foreign-born wives of U.S. citizens entered the United States as immigrants, compared to 224,691 foreign-born husbands." Joan Fitzpatrick, *The Gender Dimension Of U.S. Immigration Policy*, 9 YALE J.L. & FEMINISM 23, 24 n.7 (1997) (quoting Marion F. Houstoun et al., *Female Predominance in Immigration to the United States Since 1930: A First Look*, 18 INT'L MIGRATION REV. 908, 924 (1984)).

[32] *See id.* (commenting that the wives of lawful permanent residents constitutes two-thirds of the entrants between 1972 and 1979).

[33] *See* Wang, *supra* note 3, at 156.

[34] *See generally* Linda Kelly, *Domestic Violence Survivors: Surviving the Beatings Of 1996*, 11 GEO. IMMIGR. L.J. 303 (1997) (discussing barriers to reporting domestic violence by immigrant women); K. J. WILSON, WHEN VIOLENCE BEGINS AT HOME: A COMPREHENSIVE GUIDE TO UNDERSTANDING AND ENDING DOMESTIC ABUSE 101-33 (1997) (discussing ethnic and cultural barriers to escaping violent relationships).

[35] Tanya Baham, *Suffering in Silence: The Global Epidemic of Domestic Violence*, MINN. DAILY, June 4, 1999, 1999 WL 18803996 (quoting Donna Shalala, Secretary of the U.S. Department of Health and Human Services). "Annually about 1,500 to 3,000 women in America are killed by their partners or ex-partners." *Id.*

[36] WILSON, *supra* note 34, at 8.

our borders. "It's the one universal issue. It's something every woman in the world has in common with every other woman."[37]

Current research identifies the motivation of the perpetrator as an attempt to control the victim.[38] Among other tactics the perpetrator uses to gain control are: violence, isolation from friends and family,[39] economic abuse,[40] sexual abuse, using the children,[41] coercion and threats,[42] using male privilege,[43] intimidation,[44] emotional abuse,[45] and minimizing, denying and blaming.[46] These methods are similar to those used to coerce hostages, political prisoners, and survivors of concentration camps.[47] Additionally, recent research has indicated that batterers batter because they can, and because it works. When there are consequences, this behavior stops.[48]

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[37] Baham, *supra* note 35 (quoting Marsha Freeman, Director of the International Women's Rights Action Watch project).

[38] WILSON, *supra* note 34, at 17; *see also* Carol Lee Costa-Crowell & Ric Oliveira, *Immigrants often face difficult task of assimilation*, STANDARD TIMES, http://www.s-t.com/projects/DomVio/immigrantsofen.html (last visited Feb. 22, 2000) ("[Many immigrant males] are victims of their own conditioning. They value dominance and power. In their minds they need that power to come across as a real man.").

[39] This includes "[c]ontrolling what she does, who she sees and talks to, what she reads, where she goes . . . limiting her outside involvement . . . using jealousy to justify actions." Domestic Violence Clearinghouse & Legal Hotline, *Section Two: System Response*, *in* DOMESTIC VIOLENCE LEGAL HOTLINE TRAINING (Domestic Abuse Intervention Project Diagram) (on file with author).

[40] This includes "[p]reventing her from getting or keeping a job . . . making her ask for money; giving her an allowance . . . taking her money; not letting her know about or have access to family income." *Id.*

[41] This involves "[m]aking her feel guilty about the children . . . using the children to relay messages . . . using visitation to harass her . . . threatening to take the children away." *Id.*

[42] This includes "[m]aking and/or carrying out threats to do something to hurt her . . . threatening to leave her, to commit suicide, to report her to welfare [or the INS] . . . making her drop charges . . . making her do illegal things." *Id.*

[43] This refers to "[t]reating her like a servant; making all the big decisions; acting like the 'master of the castle;' being the one to define men's and women's roles." *Id.*

[44] Intimidation by "[m]aking her afraid by using looks, actions, gestures; smashing things; destroying her property; abusing pets; displaying weapons." *Id.*

[45] This involves "[p]utting her down; making her feel bad about herself; calling her names; making her think she's crazy; playing mind games; humiliating her; making her feel guilty." *Id.*

[46] This refers to "[m]aking light of the abuse and not taking her concerns about it seriously; saying the abuse didn't happen; shifting responsibility for abusive behavior; saying she caused it." *Id.*

[47] WILSON, *supra* note 34, at 17.

[48] *See id.* at 21.

> Abusive men have received the message that violence against women is acceptable behavior. This message may come from a variety of sources including the childhood family and our society. When societal institutions such as the judicial system do not hold men accountable for their violence, they actually collude with the batterers to perpetuate

However, without early intervention, abuse in relationships can escalate in severity, sometimes leading to death.[49]

Leaving the abusive relationship is not easy. Due to the batterer's "systematic, repetitive infliction of psychological trauma,"[50] a battered woman is usually instilled with shame, humiliation, and fear, eventually reducing her ability to act.[51] Battered women typically have lowered self-esteem, accept blame for their abuse, experience feelings of helplessness and passivity, and deny and minimize the abuse.[52] Barriers to leaving the relationship are complex and include: (1) shame; (2) fear; (3) lack of personal resources; (4) lack of emotional support; (5) lack of access to such basic things as money, transportation, jobs, education, and services; and (6) discrimination and isolation.[53] The attempts to control increase when the battered woman tries to leave, and the batterer is at his most dangerous when he feels that he is losing control over his victim.[54] Most domestic violence victims try to leave their batterers seven times before eventually succeeding.[55]

2. *Additional problems of battered immigrant women*

Because of the batterer's need to control, the batterer may seek a relationship with women from other, less assertive, cultures. A potential batterer may see women from Asian cultures as more subservient, more submissive, and more able to be controlled than their American counterparts.[56]

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the violence.

Id. Partner abuse, as a learned behavior, can be unlearned through deterrence such as arrest. *See* Julian Leigh, *Arresting Domestic Violence ... does it work?*, ADVOCACY IN ACTION (Domestic Violence Clearinghouse, Honolulu, Haw.) June, 1996. "[T]heoretically, the act of arrest itself, with its shock value, the attendant label of 'wife beater', and the fear of adverse publicity, is perceived as punishment by many abusers." *Id.*

[49] WILSON, *supra* note 34, at 29.

[50] *Id.* at 17 (quoting Dr. Judith Herman); *see also* Sana Loue, *Intimate Partner Violence Bridging the Gap Between Law and Science*, 21 J. LEGAL MED. 1 (2000) (discussing etiological theories of domestic abuse).

[51] WILSON, *supra* note 34, at 17.

[52] *Id.* at 18-21.

[53] *Id.* at 101-02.

[54] Jo Ann Merica, *The Lawyer's Basic Guide to Domestic Violence*, 62 TEX. B.J. 915, 916 (1999) (quoting Barbara Hart, National Coalition Against Domestic Violence, for the proposition that "[w]omen who leave their batterers are at a [seventy-five] percent greater risk of being killed by the batterer than those who stay").

[55] Yeung, *supra* note 1.

[56] This wish for control and for women with more "traditional values" who are thought to be content to be wives and mothers may be fueling the burgeoning mail-order bride services on the Internet. Robert J. Scholes, *The "Mail-Order Bride" Industry and Its Impact on U.S. Immigration*, (research funded by the INS), http://www.ins.usdoj.gov/graphisc/aboutins/

Alternately, a citizen or lawful permanent resident who is himself from another culture may prefer as a partner someone from his own culture.[57] In fact, these cultural factors do allow the batterer more control over the immigrant. In addition to the formidable barriers to leaving the abusive relationship that are evident in the general population, immigrant domestic violence victims face special problems above and beyond those of other victims.[58] These problems include language barriers, isolation from friends and family, religious and cultural upbringing, lack of knowledge about the U.S. legal system, lack of financial resources, and immigration status.

The immigrant's status and situation are often conducive to the batterer's tactics. For example, the tactic of isolation is much easier for a batterer when his victim cannot speak English,[59] and has no friends or family in the country. In reinforcing his wife's isolation from the community around her, the batterer may refuse to allow his spouse to learn English, to go to school, or to hold a job.[60] Further, he may isolate her from her culture and homeland by destroying letters from her family, calling her racist names, and using her language against her by insulting her in public in her native tongue.[61] Her culture may provide another tool for the abuser to use against her. An immigrant spouse may have difficulty overcoming her cultural and religious

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repsstudies/mobappa.html (last modified July 30, 1999).

[57] *See* Zhenchao Qian, *Who Intermarries? Education, Nativity, Region, and Interracial Marriage, 1980 and 1990*, 30 J. COMP. FAM. STUD. 579 (1999), 1999 WL 15782532 (stating that "foreign-born minorities are less likely than their native-born counterparts to be assimilated into the dominant culture . . . and less likely to inter-marry").

[58] WILSON, *supra* note 34, at 113-16; Tien-Li Loke, Note, *Trapped in Domestic Violence: The Impact of United States Immigration Law on Battered Immigrant Women*, 6 B.U. PUB. INT. L.J. 589, 589 (1997) ("In addition to the fears that all domestic violence victims face, battered immigrant women live with fears that are unique to their situation – fear of deportation, a general distrust of authorities, and language and cultural barriers.").

[59] Wang, *supra* note 3, at 163 ("[L]anguage erects a common barrier for most battered immigrant Asian American women . . . [and] hinders a battered immigrant woman's attempt to seek assistance from the police, an attorney, a shelter, or a service agency. Unable to effectively communicate, she may avoid seeking help altogether."). Additionally, English can be a barrier in the court system when battered immigrant women attempt to obtain restraining orders:

> [N]on-English speaking participants in the legal system obtain fewer restraining orders in domestic violence cases. Moreover, because restraining orders are only in English, victims of domestic violence often [are] unable to obtain them unless they could find a volunteer interpreter. At public hearings, [victims] told the [researchers] that judges had actually asked defendant husbands to act as interpreters for their battered wives.

Language of Government Act of 1995: Hearing on S. 356 Before the Senate Comm. On Governmental Affairs, 104th Cong. (1996) (statement of Karen K. Narasaki, Executive Director, National Asian Pacific American Legal Consortium).

[60] Telephone Interview with Irene Vasey, Staff Attorney, Domestic Violence Clearinghouse and Legal Hotline (Oct. 19, 2000) [hereinafter Vasey Interview].

[61] *Id.*

upbringing, which may place a heavy emphasis on preserving the family.[62] Her culture may place a low value on her individual happiness, emphasizing conformity and societal harmony.[63] Her religion may also emphasize preservation of the family, at all costs.[64] Additionally, cultural barriers may forbid the airing of "private" matters in public.[65] Moreover, her culture may condone her spouse's right to discipline her.[66]

Another problem is that misunderstanding of the U.S. legal system may result in the immigrant spouse's fear of deportation.[67] The immigrant may believe that there are no protections or financial assistance available to her,[68] and may thus believe her abuser when he tells her that, as a citizen, he holds all the cards.[69] Moreover, the batterer may limit access to official help by hiding or destroying her passport, identification, or health care card.[70] This may prevent her from seeking legal protections, thus making remedies such as the self-petitioning process effectively out of her reach.[71]

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[62] *See* Julian Leigh, *Cultural Beliefs – Breaking the Chains*, ADVOCACY IN ACTION 2 (Domestic Violence Clearinghouse, Honolulu, Haw.) Mar., 1996 (arguing that women in more collectivist cultures such as Asian, Latin American, African, and Pacific Island cultures encourage women to derive a sense of self from their traditional roles and to subordinate their personal goals to those of the family and community).

[63] *Id.* at 2.

[64] WILSON, *supra* note 34, at 179-83 ("Christian women are often instructed to be submissive to their husbands . . . . Muslim women are taught to devote themselves to their husbands and families. For these women, leaving their marriages feels like a betrayal of their religious beliefs . . . ."). *Id.* at 179.

[65] Wang, supra note 3, at 169-70.

> The group focus of Asian cultures protects family reputation at the expense of the individual. In many Asian cultures, "keeping face" is an important social rule. Because the individual is viewed as an extension of the goup, one family member's guilt or shame transfers to the rest of the family.

Id. at 169 (citing Christine K. Ho, *An Analysis of Domestic Violence in Asian American Communities: A Multicultural Approach to Counseling*, 9 WOMEN & THERAPY 129, 134 (1990)).

[66] *See* Costa-Crowell & Oliveira, *supra* note 38 (citing Dr. Philip Rhodes, a professor at Texas A&M University, who states, "The male carries the cultural belief that a wife should be more respective of the male and the husband has the right to instruct, discipline or control the female").

[67] Wang, *supra* note 3, at 167 ("An undocumented immigrant would understandably fear that confronting or reporting her abuser might result in her being reported to the INS and subsequently deported.").

[68] *Id.*

[69] *See* Wang, *supra* note 3, at 167 (1996) ("[M]any immigrant Asian American women live at the mercy of abusive husbands because they are under the constant fear of deportation, whether or not such fears are legally justified.").

[70] Vasey Interview, *supra* note 60.

[71] As a general rule, the legal protections created by Congress in VAWA 1994 and 2000 are only helpful when the battered woman knows about them and can pursue them. *See Stalking*

Further, the economic fears faced by many domestic violence victims—that they will be unable to support themselves and their children alone—may be exacerbated by the lack of employment opportunities without a green card.[72] Taking the legal step of filing a VAWA petition may throw her family into poverty, and thus encourage her to remain in the relationship even with the threats of deportation. While "self-petitioners and their derivative children who have an approved [VAWA petition] . . . are placed in 'deferred action'[73] [and] are also eligible for an Employment Authorization Card,"[74] the application procedure can take up to a year.[75] From the start of the VAWA petition preparation until the deferred action approval is received, the battered immigrant is unable to work legally or obtain benefits.[76] In addition, underemployment[77] may also pose a problem for immigrant women, due to language and educational barriers.

Moreover, the immigrant spouse's status poses another method of control: the batterer can threaten to withhold his help in obtaining permanent resident

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and Violence Against Women, Oversight Hearing Before the House Judiciary Comm. on Crime Violence Against Women Act, 106th Cong. (1999) (testimony of Bonnie J. Campbell, Director, Violence Against Women Office), 1999 WL 27594937 [hereinafter Campbell Testimony]. Further, remedies such as self-petitioning are more difficult to successfully obtain when an applicant files *pro se* without legal help or representation. *Battered Immigrant Women's Protection Act of 1999: Hearing on H.R. 3083 Before the House Comm. on the Judiciary*, 106th Cong. (2000) (prepared testimony of Leslye Orloff, Director, Immigrant Women Program, NOW Legal Defense and Education Fund) [hereinafter Orloff Testimony].

[72] *See* Foster, *supra* note 12, at B1 ("Olga cleaned houses for $2.50 an hour because she could not get a better job without proof that she was in the country legally. Finally . . . [t]he INS granted her a temporary work permit while her application for a green card [was] being processed.").

[73] "Deferred action" provides a basis for legal U.S. residence and work authorization. 8 C.F.R. § 274a.12(c)(14) (2000).

[74] Immigration and Naturalization Service, *How Do I Apply for Immigration Benefits as a Battered Spouse or Child?*, at 3 [hereinafter *How do I Apply*], http://www.ins.usdoj.gov/graphics/howdoi/battered.htm (last modified July 25, 2000).

[75] Foster, *supra* note 12, at B1.

[76] Cyrus Mehta & Andres Benach, *Keeping Battered Noncitizens in the United States until Permanent Residency*, 77 No. 8 INTERPRETER RELEASES 225, 231 (2000); *see also* Chin Interview, *supra* note 10.

[77] Underemployment is defined in various ways, but generally refers to involuntary part-time work or poverty-wage work. *See* David Dooley & JoAnn Prause, *Effect of favorable employment change on alcohol abuse: One- and Five-Year follow-ups in the National Longitudinal Survey of Youth*, 25 AM. J. COMMUNITY PSYCHOL. 787 (1997), 1997 WL 19332356. Those who are underemployed are often referred to as the "working poor" because although they are employed, their income still falls below the poverty line. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION: A PROFILE OF THE WORKING POOR, 1996, http://stats.bls.gov/cpswp96.htm (Dec. 1997) ("The working poor are individuals who spent at least 27 weeks in the labor force (working or looking for work), but whose income fell below the official poverty threshold.").

or citizenship status, or promise that, if she stays with him and does as he asks, his future assistance will be forthcoming.[78] He can also threaten to have her deported if she displeases him.[79]

These problems generally lead to under-reporting of domestic violence in the immigrant community.[80] Although in the general population, only about half the women victimized by an intimate[81] reported the violence to law enforcement,[82] the factors listed above provide immigrant women with even greater incentive to keep the matter private. Under-reporting within this vulnerable population has distinct consequences, making the true extent of the problem unclear. This, in turn, may limit services and information to a battered woman.[83] Immigrant women, for example, may not know that domestic violence is illegal in the United States,[84] may not know where to go for help, and may be cowed into submission by the threats of deportation that their abusers use to retain control.

B. The Legal Context of Immigration

Immigration laws view an alien immigrating to the United States either on her own merits or through her relationship to a citizen or lawful permanent resident. These laws categorize an alien immigrant[85] into one of several statutory "preferences," each of which is generally subject to immigration

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[78] Loke, *supra* note 58, at 589. "'I have one client who has been hospitalized – she's had him arrested for beating her – but she keeps coming back to him because he promises he will file for her . . . . He holds that green card over her head.'" Deanna Hodgin, *'Mail-order' brides marry pain to get green cards*, WASH. TIMES, Apr. 16, 1991, at E1, LEXIS, News Group File (describing a case prior to VAWA).

[79] Vasey Interview, *supra* note 60.

[80] Yeung, *supra* note 1.

[81] An "intimate" refers to "a current or former spouse, girlfriend, or boyfriend." LAWRENCE A. GREENFELD ET AL., U.S. DEP'T OF JUST., VIOLENCE BY INTIMATES 3 (1998).

[82] *See id.* at 19.

[83] For example, the issue of domestic violence among temporary workers has become a distinct problem. Yeung, *supra* note 1. However, the extent of the problem cannot be accurately gauged, because the INS does not keep track of how many foreign workers are charged with, or deported for, domestic violence, and does not even keep statistics on how many spouses come into the country with temporary workers each year. *Id.*

[84] This may also be a function of the battered woman's difficulty with English. "The lack of English fluency means many immigrant Asian American women may not know that domestic violence is a crime or that anti-domestic violence services exist, since much of the literature and services which exist target the English-speaking population." Wang, *supra* note 3, at 163.

[85] This is opposed to a nonimmigrant, who is typically a temporary entrant, such as a tourist, business visitor, student, or temporary worker. See INA § 101(a)(15) for a listing of nonimmigrant aliens. Immigration and Naturalization Act (INA) § 101(a)(15), 8 U.S.C. § 1101(a)(15) (2000) (amended 2000). See INA § 214 for admission requirements for nonimmigrants. INA § 214, 8 U.S.C. § 1184 (2000) (amended 2000).

quotas.[86] These quotas limit the total number of immigrants into the United States per year, and they also limit the number of immigrants from each country within a given year.[87] One exception to the quota is for those who qualify as "immediate relatives."[88] Spouses of citizens and now "intended spouses"[89] qualify under this exception. Spouses of permanent residents, by contrast, now qualify for "second preference immigration status."[90]

Depending on their residence at the time of application, two general administrative paths are available to aliens wishing to become legal permanent residents.[91] Aliens living abroad may apply for an immigrant visa at a consular office of the Department of State, obtain a visa, and be admitted into the United States.[92] If the alien is already present in the United States, either lawfully or unlawfully, and meets all the substantive requirements for admission[93] as an immigrant, he or she can go through a procedure called "adjustment of status."[94] The alien's status is adjusted to "lawfully admitted for permanent residence."[95]

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[86] See INA § 203 for preference categories and quotas. INA § 203, 8 U.S.C. § 1153 (2000). Although there have been immigration quotas since 1921, the Immigration Act of 1924 (*repealed by* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163) exempted the wives and the unmarried minor children of U.S. citizens from the quota. *See* LEGOMSKY, *supra* note 5, at 3 (citing National Origins Act, ch. 190, § 4(a), 43 Stat. 153, 155 (1924)).

[87] INA § 202(a)(2)-(4), 8 U.S.C. § 1152(a)(2)-(4) (2000) (amended 2000).

[88] INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (amended 2000). Immediate relatives are spouses, parents, and children of United States citizens. *Id.*

[89] VAWA 2000 added the category of "intended spouse" to those who qualify as an immediate relative. *See* H.R. 3244, 106th Cong., § 1503(a) (2000) (amending INA § 101, 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2000)). Those aliens who believed that they had married a U.S. citizen, and with whom a marriage ceremony was actually performed, but whose marriage was not legitimate solely because of the bigamy of the citizen are "intended spouses" and qualify for some of the battered spouse protections under the INA, as long as other conditions are met. *See* H.R. 3244, § 1503(b).

[90] INA § 202(a)(4), 8 U.S.C. § 1152(a)(4) (amended 2000); H.R. 3244, § 1503(c).

[91] ANNUAL REPORT, *supra* note 23, at 3.

[92] *Id.* Stephen H. Legomsky characterizes this as a sensible procedure for both the potential immigrant and for the government in that it allows the alien to find out if he would be admissible before "burning bridges back home" and permits a faster and easier border inspection for the government by weeding out inadmissible aliens at the visa stage. LEGOMSKY, *supra* note 5, at 366.

[93] INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2000) (amended 2000). The INA defines "admission" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.*

[94] INA § 245, 8 U.S.C. § 1255 (2000) (amended 2000); LEGOMSKY, *supra* note 5, at 5. Prior to 1952, the United States required that the alien leave the country, get an immigrant visa as described above, and then return. *Id.* at 366.

[95] *See* INA § 245(a), 8 U.S.C. § 1255(a). "Lawfully admitted for permanent residence" is defined as "the status of having been lawfully accorded the privilege of residing permanently

Because employment-based immigration establishes preferences for those with an advanced education,[96] scientific or technical renown,[97] prominent managerial position,[98] or wealth,[99] women have primarily immigrated to the United States under the "immediate relative" exception or the family-preference allowances.[100] They are therefore dependent on their spouses' status to attain their own legal status in the United States.

For most alien spouses, immigrating to the United States based on the status of the citizen or legal permanent resident spouse is easier than qualifying on their own. This dependent position, however, can pose problems. Moreover, immigration law and policy have long conflicted with the harsh reality that battered immigrants may face.[101]

II. VIOLENCE AGAINST WOMEN ACT (VAWA 1994) AS THE FIRST STEP

In the 1980's, family law and immigration law practitioners began to see a disturbing trend of abused immigrant women who were in legal limbo due to the misused spousal petitioning requirements of immigration law at the time.[102] At a conference in California in 1991, over a dozen women's organizations and 350 women from twenty-five different nationalities met to discuss

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in the United States as an immigrant in accordance with the immigration laws, such status not having changed." INA § 101(a)(20), 8 U.S.C. § 1101(a)(20) (2000) (amended 2000).

[96] *See* INA § 203(b)(2), 8 U.S.C. § 1153(b)(2) (2000).

[97] *See id.*

[98] *See* INA § 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).

[99] *See* INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). Immigration under this classification requires that the immigrant must be entering the United States for the purpose of engaging in a new commercial enterprise. *Id.* Although INA § 203(b)(3) allows for some immigration of unskilled laborers, the work cannot be of a temporary or seasonal nature, and qualified workers must be unavailable in the United States. INA § 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

[100] Fitzpatrick, *supra* note 31, at 24 (discussing the fact that lawful immigration to the United States has been predominantly female for much of the last fifty years).

[101] *See generally* Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593 (1991) (relating the history of spouse-based immigration laws and their effect upon battered immigrants); *see also* Michael R. Curran, *Flickering Lamp Beside The Golden Door: Immigration, The Constitution & Undocumented Aliens In The 1990s*, 30 CASE W. RES. J. INT'L L. 58 (1998) (discussing the history of the hardships faced by undocumented aliens in the United States).

[102] Yeung, *supra* note 1. The battered immigrant advocates also wanted to include women in the United States on temporary visas, who are still not currently protected under VAWA, but "'[w]e came to understand that politically, as a first step, we would be more successful if we started with spouses of legal permanent residents and citizens . . . . We wanted to try, originally, to have a broader group of people protected, but we weren't able to forge bipartisan support for that,'" explained Leslye Orloff, a D.C. attorney involved in drafting VAWA. *Id.*

immigration issues and domestic violence.[103] This conference served as the impetus for legislative reform.[104] In passing VAWA, Congress sought to protect undocumented women from domestic violence and prevent further violence at the hands of abusive United States citizens and legal resident spouses.[105] During the legislative hearings on VAWA, Congress looked at all aspects of domestic violence,[106] and due to the under-reporting of abuse, relied on surveys to determine the extent of domestic violence in the immigrant community.[107] Congress found that prior immigration laws had had a devastating effect on battered immigrant women.[108]

A. Law Prior To VAWA

The landmark enactment of VAWA 1994, which allowed exceptions for battered women and children, was not the first attempt to ameliorate the harsh effects of immigration law. The evolution of waivers for battered immigrants has evidenced two distinctly different viewpoints: suspicion of aliens abusing the system to obtain immigration benefits and compassion for women and children trapped in violent relationships.

The law which initially had the harshest effect was passed in 1986. The Immigration Marriage Fraud Amendment ("IMFA")[109] was enacted in 1986 in response to concerns over "sham marriages."[110] This new law subsequently changed the system for marriage-based immigration by restricting most immigrant spouses to conditional residency for a two-year period following

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[103] *Id.*

[104] *Id.*

[105] H.R. REP. NO. 103-395, at 25 (1993).

[106] According to Representative McCollum:

> Violence against women first came to be viewed as a serious and widespread social problem in the early 1970s. In response to growing rates of crimes committed against women, Congress passed the Violence Against Women Act as Title IV of the Violent Crime Control and Law Enforcement Act of 1994.

Stalking and Violence Against Women: Hearing on H.R. 1248 and H.R. 1869 Before the House Subcomm. On Crime, Comm. on the Judiciary, 106th Cong. (1999) (statement of Rep. Bill McCollum, Chairman, House Subcomm. on Crime).

[107] *See* H.R. REP. NO. 103-395, at 26, 27 n.13.

[108] *See id.* at 26 (stating that "[c]urrent law fosters domestic violence in [marriages where one spouse is not a citizen] by placing full and complete control of the alien spouse's ability to gain permanent legal status in the hands of the citizen or lawful permanent resident spouse").

[109] Pub. L. No. 99-639, 100 Stat. 3538 (1986).

[110] LEGOMSKY, *supra* note 5, at 148. The basis of these concerns were surveys conducted by the INS, which indicated that thirty percent of all petitions for immigrant visas involved suspect marriages. *Id.* Later disclosure of the methodology of the surveys suggested irregularities—the reported percentage was based on whether the investigator, surveying only high-risk cases, suspected fraud. *Id.*

entry.[111] Before IMFA, an immigrant spouse was granted permanent residency immediately regardless of the length of marriage;[112] however, under IMFA, the U.S. citizen or permanent resident had to petition the INS for a two-year conditional status.[113] After the two-year period, both spouses had to cooperate to remove the conditional residency[114] to ensure the marriage was not for immigration purposes alone. This gave batterers enormous power over their spouses. Without the aid of the abuser, the initial conditional residency status would not be granted.

Two waivers were provided for under IMFA, however. These waivers included a waiver of the joint petition requirement where the immigrant established that "extreme hardship" would result if the alien was deported,[115] or where the marriage had been entered into in good faith by the alien spouse but had been terminated by the conditional resident for good cause, and the conditional resident was not at fault for failing to file the joint petition.[116] By requiring the battered spouse to file first in order to take advantage of the second waiver, this new provision created a race to the courthouse.

In response to pressure from women's groups advocating for battered immigrants, Congress liberalized the rules as they pertained to battered immigrants in the 1990 amendments to IMFA.[117] The 1990 Act[118] eliminated the requirement in the "good faith/good cause" waiver that the immigrant woman initiate the divorce proceedings,[119] and left the "extreme hardship" waiver unchanged.[120] Additionally, the 1990 Act also added the "battered spouse/child" waiver.[121] This waiver required that the qualifying marriage be entered into in good faith, that the alien spouse or child be the subject of battery or extreme cruelty, and that the alien was not at fault in not filing a petition for removal of conditional residency.[122] Unfortunately, the 1990 Act still left the abusive husband in control over the initial process to obtain

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[111] Fitzpatrick, *supra* note 31, at 31 n.51. "Those affected by the IMFA are alien spouses of U.S. citizens and 'after-acquired' (i.e., married after the petitioning spouse has immigrated) alien spouses of lawful permanent residents." *Id.*

[112] Immigration and Naturalization Act (INA) § 216(a), 8 U.S.C. § 1186a(a) (Supp. IV 1987) (amended 2000).

[113] INA § 216(c)(1), 8 U.S.C. § 1186a(c)(1) (amended 2000).

[114] INA § 216(d)(2), 8 U.S.C. § 1186a(d)(2) (amended 2000).

[115] INA § 216(c)(4)(A), 8 U.S.C. § 1186a(c)(4)(A) (amended 2000).

[116] INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B) (amended 2000).

[117] *See id.*

[118] Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.) (amended 2000).

[119] *See* INA § 216(c)(4)(B), 8 U.S.C. § 1186a(c)(4)(B) (Supp. II. 1991) (amended 2000).

[120] INA § 216(c)(4)(A), 8 U.S.C. § 1186a(c)(4)(A) (Supp. II. 1991) (amended 2000).

[121] *See* INA § 216(c)(4)(C), 8 U.S.C. § 1186a(c)(4)(C) (Supp. II. 1991) (amended 2000).

[122] *Id.*

conditional residency. Additionally, the waivers only applied to battered women who had acquired conditional status, failing to take into account the large group of undocumented women whose husbands never filed an initial petition for conditional status.[123]

B. VAWA and IIRIRA Provisions

VAWA was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994.[124] The VAWA provisions reflected a "comprehensive understanding of the broad range of strategies needed to change this nation's response to violence against women."[125] VAWA provided federal resources and funding to combat the problem of domestic violence.

Under VAWA 1994, a battered alien spouse was allowed to initiate her own request for lawful permanent residency through "self-petitioning."[126] This new provision modified the "battered spouse/child waiver" of IMFA by eliminating the need of the citizen spouse to initially file the petition for conditional

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[123] Loke, *supra* note 58, at 599; *see also* Kelly, *supra* note 34, at 313.

[124] Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994).

[125] Campbell Testimony, *supra* note 71.

[126] *See* INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2000) (amended 2000). Under VAWA 1994, since amended, the procedure for granting immigrant status was as follows:

> (a) Petitioning procedure.
>
> (1) (A) (i) Any citizen of the United States claiming that an alien is entitled to classification by reason of a relationship described in paragraph (1), (3), or (4) of section 203(a) [8 U.S.C. § 1153(a)(1), (3), or (4)] or to an immediate relative status under section 201(b)(2)(A)(i) [8 USCS § 1151(b)(2)(A)(i)] may file a petition with the Attorney General for such classification.
>
> (ii) An alien spouse described in the second sentence of section 201(b)(2)(A)(i) [8 U.S.C. § 1151(b)(2)(A)(i)] also may file a petition with the Attorney General under this subparagraph for classification of the alien (and the alien's children) under such section.
>
> (iii) An alien who is the spouse of a citizen of the United States, who is a person of good moral character, who is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) [8 U.S.C. § 1151(b)(2)(A)(i)], and who has resided in the United States with the alien's spouse may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien if such a child has not been classified under clause (iv)) under such section if the alien demonstrates to the Attorney General that—
>
> (i)the alien is residing in the United States, the marriage between the alien and the spouse was entered into in good faith by the alien, and during the marriage the alien or a child of the alien has been battered by or has been the subject of extreme cruelty perpetrated by the alien's spouse; and
>
> (ii) the alien is a person whose removal, in the opinion of the Attorney General, would result in extreme hardship to the alien or a child of the alien.

Id. (amended 2000).

residency.[127] Self-petitioning takes the place of only the first step in the visa petition process; once granted, the petitioning spouse must adjust status.[128] VAWA 1994 also provided relief to battered spouses and children facing deportation, by making available a method to apply for suspension of deportation proceedings when the INS initiates such proceedings.[129] The remedy was limited, however, and not available to applicants who were divorced or had not been present in the United States for the required three years.[130]

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[131] Among other provisions,[132] IIRIRA restricted judicial review,[133] most alarmingly for battered immigrants seeking discretionary relief under INA § 240A for cancellation of removal or adjustment of status.[134]

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[127] Goldman, *supra* note 3, at 380.

[128] INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (2000) (amended 2000).

[129] INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2000) (amended 2000).

[130] *See Battered Immigrant Women Protection Act of 1999: Hearing on H.R. 3083 Before the House Comm. on the Judiciary*, 106th Cong. (2000) (prepared testimony of Jacqueline Rishty, Catholic Charities Immigration Legal Services of Maryland, on behalf of Catholic Charities, USA)[hereinafter Rishty Testimony].

[131] Pub. L. No. 104-208, 100 Stat. 3009-708 (1996). Most of the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) became effective on April 1, 1997. Francesco Isgro, *Attorney General takes steps to ameliorate impact of new law*, MIGRATION WORLD MAG., May 15, 1997, at 42, 1997 WL 10938884. Of particular concern to undocumented aliens was whether to return to their native countries – prior to IIRIRA, an illegal alien residing here could hope someday to become legal, but under IIRIRA the longer an alien stays in unlawful status in the United States, the more difficult it is to acquire a lawful status. *Id.* at 35.

[132] Prior to IIRIRA, the immigration judge had the discretion to suspend deportation of an alien who had been present in the United States for seven years, showed good moral character, and demonstrated that deportation would cause "extreme hardship." Isgro, *supra* note 131, at 35. IIRIRA also increased the length of time an alien had to be present in the United States to ten years, and raised the hardship standard to "exceptional and extremely unusual hardship." INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (amended 2000). The standard for battered spouses, however, remains at the "extreme hardship" level. INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (amended 2000). The new law also set a cap on the number of suspensions of deportations that could be granted in any fiscal year. Isgro, *supra* note 131, at 42. The Clinton Administration proposed the "Immigration Reform Transition Act of 1997" allowing those deportation cases which had commenced before April 1, 1997, to come under the old standards. *Id.* See generally Nadine K. Wettstein, *The 1996 Immigration Act: New Removal Proceedings, Cancellation of Removal, and Voluntary Departure*, 73 No. 46 INTERPRETER RELEASES 1677 (1996), for a summary of changes made to removal proceedings by IIRIRA.

[133] Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) § 306 (amending INA § 242, 8 U.S.C. § 1252(a)(2)(B)).

[134] *See* INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i) (2000).

While VAWA 1994 represented a step forward, to some extent, IIRIRA represented a step back. The new procedures under VAWA and IIRIRA gave battered immigrants a method of avoiding the previous requirement of petitioning by the abuser, but instituted a long and complicated process to take advantage of the special waivers.

IV. STEP TWO: VAWA 2000 AND THE REMOVAL OF THE EXTREME HARDSHIP SHOWING FOR SELF-PETITIONERS

Following the passage of VAWA 1994, problems and gaps began to appear as advocates grappled with the new procedures. Battered spouses married to U.S. citizens not living in the United States were not covered by VAWA's self-petitioning procedures, for example.[135] Further, IIRIRA had expanded the scope of removable offenses, and now included domestic violence offenses committed by batterers. An unintended effect was that, if the batterer was prosecuted for abusing his spouse who was in the process of self-petitioning for status, his deportation would void the petition.[136] Another provision to be corrected was the inclusion of the "extreme hardship" requirement for self-petitioners. Unrepresented petitioners experienced great difficulty in fulfilling the requirement, and were being denied access to this remedy.[137] These and other unforeseen problems led to Congress's attempts to ameliorate the negative impacts of VAWA 1994 and subsequent laws.[138]

VAWA 2000 was signed into law on October 28, 2000.[139] The passage of VAWA 2000 was a long time in coming,[140] and was the product of attempts by various legislators to refund some of the expiring provisions[141] and programs of VAWA 1994, and to remedy gaps in the protections in VAWA 1994. One of these gaps was the extreme hardship showing in the self-petitioning process.

Included in the VAWA 2000 provisions is the Battered Immigrant Women's Protection Act. House Bill 3083 was first introduced on October 14, 1999 by

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[135] Orloff Testimony, *supra* note 71.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Press Release, President William J. Clinton, Statement by the President (Oct. 28, 2000), http://ofcn.org/cyber/serv/teledem/pb/2000/oct/msg00298.htm (beginning, "Today I am pleased to sign into law H.R. 3244, the 'Victims of Trafficking and Violence Prevention Act of 2000' . . . ").

[140] Editorial, *Let measure pass: Why are a minority of Senators blocking Violence Against Women Act?*, POST-STANDARD (Syracuse, N.Y.), Oct. 4, 2000, at A14, 2000 WL 5858911 (relating the difficulties of passing VAWA 2000 due to political maneuverings).

[141] *See* discussion *supra* note 12.

Representative Jan Schakowsky.[142] The purposes of this component of VAWA 2000 are twofold: (1) to remove barriers to criminal prosecutions of batterers for abusing immigrant women and children, and (2) to offer further protection against domestic violence.[143] The majority of the legislative discussion on the extreme hardship standard is pursuant to this bill, and in relation to victims of sex traffickers. Recognizing the inequity of requiring self-petitioners to prove extreme hardship while not requiring joint-petitioners to do so,[144] Congress eliminated the extreme hardship requirement for battered spouses when self-petitioning.[145] Congress did not address the requirement for those seeking cancellation of removal, even though the other elements for this remedy were modified to give better access to VAWA applicants.[146]

A. Removal of the Extreme Hardship Standard from the Self-Petitioning Requirements

One of the substantial improvements made by VAWA 2000 was the removal of the extreme hardship requirement from the self-petitioning process. Obtaining permanent residency for a battered immigrant occurs in two steps:[147] (1) receiving a waiver for the requirement that the citizen spouse and alien jointly file (also called "self-petitioning");[148] and (2) then adjusting the

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[142] *See* H.R. 3083, 106th Cong. (1999), LEXSEE 106 H.R. 3083, at *2.

[143] H.R. 3244, 106th Cong. § 1502(b) (2000).

[144] *See* 146 CONG. REC. S10,195 (daily ed. Oct. 11, 2000) (section-by-section summary).

[145] *See* H.R. 3244, § 1503(a) (amending INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2000) (amended 2000)).

[146] *See* H.R. 3244, § 1504(a) (amending INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2000)).

[147] Under some circumstances, the VAWA petition may be filed in conjunction with an application by the alien for adjustment to permanent resident status. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE § 3.3 (1997). "The petition may be filed concurrently with an adjustment of status application if a visa is immediately available (immigrant visas are always immediately available for spouses and children of U.S. citizens)." *Id.* § 3.3(c).

[148] Immigration and Naturalization Act (INA) § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2000) (amended 2000) (allowing an alien spouse to file a petition for immigrant status without the aid of the citizen spouse). The first step in the self-petitioning process is to file the I-360 petition with the Vermont Service Center of the INS. FRAGOMEN & BELL, *supra* note 147, § 3.3(c). When the Service Center receives the petition, "the Service shall make a determination as to whether the petition and the supporting documentation establish a 'prima facie case.'" 8 C.F.R. § 204.2(c)(6) (2000) states:

> (6) Prima facie determination – (i) Upon receipt of a self-petition . . . the Service shall make a determination as to whether the petition and the supporting documentation establish a "prima facie case" for purposes of 8 U.S.C. [§] 1641, as amended by section 501 of Public Law 104-208.
>
> (ii) For purposes of paragraph (c)(6)(i) of this section, a prima facie case is established only if the petitioner submits a completed Form I-360 and other evidence supporting all

immigrant's status.[149] The requirements under VAWA 1994 were extensive,

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of the elements required of a self-petitioner . . . . A finding of prima facie eligibility does not relieve the petitioner of the burden of providing additional evidence in support of the petition and does not establish eligibility for the underlying petition.

(iii) If the Service determines that a petitioner has made a "prima facie case," the Service shall issue a Notice of Prima Facie Case to the petitioner. Such Notice shall be valid until the Service either grants or denies the petition.

(iv) For purposes of adjudicating the petition submitted . . . a prima facie determination --

(A) Shall not be considered evidence in support of the petition;

(B) Shall not be construed to make a determination of the credibility or probative value of any evidence submitted along with that petition; and,

(C) Shall not relieve the self-petitioner of his or her burden of complying with all of the evidentiary requirements . . . .

Id. A prima facie determination does not guarantee that the petition will be approved, but allows the alien to receive certain public benefits. Prima Facie Review of Form I-360 When Filed by Self-Petitioning Battered Spouse/Child, 62 Fed. Reg. 60769, 60770 (proposed Nov. 13, 1997) (to be codified at 8 C.F.R. pt. 204). This states:

The prima facie evaluation will consist of an initial review of the Form I-360 and the supporting documentation. Applicants who set forth a prima facie case will receive a Notice of Prima Facie Case to document their "qualified alien" status for public benefits. The Notice is valid until the Service has adjudicated the petition. At present, the Service intends to issue the Notice with a validity period of 150 days, which exceeds the time required for adjudication in the majority of these cases. In those few cases when the Service is unable to complete the adjudication within the 150-day period, the applicant will be able to request an extension pursuant to the instructions on the Notice. Because the Notice is intended solely for the purpose of enabling petitioners to apply for public benefits within the United States, the Service will only issue the Notice to petitioners residing in the United States.

Id. These petitioning rules were in force prior to the passage of VAWA 2000, and presumably will be modified to conform to the changes made by VAWA 2000.

[149] See INA § 245, 8 U.S.C. § 1255 (2000) (amended 2000) which provides:

(a) Status as person admitted for permanent residence on application and eligibility for immigrant visa. The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.

(b) Record of lawful admission for permanent residence; reduction of preference visas. Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the number of the preference visas authorized to be issued under sections 202 [8 U.S.C. § 1152] and 203 [8 U.S.C. § 1153] within the class to which the alien is chargeable for the fiscal year then current.

INA § 245, 8 U.S.C. § 1255 (2000) (amended 2000). Self-petitioners may file INS Form I-485

however, and required a tremendous amount of evidence. Further, proof required from a VAWA applicant was not always required from non-VAWA applicants seeking the same status.[150]

Under VAWA 1994, the self-petitioner was required to show that: (1) she was legally married to the U.S. citizen or lawful permanent resident batterer; (2) she was currently residing in the United States; (3) she had resided with the U.S. citizen or lawful permanent resident spouse in the United States; (4) she was battered or subjected to extreme cruelty during the marriage;[151] (5) she or her child would suffer extreme hardship if she was to return to her native

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(Application to Register Permanent Residence or Adjust Status) with their local INS office.

[150] *See* INA § 204, 8 U.S.C. § 1154 (amended 2000). Petitioning by the citizen spouse does not require proof of good moral character or extreme hardship. *Compare* INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i), *with* INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii).

[151] 8 C.F.R. § 204.2(c)(1)(vi) defines "battery or extreme cruelty" as:

> (vi) Battery or extreme cruelty. For the purpose of this chapter, the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen or lawful permanent resident spouse, must have been perpetrated against the self-petitioner or the self-petitioner's child, and must have taken place during the self-petitioner's marriage to the abuser.

8 C.F.R. § 204.2(c)(1)(vi) (2000). Proving the requisite domestic abuse can be burdensome for many battered immigrant women. While the "[p]rimary evidence of the self-petitioner's good moral character is the self-petitioner's affidavit," the evidence suggested to show abuse is more of an official nature. 8 C.F.R. § 204.2(c)(2)(v). Title 8, C.F.R. § 204.2(b)(2)(iv), states that "[e]vidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel." 8 C.F.R. § 204.2(b)(2)(iv). Practitioners preparing VAWA petitions have used such evidence as: letters from advocates, restraining or protection orders, matters alleged in divorce petitions, and various police records (reports, print outs of calls to the petitioner's home designated as a domestic dispute). *See* Telephone Interview with Lenore Millibergity, Staff Attorney, Immigrant Law Center, (Feb. 24, 2000) [hereinafter Millibergity Interview]; *cf.* Chin Interview, *supra* note 10 (stating that police records are unavailable in Hawai'i without a subpoena). However, this evidence can be difficult to gather. Cultural and language barriers, embarrassment, and fear of deportation or reprisals from their batterers make available services such as shelters, police, and doctors unacceptable for many immigrant women who come from vastly different cultural backgrounds. *See* Loke, *supra* note 58, at 597. For many battered spouses, such official evidence of battery may simply be unavailable.

country; and (6) she entered into the marriage in good faith,[152] not solely for the purpose of obtaining immigration benefits.[153]

Under VAWA 2000, the self-petitioning requirements are abbreviated to mandating that the petitioner show: (1) the marriage to or the intent to marry the United States citizen was entered into in good faith by the alien;[154] (2) during the marriage or relationship intended by the alien to be legally a marriage, the alien or child of the alien has been battered or has been the subject of extreme cruelty perpetrated by the alien's spouse or intended spouse;[155] (3) good moral character;[156] (4) eligibility to be classified as an immediate relative;[157] and (5) residence with the spouse or intended spouse.[158]

Among other revisions to the self-petitioning procedure,[159] VAWA 2000 removed the extreme hardship requirement. Proof of extreme hardship was onerous for self-petitioners. This requirement was often insurmountable when the petitioner attempted to prepare the VAWA petition on her own, without legal assistance.[160] Further, the evidentiary burdens in the self-petitioning process were higher than what was required in other, family-based

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[152] One remaining provision from the harsh IMFA goes toward the "good faith marriage" determination. This condition restricts petitions based on marriages entered into while in exclusion or deportation proceedings. *See* INA § 204(g), 8 U.S.C. § 1154(a)(1)(A)(iii) (amended 2000). This provision states:

> Notwithstanding subsection (a) [which lists the qualifications for granting immigrant status for immediate relatives], except as provided in 245(e)(3) [which allows affected aliens to show that their marriage was made in good faith] [8 U.S.C.A. § 1255(e)(3)], a petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage which was entered into during the period described in section 245(e)(2) [8 U.S.C.A. § 1255(e)(2)], until the alien has resided outside the United States for a [two]-year period beginning after the date of the marriage.

Id.

[153] *See How Do I Apply*, *supra* note 74.

[154] H.R. 3244, 106th Cong. § 1503(b) (2000) (amending INA § 204(a)(1)(A)(iii)(I), 8 U.S.C. § 1154(a)(1)(A)(iii)(I) (amended 2000)).

[155] *Id.*

[156] *Id.* (amending INA § 204(a)(1)(A)(iii)(II), 8 U.S.C. § 1154(a)(1)(A)(iii)(II) (2000)).

[157] *Id.*

[158] *Id.*

[159] VAWA 2000 expanded the scope of who would be allowed to self-petition, adding those aliens who would have been legally married but for the bigamy of the U.S. citizen; widowed spouses of U.S. citizens; aliens whose spouses have lost or renounced citizenship related to a domestic violence incident; aliens who have divorced their U.S. citizen spouse who can demonstrate a connection between the divorce and the abuse; and for aliens living abroad married to a U.S. government employee, a member of the uniformed services, or one who had abused the alien in the United States. *See* H.R. 3244, § 1503(b) (amending INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2000)). Further, VAWA 2000 expanded these provisions for spouses of lawful permanent residents, as well. *See* H.R. 3244, § 1503(b) (amending INA § 204(a)(1)(A)(iii), 8 U.S.C. § 1154(a)(1)(A)(iii) (2000)).

[160] Rishty Testimony, *supra* note 130.

immigration applications.[161] Finding that the spirit and intent of VAWA 1994 made the extreme hardship standard inequitable,[162] Congress removed the requirement.

B. The Old and New Cancellation of Removal Procedures Under VAWA 1994 and VAWA 2000

Cancellation of removal can be the only remedy available to an alien facing deportation or removal. An undocumented battered immigrant now qualifies for a more lenient set of qualifications under this changed remedy than before. Congress expanded the scope of cancellation to many previously uncovered immigrants,[163] allowed a waiver of the "good moral character" element,[164] allowed all time within the United States to be counted toward the required period,[165] and expanded who is a qualifying person whose hardship may be considered for the "extreme hardship" requirement.[166] While VAWA 2000 has improved access to the cancellation remedy, the new law has also retained several potential barriers including the enormous discretion afforded the INS expressly provided in the law and through its delegated powers,[167] severely limited judicial review,[168] and the retained "extreme hardship" requirement.[169] Many of those battered immigrants who should benefit from this amended remedy could fall through the remaining gaps.

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[161] Orloff Testimony, *supra* note 71.

[162] *See* 146 CONG. REC. H9036 (daily ed. Oct. 6, 2000) (statement of Rep. Jackson-Lee) ("The spirit and intent of the 1994 law was to allow immigrants to safely escape the violence and bring their abusers to justice, now this can be done with the adoption of this report.").

[163] *See infra* text accompanying notes 185-91.

[164] *See infra* text accompanying notes 192-95.

[165] *See infra* text accompanying notes 195-202.

[166] *See infra* text accompanying notes 202-04.

[167] *See* discussion *infra* section IV.C.1.

[168] *See* discussion *infra* section IV.C.2.

[169] *See* discussion *infra* section IV.C.3.

To qualify for cancellation of removal,[170] applicants are required to be "deportable," which usually meant that they are present in the United States without legal immigration status.[171] Removal (or "deportation") of an alien already in the United States is usually due to overstaying or otherwise violating the terms of a nonimmigrant visa, or because the alien was never admitted initially and is not currently admissible.[172] Removal proceedings involve a hearing presided over by an immigration judge,[173] at which the alien may be represented by counsel, present and examine evidence, and cross-examine witnesses.[174] The alien is entitled to a limited appeals procedure.[175] Following a removal determination, the Attorney General retains the discretion to cancel the removal of an alien who is inadmissible or deportable, or to cancel removal and adjust status, if certain conditions are met.[176] Cancellation of removal is entirely discretionary, and is not subject to judicial review.[177] Although cancellation of removal is technically available to battered

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[170] Until 1996 and the passage of IIRIRA, the term was "suspension of deportation." However, under IIRIRA, this term was changed to "cancellation of removal." *See* INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2000) (amended 2000). Prior to changes made by VAWA 2000, this provision stated:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that—
>
> (iii) the alien has been battered or subjected to extreme cruelty in the United States by a spouse or parent who is a United States citizen or lawful permanent resident (or is the parent of a child of a United States citizen or lawful permanent resident and the child has been battered or subjected to extreme cruelty in the United States by such citizen or permanent resident parent);
>
> (iv) the alien has been physically present in the United States for a continuous period of not less than 3 years immediately preceding the date of such application;
>
> (v) the alien has been a person of good moral character during such period;
>
> (vi) the alien is not inadmissible under paragraph (2) or (3) of section 212(a) [8 U.S.C. § 1182(a)], is not deportable under paragraph (1)(G) or (2) through (4) of section 237(a) [8 U.S.C. § 1227(a)], and has not been convicted of an aggravated felony; and
>
> (vii) the removal would result in extreme hardship to the alien, the alien's child, or (in the case of an alien who is a child) to the alien's parent.
>
> In acting on applications under this paragraph, the Attorney General shall consider any credible evidence relevant to the application. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Attorney General.

INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (amended 2000).

[171] *See* Legomsky, *supra* note 5, at 5.

[172] *Id.*

[173] INA § 240(a), 8 U.S.C. § 1229a(a) (amended 2000).

[174] INA § 240(b)(4), 8 U.S.C. § 1229a(b)(4) (amended 2000).

[175] INA § 240(c)(5), 8 U.S.C. § 1229a(c)(5) (amended 2000).

[176] INA § 240A, 8 U.S.C. § 1229b (amended 2000).

[177] INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i) (2000).

immigrant women as a remedy, there is no mechanism under which the immigrant woman can apply.[178]

Under VAWA 1994, a battered immigrant could qualify for cancellation of removal if she showed: (1) that she was inadmissible or deportable; (2) that she had been battered or subjected to extreme cruelty; (3) that she had been in the United States for three years; (4) that she had good moral character; and (5) that extreme hardship would occur to herself or her children if she were returned to her native country.[179]

Under VAWA 2000, cancellation of removal is available to an applicant if she demonstrates: (1) she has been battered or subjected to extreme cruelty by a qualifying person;[180] (2) continuous physical presence of not less than three years immediately preceding the date of the application;[181] (3) good moral character;[182] (4) not inadmissible, deportable, and not convicted of an aggravated felony;[183] and (5) that the removal would result in extreme hardship to the alien, the alien's child, or the alien's parent.[184]

The factors do not tell the whole story, however, because VAWA 2000 additionally made changes to the eligibility and scope of the remedy in several ways. First, the circumstances meriting relief under section 240A(2)(A) were broadened. Previously, relief under this section required the alien to demonstrate that the battery or extreme cruelty had occurred in the United States,[185] and that it was committed by a currently living spouse or parent.[186] Now, the alien may qualify if the battery or extreme mental cruelty occurs

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[178] *See* Loke, *supra* note 58, at 605; *see also* Pincilotti v. Reno, No. C-95-2143 MHP, 1996 WL 162980, at *3 (N.D. Cal. Mar. 11, 1996) (finding that plaintiffs seeking to avail themselves of the VAWA suspension of deportation provisions were not able to do so, unless the INS first initiated deportation proceedings against them).

[179] INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2000) (amended 2000).

[180] H.R. 3244, 106th Cong. § 1504(a)(2)(i)(2000) (amending INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2)(A) (2000).

[181] H.R. 3244, § 1504(a)(2)(ii) (amending INA § 240A(b)(2)(B), 8 U.S.C. § 1229b(b)(2)(B) (2000)).

[182] H.R. 3244, § 1504(a)(2)(iii) (amending INA § 240A(b)(2)(C), 8 U.S.C. § 1229b(b)(2)(C) (2000)).

[183] H.R. 3244, § 1504(a)(2)(iv) (amending INA § 240A(b)(2)(D), 8 U.S.C. § 1229b(b)(2)(D) (2000)).

[184] H.R. 3244 § 1504(a)(2)(v) (amending INA § 240A(b)(2)(E), 8 U.S.C. § 1229b(b)(2)(E) (2000) (amended 2000)).

[185] INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2)(A) (2000) (amended 2000) ("[T]he alien has been battered or subjected to extreme cruelty in the United States . . . .").

[186] *Id.* (requiring that such abuse be perpetrated by "a spouse or parent who *is* a United States citizen or lawful permanent resident (or *is* the parent of a child of a United States citizen or lawful permanent resident[])") (emphasis added).

outside of the United States.[187] Additionally, relief is allowed if the abuser is (1) formerly a lawful permanent resident or citizen but lost status,[188] (2) no longer living,[189] or (3) not legally married to the alien, because the abuser is a bigamist.[190] Further, a battered immigrant who is divorced from her abuser or remarries is no longer barred from relief.[191]

Second, VAWA 2000 allows the Attorney General discretion to waive the "good moral character" requirement, under most circumstances.[192] Relief under this section was previously not available to aliens who were inadmissible, deportable, or had been convicted of an aggravated felony.[193]

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[187] H.R. 3244, § 1504(a) (amending INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2)(A) (2000)).

[188] H.R. 3244, § 1504(a)(2)(A)(i)(I)-(II) (stating that the abuse must be "by a spouse or parent who is *or was* a United States citizen. . .") (emphasis added). One problem with the INA that Congress sought to correct pertained to an abuser's loss of status, for example, when the batterer was a lawful permanent resident who was removed because of domestic abuse. 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000). The new change was meant to "[c]larif[y] that negative changes of immigration status of abuser or divorce after abused spouse and child file petition under VAWA [so that the change] ha[s] no effect on [the] status of the abused spouse or child." *Id.*

[189] H.R. 3244 § 1504(a)(2)(A)(i)(I) (amending INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2)(A) (2000)) (stating that the abuse must be "by a spouse or parent who is *or was* a United States citizen . . .") (emphasis added).

[190] H.R. 3244, § 1504(a)(2)(A)(i)(III) (amending INA § 240A(b)(2)(A), 8 U.S.C. § 1229b(b)(2)(A) (2000)). This new provision allows for cancellation for an alien who "has been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident whom the alien intended to marry, but whose marriage is not legitimate because of that United States citizen's or lawful permanent resident's bigamy[.]" *Id.* The inclusion of this provision:

> allows battered immigrants who unknowingly marry bigamists to avail themselves of VAWA's self-petition [and cancellation of removal] procedures. This provision is also intended to facilitate the filing of a self-petition by a battered immigrant married to a citizen or lawful permanent resident with whom the battered immigrant believes he or she had contracted a valid marriage and who represented himself or herself to be divorced.

146 CONG. REC. S10,192 (daily ed. Oct. 11, 2000) (statement of joint managers).

[191] *See supra* note 188.

[192] H.R. 3244, § 1504(a)(2)(c) (amending INA § 240A(b)(2)(C), 8 U.S.C. § 1229b(b)(2)(C) (2000)). This new provision states:

> Notwithstanding section 101(f) [which defines the term "good moral character" for the INA], an act or conviction that does not bar the Attorney General from granting relief under this paragraph by reason of subparagraph (A)(iv) [restricting discretionary waiver for some inadmissibility and deportability grounds] shall not bar the Attorney General from finding the alien to be of good moral character . . . if the Attorney General finds that the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted.

Id.

[193] *See* Immigration and Naturalization Act (INA) § 240A(c), 8 U.S.C. § 1229b(c) (2000) (amended 2000). "Good moral character" is defined in the negative in INA § 101(f), 8 U.S.C. 1101(f). It states:

VAWA 2000 gives the Attorney General discretion to waive this bar, if the Attorney General finds that "the act or conviction was connected to the alien's having been battered or subjected to extreme cruelty and determines that a waiver is otherwise warranted."[194] Although some acts of a battered immigrant will still bar her from obtaining relief from removal, and are not subject to the discretionary waiver,[195] many can now be waived by the Attorney General.

Third, VAWA 2000 allows for more latitude for failure to maintain the "continuous physical presence" requirement. Under section 240A(d)(2), leaving the United States for any period longer than 90 days or an aggregate absence of more than 180 days is deemed to be a failure to maintain the required physical presence.[196] VAWA 2000 makes an exception to this requirement for battered aliens who can show a connection between the absence from the United States and the battering or extreme cruelty.[197] If the connection is demonstrated, the absence does not count towards the allowable breaks established by section 240A(d)(2).[198] This waiver of time outside the United States when connected with the abuse is not a discretionary decision

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No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

(1) a habitual drunkard;

. . . .

(3) a member of one or more of the classes of persons, whether inadmissible or not, [for criminal and security related grounds];

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony.

INA § 101(f), 8 U.S.C. § 1101(f) (2000) (amended 2000).

[194] H.R. 3244, § 1504(a)(2)(C) (amending INA § 240A(b)(2) 8 U.S.C. § 1229b(b)(2)).

[195] *See* H.R. 3244, § 1504(a). VAWA 2000 allows for waiver of any of the "good moral character" grounds listed in INA § 101(f), except: inadmissibility on criminal and related grounds under INA § 212(a)(2)-(3); deportability due to marriage fraud, criminal grounds, failure to register and falsification of documents, and security and related grounds under INA § 237(a)(1)(G), (2)-(4); and conviction of an aggravated felony as described in INA § 101(a)(43). H.R. 3244, § 1504(a)(2)(A)(iv).

[196] INA § 240A(d)(2), 8 U.S.C. § 1229b(d)(2) (amended 2000).

[197] H.R. 3244, § 1504(a) (amending INA § 240A(b)(2), 8 U.S.C. § 1229b(b)(2)).

[198] *Id.* ("*No* absence or portion of an absence connected to the battering or extreme cruelty *shall count* toward the [time] limits established . . . .") (emphasis added).

of the Attorney General,[199] as the "good moral character" waiver is.[200] Further, VAWA 2000 allows a "time-stop" provision, which counts the entire time the immigrant is within the United States, rather than until the time when she receives notice that she will be deported.[201] Previously, the three-year physical presence within the United States required to qualify for cancellation of removal was counted only until the time when notice of removal was served on the alien.[202]

Fourth, the extreme hardship standard has been revised to expand the scope of "qualifying relatives" for whom hardship can be weighed to include the alien's parents.[203] Prior to VAWA 2000, only extreme hardship to the immigrant, the immigrant's child, or, if the immigrant was a child, the child's parents were considered in canceling removal.[204] Although VAWA 2000 has liberalized the requirements for cancellation of removal for battered spouses, some gaps in protection still remain.

C. Remaining Gaps in the New Legislation

The substantial changes to the INA made by VAWA 2000 have afforded battered immigrants more opportunities to escape their abusers. Liberalizing the requirements for self-petitioners and allowing the INS discretion to waive certain requirements for those seeking cancellation of removal represent a

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[199] *Id.*

[200] H.R. 3244, § 1504(a)(2)(C) (amending INA § 240A(b)(2) 8 U.S.C. § 1229b(b)(2)) (stating that the Attorney General is *not barred* from finding good moral character if the act or conviction is not one expressly listed).

[201] *See id.* (stating that "the issuance of a charging document for removal proceedings shall not toll the 3-year period of continuous physical presence in the United States"); *cf.* INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (amended 2000) (deeming any period of continuous presence to end when the alien is served a notice to appear in a removal proceeding). This VAWA 2000 provision addresses a change to the INA by IIRIRA, which "stopped the clock on accruing any time toward continuous physical presence at the time INS initiate[d] removal proceedings against an individual." 146 CONG. REC. S10,196 (daily ed. Oct. 11, 2000) (summary of VAWA 2000). Originally, this "time-stop" rule was added to the INA to discourage "gaming" of the system; removing this barrier for battered immigrants takes into consideration that "if [the battered immigrant spouses and children] are sophisticated enough about immigration law and [have] sufficient freedom of movement to 'game the system', presumably [they] would have filed self-petitions, and more likely do not even know that INS has initiated proceedings against them . . . ." *Id.*

[202] INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (amended 2000). This states, "For purposes of [cancellation of removal], any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear [in a removal proceeding]." *Id.*

[203] H.R. 3244, § 1504(a) (amending INA § 240A(b)(2)(E), 8 U.S.C. § 1229b(b)(2)(E) (2000)).

[204] INA § 240A(b)(2)(E), 8 U.S.C. § 1229b(b)(2)(E) (amended 2000).

milestone for abused immigrants. Some gaps still remain, however, as well as areas for potential hurdles for those immigrants seeking to utilize the new procedures. The INS retains considerable discretion, both explicitly under VAWA 2000 and through existing case law. Battered immigrants may still slip through these gaps.

1. INS discretion under VAWA 2000

Under VAWA 2000, the Attorney General retains considerable discretion in determining whether to grant relief under section 240A. The Attorney General has discretion as to whether to waive the "good character" requirement. Moreover, the sufficiency of the evidence pertaining to all of the elements is within the discretion of the Attorney General. While the Attorney General is required to consider "any credible evidence relevant to the application,"[205] she still retains discretion as to what evidence is credible and the weight to be given evidence submitted by an applicant.[206] Further, proving the elements required is not sufficient to guarantee a battered immigrant will be granted cancellation of removal.[207] The applicant must first demonstrate all elements of the claim, then the Attorney General "may" cancel the removal of the battered immigrant.[208] Providing the documentation necessary to show all the elements required under the statutes can be a long and painstaking process.[209] The discretion afforded the INS, through the Attorney General, can render the substantial effort to provide this documentation meaningless.

While the discretion afforded the INS in determining eligibility for relief under the cancellation of removal provision makes qualifying initially more difficult for an abused spouse, it also establishes a high threshold for appellate review. In order to "overturn an immigration official's decision denying

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[205] INA § 240A(b)(2)(D), 8 U.S.C. § 1229b(b)(2)(D) (amended 2000); H.R. 3244, § 1504(a)(2)(D).

[206] INA § 240A(b)(2)(D), 8 U.S.C. § 1229b(b)(2)(D) (2000) (amended 2000); *see also* H.R. 3244, § 1504.

[207] *See* Annotation, *What Constitutes "Extreme Hardship" or "Exceptional and Extremely Unusual Hardship," Under § 244(a) of Immigration and Nationality Act (8 U.S.C.A. § 1254(a)), Allowing Attorney General to Suspend Deportation of Alien and Allow Admission for Permanent Residence*, 72 A.L.R. FED. 133, § 2b (1999) [hereinafter Annotation].

[208] *See* INA § 240A(b)(2), 8 U.S.C. § 1229b(a)(2)(A) (amended 2000); H.R. 3244, § 1504(a)(2)(A) ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates [the required elements.]").

[209] *See* Foster, *supra* note 12, at B1 ("Advocates say that collecting evidence — taking pictures of victims' injuries, gathering written statements from neighbors who witnessed the abuse and filing police reports — to support claims under VAWA is a painstaking process that can take more than a year.").

suspension of deportation, the attorney must show not only that the deportee was eligible for suspension of deportation, but also that the denial of suspension of deportation constituted an abuse of discretion."[210]

2. *Decision-making capacity and judicial review*

Judicial review of immigration decisions is also limited. One of these decisions is what constitutes "extreme hardship." Under the judicially created plenary power doctrine, Congress and the executive branch have broad and often exclusive authority over immigration decisions.[211] Congress enacted changes to the INA through IIRIRA that have vested even more discretionary power in the hands of the Attorney General through the INS.[212] VAWA 2000 has not changed this authority.

Judicial review is limited, particularly for extreme hardship determinations. Currently, authority for immigration laws and enforcement is vested in the Attorney General.[213] The Attorney General, as authorized by Congress, has delegated to the immigration judges the authority and discretion to suspend or refuse to suspend deportation.[214] Decisions of immigration judges are subject to administrative review by the Board of Immigration Appeals ("BIA").[215] There is no judicial appeal from an INS decision denying an application for adjustment of status.[216] This includes cancellation of removal and adjustment

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[210] Annotation, *supra* note 207, § 2b.

[211] The U.S. Supreme Court created the doctrine in the *Chinese Exclusion Case*, 130 U.S. 581 (1889). In the majority opinion, Justice Field suggested that Congress's power to regulate immigration was not subject to judicial review, and was based on national security, sovereignty over its own territory, and self-preservation. *See id.* at 604.

[212] *See* INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii) (2000). IIRIRA purported to restrict judicial review for *any* discretionary decision made by the Attorney General. *See id.*

[213] *See* INA § 103(a), 8 U.S.C. § 1103(a) (2000).

[214] *See* INA § 103(a), 8 U.S.C. § 1103(a) (authorizing the Attorney General to administer and enforce the INA). Section 103 states: "The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens." *Id.* Further, the INA expressly defines "immigration judge" as one who is appointed by the Attorney General:

> The term "immigration judge" means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office for Immigration Review, qualified to conduct specified classes of proceedings, including a hearing under section 240 [removal proceedings]. An immigration judge shall be subject to such supervision and shall perform such duties as the Attorney General shall prescribe, but shall not be employed by the Immigration and Naturalization Service.

INA § 101(b)(4), 8. U.S.C. § 1101(b)(4) (2000) (amended 2000).

[215] See 8 C.F.R. § 3.1(b) (2001) for a listing of specific decisions reviewable by the Board of Immigration Appeals.

[216] *See* 8 C.F.R. § 245.2(a)(5)(ii) (2000); *see also* INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B): "Notwithstanding any other provision of law, no court shall have jurisdiction to

of status of battered immigrants under section 240A.[217] Further, courts have held that a determination of extreme hardship constitutes a discretionary function which is barred from judicial review under IIRIRA.[218]

Judicial review under IIRIRA, then, has been narrowed considerably, affording the INS and the BIA substantial discretion and autonomy in determining what constitutes extreme hardship.[219] The Supreme Court in *Immigration and Naturalization Service v. Jong Ha Wang*[220] established that "[t]he Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so."[221] However, the Court did not specifically address the standard of review applicable to BIA cases.[222] Most courts have construed this to be an abuse of discretion standard.[223] Abuse of discretion has been defined as arising when a decision "[is] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group."[224] The Ninth Circuit has defined this standard as requiring the BIA "to take into account all relevant factors without acting in an arbitrary, illegal, or irrational fashion."[225] Under this very high standard, a battered woman requesting cancellation of removal risks not being able to avail herself of significant review of her application for cancellation, if she does not meet the documentary requirements or if the INS feels she does not merit the discretionary relief.

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review . . . any judgment regarding the granting of relief under section . . . 245." *Id.*

[217] *See* INA § 242(a)(2)(B), 8 U.S.C. § 1252(a)(2)(B) (2000): "Notwithstanding any other provision of law, no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 240A." *Id.*

[218] *See, e.g.*, Bernal-Vallejo v. INS, 195 F.3d 56, 63 (1st Cir. 1999); Moosa v. INS, 171 F.3d 994, 1012 (5th Cir. 1999).

[219] See Jonathon P. Foerstel, Comment, *Suspension of Deportation—Toward a New Hardship Standard*, 18 SAN DIEGO L. REV. 663, 669-73 (1981), Susan L. Kamlet, Comment, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175 (1984), and William C. B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885 (1997), for a more thorough discussion of judicial review of extreme hardship.

[220] 450 U.S. 139 (1981).

[221] *Id.* at 145.

[222] *Id.* at 144. *But see* Sida v. INS, 665 F.2d 851, 854 (9th Cir. 1981) (finding that the Supreme Court in *Wang* implicitly adopted the abuse of discretion standard of review).

[223] *See* Barragan-Verduzco v. INS, 777 F.2d 424, 425 (8th Cir. 1985) (finding that a petitioner may prevail under the limited abuse of discretion standard if he can demonstrate that the agency failed to consider all the factors he presented as constituting extreme hardship).

[224] Achacoso-Sanchez v. INS, 79 F.2d 1260, 1265 (7th Cir. 1985) (citations omitted); *cf.* Mejia-Carrillo, 656 F.2d 520, 522 (9th Cir. 1981) (defining abuse of discretion as a decision that is "arbitrary, irrational or contrary to law").

[225] Dabao v. INS, 127 F.3d 1104, No. 96-70691, 1997 WL 661457 (9th Cir. Oct. 14, 1997) (unpublished opnion).

3. Battered immigrants who fall through the gaps

Although the self-petitioning and cancellation of removal provisions have been eased substantially by VAWA 2000, there are still those battered immigrants who will fall through the gaps. Deportation for battered immigrants remains a distinct possibility, even under the less restrictive VAWA 2000 requirements. Those subject to deportation include those who would qualify for self-petitioning, but never learn about the remedy before being placed into deportation proceedings.[226] With limited English and isolated from others, an undocumented immigrant may believe her husband when he tells her that no remedies exist.

Further, laws which exist to protect battered women may actually hurt them when used by the abuser. For example, the procedures for obtaining temporary restraining orders have been streamlined to facilitate access by abuse victims. As a result, however, the batterer may obtain a restraining order against the battered immigrant, lure her back, and then have her arrested for violating the order.[227] Battered immigrants who try to defend themselves against the violence may be arrested for assault or battery themselves.[228] Convictions on charges such as these may run afoul of the "good moral character" requirement.[229] The INS is still barred from finding good moral

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[226] *See* Vanessa Bauza, *Law Protects Immigrants from Abuses Battered Women Can Seek Residency*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 6, 2000, at 1B, 2000 WL 5643976. "[Self-petitioning is] the primary way for a battered woman to get relief . . . . The problem is that [the numbers of those self-petitioning reported by the INS] reflect battered women who have found their way to a trained attorney who understands how to assist them." *Id.* (quoting Leslye E. Orloff, Director of the Immigrant Women Program at the NOW Legal Defense and Education Fund).

[227] *See* Suzanne Hoholik, *Abuse law offers help to battered immigrants*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 1999, at 3B, WL 100185378.

> [An undocumented immigrant] tried to leave her husband three times, but one night in September 1998 while he was hitting her, she defended herself and scratched him. He used the injury to get a protective order against [her] and gain custody of their children, then used the children to lure her back. When the violence started up again last month and the police became involved, [she] was jailed on a charge of violating the order.

Id.

[228] *See* Bauza, *supra* note 226 ("[An undocumented immigrant's] husband finally turned her in to INS officials after she bit him while trying to escape during a fight. She has been in [INS] custody for more than two years . . . . Initially, immigration officials considered her a flight risk and a danger to the community due to a DUI arrest and a battery arrest for biting her husband."); *see also* Philip P. Pan, *Victimized Woman Faces Deportation; System Designed to Help "Turned Against" Mother Who Can't Speak English*, WASH. POST, Feb. 20, 2000, at A01, 2000 WL 2286664 (detailing the required deportation of a woman convicted of domestic violence for defending herself against her husband's assault).

[229] *See supra* note 195.

character in some circumstances, even if such an act or conviction is connected to the abuse. Further, even when not barred, this waiver is still within the discretion of the INS, and thus there is no guarantee that the INS will find that such discretion is warranted.

Additionally, under VAWA 2000, some battered immigrants may not qualify for the cancellation of removal remedy. These aliens include those who have committed an act or have a conviction for which a connection cannot be demonstrated, those who do not have the continuous physical presence requirement, and those who do not have sufficient credible evidence to establish extreme hardship.

V. THE EVOLVING EXTREME HARDSHIP STANDARD

In addition to the other elements required for relief under section 240A(b), the battered immigrant must also show that she, her children, or her parents will suffer extreme hardship should she be returned to her native country.[230] This is the most difficult element to prove,[231] particularly because the settled judicial interpretation is historically based on suspension of deportation cases which are substantially different than those cases in which domestic violence occurs. Additionally, the definition of "extreme hardship" is not entirely clear and has changed since its first appearance in 1940. While factors to be considered by judges in determining whether "extreme hardship" exists have been identified, these early factors did not adequately address the later use of the "extreme hardship" standard in domestic abuse cases. Although adding the more appropriate VAWA factors[232] ameliorated this problem to some extent, the standard itself presupposes that the battered spouse should return home, absent some particularly unconscionable reason not to do so. Further, legislative history in VAWA 2000 raises doubts about whether Congress understands the difficulty of meeting the "extreme hardship" standard.[233] Use of the same standard in domestic violence cases as in suspension of deportation cases minimizes the battered woman's experience.

A. Legislative History Of The Extreme Hardship Standard and the Settled Judicial Interpretation

One provision that escaped the good intentions of VAWA is the continued use of the hardship standard in determining whether a battered immigrant can

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[230] H.R. 3244, 106th Cong. § 1504(a) (2000).

[231] *See* Chin Interview, *supra* note 10.

[232] *See infra* text accompanying note 275.

[233] *See infra* text accompanying notes 280-82.

avail herself of the VAWA cancellation of removal provision.[234] The purpose of the standard, as it has evolved over the years, has been to ameliorate the hardships endured by aliens deported under inflexible immigration laws.[235] This compassionate urge has been tempered by the countervailing concern over too lax immigration policies. Consequently, the level of hardship required to be shown by an alien has fluctuated considerably over the years as each competing interest has peaked and waned. The hardship requirement has, at various times, gone from "serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien" to "exceptional and extremely unusual hardship" to "extreme hardship."[236]

The hardship standard first appeared in immigration law in connection with suspension of deportation in 1940.[237] During this period, an alien was required to show that deportation to his or her native country would cause hardship in order to avoid being deported.[238] In the Alien Registration Act of 1940,[239] Congress set the standard at "serious economic detriment."[240] When the hardship standard was first established in 1940, the BIA's interpretation of the "serious economic detriment" was very liberal and easy to prove. Courts found that serious economic detriment existed if the effect of deportation would be to substantially lower the standard of living of a dependent relative, such as a wife or a child.[241] This showing of hardship was found to be

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[234] *See* discussion *supra* section IV.B.

[235] *See* Underwood, *supra* note 219, at 888-89.

[236] See *In re* O-J-O, File A23 726 233, 1996 WL 393504 (B.I.A. Interim Decision 3280, June 14, 1996) for a history of the hardship standard.

[237] *See* Kamlet, *supra* note 219, at 177-78. The law from 1917, when the first wide-spread immigration policy was first passed by Congress, until 1940, made aliens automatically deportable if they were in violation of the Act. *See id.* In 1940, Congress passed the Alien Registration Act to provide some leeway in cases of hardship to aliens about to be deported. *See id.*

[238] *See* LEGOMSKY, *supra* note 5, at 477. The Act stated:

> In the case of any alien . . . who is deportable under any law of the United States [except certain aggravated grounds] and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien . . . if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien.

Foerstel, *supra* note 219, at 665 n.12 (citing the Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 672 (1940) (amending the Immigration and Nationality Act of 1917, ch. 29, § 19(c), 39 Stat. 874 (1917))).

[239] *See* Foerstel, *supra* note 219, at 665 n.12 (citing the Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 672 (1940) (amending the Immigration and Nationality Act of 1917, ch. 29, § 19(c), 39 Stat. 874 (1917))).

[240] *See id.*

[241] *See, e.g.*, *In re* T. 3 I. & N. Dec. 707, 710 (1949); *In re* L., 2 I. & N. Dec. 775, 776 (1947).

sufficient in cases where aliens had established economic holdings in the United States,[242] and seemed to reward those aliens who had bypassed the waiting lists abroad and had established roots within the United States, even if such aliens were here illegally.[243] This liberal standard was criticized in the early 1950s, as concerns arose over the use of the suspension provisions to bypass normal immigration channels, benefiting those aliens who entered the country illegally over those aliens attempting to immigrate via conventional means.[244] As a result, in 1952, Congress raised the level to "exceptional and extremely unusual hardship."[245] This new incarnation of the standard was intended to provide relief only where an alien's deportation would be unconscionable.[246] The factors identified by the BIA in considering whether or not to grant relief were: (1) length of residence in the United States, including the manner of entry; (2) family ties; (3) possibility of obtaining a visa abroad; (4) financial burden on the alien of having to go abroad to obtain a visa; and (5) health and age of the alien.[247] Because the change to the "exceptional and extremely unusual hardship" standard reflected this concern over abuse, it perhaps went too far in the other direction, creating a needlessly high hurdle.[248] This new standard, too, drew harsh criticism and concern that the new hurdle was "cruel and vindictive, heedless of the opinions or good will of our allies, and oblivious of the standards of decency and fair play that mark our criminal legislation."[249]

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[242] *See, e.g., In re* K-, 4 I. & N. Dec. 731, 732 (1952) (finding serious economic detriment would occur if a husband, unemployed wife, and two children were deported when their economic holdings included a "fruit and vegetable business from which [the male alien] derive[d] a livelihood for himself and his children[, and his] business and the personal assets and cash [were] estimated to be of the value of $2,800"); *In re* G-, 4 I. & N. Dec. 500, 500-01 (1951) (finding serious economic detriment if husband, the sole source of support for wife and two children, was deported when their economic holdings included "assets total[ling] approximately $10,700").

[243] *See id.*

[244] Foerstel, *supra* note 219, at 666.

[245] *Id.* (citing the McCarran-Walter Act of 1952, ch. 477, 66 Stat. 163 (1952)).

[246] *See* Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 95 (1999).

[247] *In re* S., 5 I. & N. Dec. 409, 410-11 (1953).

[248] One indication that the laws were too harsh is the subsequent reaction by the BIA and Congress. The BIA took a liberal attitude in interpreting the new standard, and there had been a dramatic increase in private immigration bills that carved out exceptions for individuals who did not meet the standard. *See* Foerstel, *supra* note 219, at 668 n.37. As a private bill is a remedy of last resort, an increase in private bills granting status for a specific individual can indicate that the rules under which the individual does not qualify are too harsh. *See* LEGOMSKY, *supra* note 5, at 504.

[249] Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 309 (1956).

In 1962, Congress again revised the hardship standard by splitting the hardship required into two categories: (1) "extreme hardship" for those aliens found deportable on less serious grounds;[250] and (2) "exceptional and extremely unusual hardship" standard for more serious violators.[251] This "extreme hardship" standard for less serious violators, which is still used in battered immigrant cases, lacked statutory guidelines or definitions to provide guidance for the INS to determine who was eligible.[252] This ambiguity posed problems for subsequent courts grappling with the new standard.[253] Extreme hardship was not a term of fixed meaning, and a finding of hardship depended upon the facts of each case.[254] Moreover, because the hardship provisions were now split into two different standards, there was a challenge in distinguishing between the extreme hardship standard and the "extremely unusual hardship standard."[255] Courts varied in their interpretation of Congress's refusal to supply a concrete definition of "extreme hardship" for the INS to apply.[256] Some courts determined that this lack of guidance meant

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[250] Underwood, *supra* note 219, at 890-91.

[251] *Id.*

[252] *See In re* L-O-G, File A28-862 064, 1996 BIA LEXIS 18 (BIA Interim Decision 3281, June 14, 1996) ("The legislative history is silent regarding the reasons for the 1962 change in the suspension of deportation statute . . . [h]owever, it is clear that Congress found the 'exceptional and extremely unusual' language inappropriate, and that it intended to make the suspension remedy more widely available . . . .").

[253] INS v. Wang, 450 U.S. 139, 144 (1981) ("[R]easonable men could easily differ as to [the] construction [of 'extreme hardship']."); *In re* Hwang, 10 I. & N. Dec. 448, 452 (1964) ("The term 'extreme hardship,' however, admits of varying degrees of severity. The limits of personal deprivation and economic detriment contemplated in the term 'extreme hardship' cannot be stated in a hard and fast rule.").

[254] *See In re* Chumpitazi, 16 I. & N. Dec. 629, No. A-19654637, 1978 BIA LEXIS 48 (B.I.A. Interim Decision 3230, Nov. 20, 1978); Jara-Navarrete v. INS, 813 F.2d 1340, 1343 (9th Cir. 1987) (finding cursory evaluation of hardship factors constitutes abuse of discretion). Because the hardship that must be demonstrated by the alien is "a degree of hardship beyond that typically associated with deportation," the petitioner must show why the facts of his or her case merits suspension of deportation. 8 C.F.R. § 240.58(b) (2000). "The alien carries the burden of demonstrating both that he is statutorily eligible for relief and that he merits a favorable exercise of discretion." *In re* Ige, 20 I. & N. Dec. 880, Nos. A-27178229, A-27594794, 1994 BIA LEXIS 13 (B.I.A. Interim Decision 320, Sept. 16, 1994) at *4. To do this, the court looks at the aggregate of circumstances. *Id.* at *4-*5.

[255] Griffith, *supra* note 246, at 98-99.

[256] *See, e.g.*, Hernandez-Patino v. INS, 831 F.2d 750, 753 (7th Cir. 1987). "Congress, in refusing to define 'extreme' hardship fully, avoided the substantive policy decision and has deferred to agency expertise. Given the power to define extreme hardship, the BIA need merely follow established procedures, support conclusions with evidence and articulate reasons for its decision." *Id.*

that Congress, and therefore the courts, should defer to the INS's expertise in determining whether extreme hardship existed.[257]

In 1978, the BIA identified factors to be considered when determining "extreme hardship" in *In re Anderson*.[258] In *Anderson*, the petitioner, a fifty-five year-old native of the Dominican Republic, asserted that because the economic conditions in his native country were so depressed, he would find it difficult to find employment to support himself and his wife.[259] Relying on comments by the House Judiciary Committee,[260] the court determined that the economic situation in Anderson's native country was relevant, but a finding of extreme hardship required "a sufficient number of other adverse factors to conclude that deportation will result in the degree of hardship that section 244(a)(1) was designed to alleviate."[261] These factors included:

> age of the subject; family ties in the United States and abroad; length of residence in the United States; condition of health; conditions in the country to which the alien is returnable—economic and political; financial status—business and occupation; the possibility of other means of adjustment of status; whether of special assistance to the United States or community; immigration history; position in the community.[262]

In early 1996, the BIA issued several decisions, seeming to open the extreme hardship determination to other factors not explicitly listed in *Anderson* and allowing the immigration and BIA judges more discretion and

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[257] *Id.* (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), for the proposition that when Congress inadvertently or intentionally leaves issues to be resolved by the agency charged with the administration of the statute, it is deferring to agency expertise).

[258] 16 I. & N. Dec. 596 (1978).

[259] *Id.* at 596-97.

[260] *See id.* at 597. The discussion of how to determine hardship by the Committee is as follows:

> With respect to determining hardship under section 4 of this bill the Attorney General is expected to apply similar criteria to that which is currently utilized in granting suspension of deportation and consider the following facts and circumstances among others: age of the subject; family ties in the United States and abroad; length of residence in the United States; condition of health; conditions in the country to which the alien is returnable—economic and political; financial status—business and occupation; the possibility of other means of adjustment of status; whether of special assistance to the United States or community; immigration history; position in the community.

Id.

[261] *Id.* at 598.

[262] *Id.* at 597. Although utilizing these factors in its decision, the BIA in *Anderson* goes on to point out the limited significance of legislative committee statements, especially as no action was taken on the measure by the House prior to the adjournment of the 94th Congress. *Id.* at 597 n.1.

latitude in finding extreme hardship. In *In re O-J-O*,[263] the BIA stated that "[a]lthough [the *Anderson* factors] provide a framework for analysis, . . . this list was not meant to preclude consideration of aspects of hardship which do not fit squarely within one of these nine factors."[264] In a companion case to *In re O-J-O*, *In re L-O-G*,[265] the majority of the Board stated that "[a] restrictive view of extreme hardship is not mandated either by the Supreme Court or by our published case law."[266]

The modern formulation, then, is still the standard for "extreme hardship." Based on factors considered in BIA decisions, the INS codified an expanded list of nonexhaustive factors for suspension of deportation cases.[267] The hardship that must be demonstrated by the alien is "a degree of hardship beyond that typically associated with deportation."[268] This normally requires a combination of a number of different factors. "Adjudicators should weigh

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[263] File A23 726 233, 1996 BIA LEXIS 19 (B.I.A. Interim Decision 3280, June 14, 1996).

[264] *See id.* at *6.

[265] File A28-862 064, 1996 BIA LEXIS 18 (B.I.A. Interim Decision 3281, June 14, 1996).

[266] *Id.* at *13.

[267] Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 63 Fed. Reg. 64,895 (proposed Nov. 24, 1998) (to be codified at 8 C.F.R. pts. 103, 208, 240, 274a, and 229) [hereinafter Suspension of Deportation I]. These factors were later codified at 8 C.F.R. § 240.58. Suspension of Deportation I, 63 Fed Reg. at 64,907. These factors include:

(1) the age of the alien, both at the time of entry to the United States and at the time of application for suspension of deportation;

(2) the age, number, and immigration status of the alien's children and their ability to speak the native language and adjust to life in another country;

(3) the health condition of the alien or the alien's child, spouse, or parent and the availability of a required medical treatment in the country to which the alien would be returned;

(4) the alien's ability to obtain employment in the country to which the alien would be returned;

(5) the length of residence in the United States;

(6) the existence of other family members who will be legally residing in the United States;

(7) the financial impact of the alien's departure;

(8) the impact of a disruption of educational opportunities;

(9) the psychological impact of the alien's deportation;

(10) the current political and economic conditions in the country to which the alien would be returned;

(11) family and other ties to the country to which the alien would be returned;

(12) contributions to and ties to a community in the United States, including the degree of integration into society;

(13) immigration history, including authorized residence in the United States; and

(14) the availability of other means of adjusting to permanent resident status.

Id. at 64,903.

[268] 8 C.F.R. § 240.58(b) (2000).

all relevant factors presented and consider them in light of the totality of the circumstances, but are not required to offer an independent analysis of each listed factor when rendering a decision."[269]

Although the traditional factors enunciated in *Anderson* and those factors subsequently codified by the INS are somewhat pertinent to battered spouses, these factors did not begin to take into account other, more relevant circumstances that would more adequately determine whether an alien was suffering extreme hardship.[270]

B. Attempting to Tailor the Old Standard for Battered Spouses

With the passage of VAWA 1994, Congress created the battered spouse exceptions to relief from deportation, using the "extreme hardship" standard.[271] Additionally, IIRIRA restructured the deportation provision in 1996, collapsing several provisions—the waiver of deportation relief under section 212(c) and the suspension of deportation relief under section 244—into one provision called "cancellation of removal" under section 240A. IIRIRA raised the level of hardship required for all but battered spouses and children to "exceptional and extremely unusual hardship,"[272] and added the requirement that this hardship be suffered by the non-battered applicant's qualifying family member.[273]

On March 26, 1996, the INS published an interim rule, which established the eligibility requirements for battered spouses and children using the self-petitioning process.[274] Because "extreme hardship" was not defined by Congress, and no guidelines were given for this element's interpretation, the INS has used the "settled judicial and administrative meaning [acquired] in the context of suspension of deportation cases under section 244 of the [Immigration and Naturalization] Act."[275] Each petition was to be evaluated

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[269] 8 C.F.R. § 240.58(a).

[270] *See* Virtue Memorandum, *supra* note 21, at 166 ("There are many factors that are either unique to the battered spouse or child self-petitioner or of heightened significance.").

[271] *See* Immigration and Naturalization Act (INA) § 240A(b)(2), 8 U.S.C. § 1229b(b)(2) (2000) (amended 2000).

[272] INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (amended 2000).

[273] *See id.*

[274] Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13,061 (interim rule proposed Mar. 26, 1996) (to be codified at 8 C.F.R. pts. 103, 204, 206 and 216). This interim rule did not initially deal with the suspension of deportation portion of VAWA, as the Executive Office for Immigration Review was responsible for that aspect of VAWA. *See* 73 No. 13 INTERPRETER RELEASES 385, 399 (1996).

[275] Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. at 13,067. Presumably, VAWA 2000 changes in the INA will require an updated rule for self-petitioning.

on a case-by-case basis[276] looking at a combination of factors, with no guarantee that any particular reason or reasons would result in a finding of extreme hardship.[277] The interim rule included new factors, which added to or expanded upon the traditional factors. The new factors included:

(1) the nature and extent of the physical and psychological consequences of the battering or extreme cruelty;

(2) the impact of the loss of access to the U.S. courts and criminal justice system (including, not limited to, the ability to obtain and enforce: orders of protection; criminal investigations and prosecutions; and family law proceedings or court orders regarding child support, maintenance, child custody and visitation);

(3) the self-petitioner's and/or the self-petitioner's child's need for social, medical, mental health, or other supportive services which would not be available or reasonably accessible in the foreign country;

(4) the existence of laws, social practices, or customs in the foreign country that would penalize or ostracize the self-petitioner or the self-petitioner's child for having been the victim of abuse, for leaving the abusive situation, or for actions taken to stop the abuse;

(5) the abuser's ability to travel to the foreign country and the ability and willingness of foreign authorities to protect the self-petitioner and/or the self-petitioner's child from future abuse; and

(6) the likelihood that the abuser's family, friends, or others acting on behalf of the abuser in the foreign country would physically or psychologically harm the self-petitioner and/or the self-petitioner's child.[278]

The Code of Federal Regulations was later amended to include these factors for battered spouses seeking suspension of deportation, as well.[279]

The latest word regarding "extreme hardship" comes from Congress. When amending the battered spousal provisions with VAWA 2000, the Congressional intent to retain the standard for cancellation of removal cases appears clear. Congress removed the requirement of extreme hardship from the self-petitioning remedy and made only minor changes to the standard to the cancellation of removal provision. It remains questionable, however, whether Congress's understanding of the extreme hardship standard coincides with the

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[276] 8 C.F.R. § 204.2 (c)(1)(viii) (2000).

[277] *Id.*

[278] Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. at 13,067.

[279] Suspension of Deportation and Special Rule Cancellation of Removal for Certain Nationals of Guatemala, El Salvador, and Former Soviet Bloc Countries, 64 Fed. Reg. 27,856, 27,864 (proposed May 21, 1999) (to be codified at 8 CF.R. pts. 103, 208, 240, 246, 274a, 299) [hereinafter Suspension of Deportation II].

settled judicial interpretation. When addressing the hardship standard for the newly created relief for trafficking victims, a minority of the House Committee on the Judiciary indicated, "The Majority repeatedly noted that in immigration law the 'extreme hardship' standard is not difficult to meet. Unfortunately, they cited no evidence to support this proposition and the plain meaning of the standard would suggest otherwise."[280]

Further, after considering the standard to apply for victims of sex-traffickers, legislators decided that the almost insurmountable extreme hardship standard could be fulfilled if the applicant showed as little hardship as "miss[ing] American baseball."[281] Based upon this concern, the law was subsequently amended to raise the standard even further, to "extreme hardship involving unusual and severe harm."[282]

Congressional intent may be present in retaining the extreme hardship standard in cancellation of removal cases, however the significance of the standard may be absent. Although Congress may not understand the high threshold of the extreme hardship standard, the INS certainly does. The promulgation of the VAWA factors prior to the passage of VAWA 2000 allows a more realistic treatment of abuse cases. Tailoring the standard for battered spouses eases the burden somewhat. Unfortunately, while the intentions behind the ameliorating factors are admirable and more in line with VAWA 1994 and VAWA 2000, some problems remain.

In publishing new factors to be considered by the INS when considering a VAWA applicant, the INS sought to be sensitive to the needs of domestic

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[280] H.R. REP. NO. 106-487 (II) (2000) (Minority views).

[281] 146 CONG. REC. S10,179 (daily. ed. Oct. 11, 2000) (statement of Sen. Brownback). The exchange is as follows:

> MR. WELLSTONE. . . . In order to be eligible for the visa provided, the traffic victim would be required to prove she would face "extreme hardship involving unusual and severe harm." This is a new standard under the Immigration and Nationality Act. Can the Senator [Brownback] explain why this new standard was created?
>
> MR. BROWNBACK. . . . This was raised in conference committee under thorough discussion about this new standard of "extreme hardship involving unusual and severe harm." There was a fear on the part of some conferees that some judicial interpretations over the term "extreme hardship" might be too expansive; specifically, the conferees objected to an interpretation that the applicant could prove "extreme hardship" by showing he or she would miss American baseball after being deported from the United States. So this language should be interpreted as a higher standard than some of these expansive interpretations of "extreme hardship."
>
> . . . .
>
> The purpose of inserting the phrase "unusual and severe" is to require a showing that something more than the inconvenience and dislocation that any alien would suffer upon removal might occur.

Id.

[282] *Id.*

violence victims and their unique circumstances. Congress's continued use of the "extreme hardship" standard in cancellation of removal cases, however, weighs against this new sensitivity. The settled judicial interpretation of the *Anderson* factors[283] remains. In fact, INS adjudicators are admonished to consider case law interpreting hardship in suspension of deportation cases.[284] Because judges interpreted extreme hardship in suspension of deportation cases without the additional complexities and difficulties of domestic violence, the use of this standard in the more remedial battered spouse context is inappropriate. These situations are not analogous, as will be discussed in Section VI.[285] Additionally, an "extreme hardship" determination requires the battered spouse to show "a degree of hardship beyond that typically associated with deportation."[286] The very nature of potential deportation for a battered immigrant constitutes extreme hardship in many cases, above and beyond that experienced by most immigrants subject to removal. Layering new factors onto the old standard with its settled judicial interpretation does not neutralize this inconsistency. A new standard, without the history and without the "hardship beyond that typically associated with deportation" requirement is needed.

VI. THE UNTAKEN STEP THREE: "EXTREME HARDSHIP" IN CANCELLATION OF REMOVAL CASES

The use of various hardship standards as a way to soften the sometimes harsh results of immigration deportation or removal provisions has compassionate underpinnings, but can pose a substantial obstacle to those the provision is designed to help. Although VAWA 2000 eliminated the required showing of extreme hardship for self-petitioners, there remains the determination of extreme hardship by the INS for cancellation of removal cases. The VAWA factors as applied to battered immigrants represent a step in the right direction, compared with the ill-suited *Anderson* factors.

Almost immediately after the passage of VAWA 1994, it became clear to advocates that the *Anderson* factors, now firmly established as the basis for the extreme hardship determination, were inadequate to describe hardship in cases of domestic abuse. Although the subsequent VAWA factors expanded upon the *Anderson* factors and added new factors to the extreme hardship determination, the requirement remained. The overlap of these factors when applied to immigrants from South Korea, the Philippines, Japan, and Malaysia

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[283] *See supra* text accompanying note 262.

[284] *See* Virtue Memorandum, *supra* note 21, at 167.

[285] *See* discussion *infra* section VI.

[286] 8 C.F.R. § 240.58(b) (2000).

illustrates that domestic violence cases, by their very nature, pose extreme hardship on the alien different in kind than a typical deportation case.

A. Traditional Elements Of Extreme Hardship – Selected Anderson Factors

The "extreme hardship" standard utilized in suspension of deportation cases[287] was based upon the totality of circumstances, and included evaluation of both economic and emotional factors. Although the traditional *Anderson* factors[288] may be sufficient in most cases to evaluate hardship in non-domestic violence immigration cases, they are often inadequate when describing the extreme hardship a battered alien spouse would face in returning to her native country.

1. Community involvement

One element in the *Anderson* formulation is evaluation of the alien's community involvement, and the resulting hardship from the proposed separation. The courts view this involvement as relevant to the alien's integration in the community at large[289] and is evaluated with other factors. Although the social and emotional hardships imposed by separation from ties established in the United States have been particularly effective in courts' weighing the balance of extreme hardship,[290] this is not always the case.[291] Some courts view the emotional hardship caused by separation from family and friends in the United States as "a common result of deportation[,]"[292] and therefore would not be distinguishable from other similarly situated immigrants facing deportation.

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[287] Under IIRIRA, the standard for suspension of deportation became "exceptional and extremely unusual." Curtis Pierce, *The Benefits of "Hardship": Historical Analysis and Current Standards for Avoiding Removal*, 76 No. 10 INTERPRETER RELEASES 405, 405 (1999).

[288] *See supra* text accompanying note 262.

[289] *See* Agustin v. INS, 700 F.2d 564, 565 (9th Cir. 1983) (letters from labor union and minister insufficient for extreme hardship absent other factors); Santana-Figueroa v. INS, 644 F.2d 1354, 1356 (9th Cir. 1981) (petitioner "an asset to [his] church and community"); Kam Ng v. Pilliod, 279 F.2d 207, 210 (7th Cir. 1960) (finding that alien's *not* establishing roots in the United States during seventeen years an important factor in court's determination that no extreme hardship existed).

[290] *See, e.g.*, Luna v. INS, 709 F.2d 126, 127-28 (1st Cir. 1983).

[291] *See* Bueno-Carrillo v. Landon, 682 F.2d 143 (7th Cir. 1982). *But see* Partheniades v. Shaughnessy, 146 F. Supp. 772, 774 (S.D.N.Y. 1956) (discussing the lower, administrative decision not to grant relief from suspension of deportation to those family members who were eligible in an effort to avoid separating the family, some of whom were ineligible for relief).

[292] *In re* Pilch, File A29-603-413, 1996 WL 706595 (B.I.A. Interim Decision 3298, Dec. 3, 1996).

Often, separation from the community is a large concern for those facing removal to their native countries after building a life in the United States over an extended period. Showing strong ties with the community can be particularly difficult for a battered spouse, however, whose batterer may have used the common tactic of isolating her from those in her new community. Contact with those in the United States may be limited to the batterer's family and friends only. As one Asian woman stated, "After I got here, I didn't have too many friends, and as a housewife, I was always at home. Most of our friends were his friends and from the man's side of the family, so no matter what I said, you know, they usually helped the man."[293]

2. Family ties within the United States

The hardship imposed on the children of immigrants is another factor in the "extreme hardship" balance to which courts have given particular weight. Of special concern is the separation of alien parents from citizen children. The BIA has generally viewed separation of alien parents from their citizen children as "parental choice," assuming that the natural course would be for the parents to take the children with them when leaving the United States.[294] Courts, however, have not always taken such a strident stance, and have reversed the BIA when it appears that leaving the citizen child in the United States is not parental choice, or when they feel that the BIA has not given sufficient consideration to the potential for separation. For example, the court in *Babai v. Immigration & Naturalization Service*[295] characterized the separation as a citizen's "absolute right to remain in the United States[,]"[296] not as a convenient and empty threat of "abandonment" as the BIA has in other cases.[297] As such, the Court of Appeals for the Sixth Circuit found that it was

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[293] Heidi M. Bauer et al., *Barriers to health care for abused Latina and Asian immigrant women*, 11 J. HEALTH CARE FOR POOR & UNDERSERVED 33 (2000), 2000 WL 13770459, at *3.

[294] *See In re* Ige, 20 I. & N. Dec. 880, Nos. A-27178229, A-27594794, 1994 BIA LEXIS 13 (B.I.A. Interim Decision 320, Sept. 16, 1994), at *13. If no hardship to the citizen child would occur if he accompanies his parent abroad, the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation. *Id.* at *14.

[295] 985 F.2d 252 (6th Cir. 1993).

[296] *Id.* at 254; *see also* Cerrillo-Perez v. INS, 809 F.2d 1419, 1426 (9th Cir. 1987) ("[T]he hardship to a citizen child remaining in this country . . . is a factor that must be considered on a case by case basis by the BIA."); Zamora-Garcia v. INS, 737 F.2d 488, 494 (5th Cir. 1984) ("[W]e do require consideration of the hardship to [petitioner's child] posed by the possibility of separation from [her foster family in the United States].").

[297] *See Ige*, 20 I. & N. Dec. 880, 1994 BIA LEXIS 13, at *15 ("[I]f the male respondent believes it would be an 'extraordinary hardship' for his children to remain here, he should by all means take them with him. He has presented no good reason for leaving a small child here, nor shown any reasonable means to do so."); Liu v. United States Dep't of Justice, 13 F.3d 1175, 1177 (8th Cir. 1994) (finding that the decision whether to leave [the child] or take him

within the rights of the child to stay in the United States, and that the BIA abused its discretion in failing to consider the impact on the petitioners' citizen son if he remained without his parents.[298]

If the child were to return with the mother to her native country, additional issues arise when considering the hardship to the child. Whether removal would amount to a de facto deportation of the child and thus be a violation of the child citizen's constitutional rights has been argued, but generally not successfully.[299] Other hardships the children must endure, such as loss of educational opportunities for the citizen child,[300] the child's lack of familiarity with the language of the native country,[301] and inconvenience to the child in changing schools, are viewed along with other factors.

Battered aliens with children face the possibility of being separated from their citizen children, not through "parental choice" or "unnecessary abandonment," but through bitter custody battles[302] or threats of various kinds by the batterer. As such, separation from their children can be heart wrenching both for the battered immigrant and her children.[303] Making the difficult

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with them "rests solely with [the child's] parents--and is not being imposed upon them by the government").

[298] *See Babai*, 985 F.2d at 254-55.

[299] *See, e.g.*, Urbano de Malaluan v. INS, 577 F.2d 589, 595 (9th Cir. 1978) ("[T]he focus of s 244 is not upon the mere existence of children of the alien who are United States citizens, but rather a discretionary review of the hardship that would be inflicted upon those citizens."); *see also* Rubio de Cachu v. INS, 568 F.2d 625 (9th Cir. 1977); Mamanee v. INS, 566 F.2d 1103, 1105-06 (9th Cir. 1977).

[300] *See, e.g.*, *In re* Kim, 15 I. & N. Dec. 88, 90 (1974) (finding no significant disruption of petitioner's children's educational program).

[301] *See, e.g.*, Diaz-Salazar v. INS, 700 F.2d 1156, 1160 (7th Cir. 1983) (younger children have less difficulty in adapting to new language, etc.); Banks v. INS, 594 F.2d 760, 762 (9th Cir. 1979) (learning language of instruction at new school difficult, but not sufficient to constitute extreme hardship).

[302] *See infra* note 332.

[303] In addition, it can also be physically dangerous. In homes where domestic violence occurs, children are at high risk of suffering physical abuse themselves. *See* NATIONAL WOMAN ABUSE PREVENTION PROJECT, Domestic Violence Fact Sheets: Effects of Domestic Violence on Children, *in* CHILD AND FAMILY SERVICE, DOMESTIC VIOLENCE COUNSELOR TRAINING 1 (copy on file with author) (1996).

> A major study of more than 900 children at battered women's shelters found that nearly 70% of the children were themselves victims of physical abuse or neglect. Nearly half of the children had been physically or sexually abused. Five percent had been hospitalized due to the abuse. However, only 20% had been identified and served by Child Protective Services prior to coming to the shelter.

Id.

Leaving the children with the batterer, then, is leaving the children in harm's way.

> It appears that all children, regardless of race or social class, are victimized at higher rates than adults in both urban and rural areas. Children are more vulnerable because of their size, age, and dependency status. Children have little or no control over who lives in their

choice between leaving her children with the parent who may have also abused them, or taking the children back to her native country can be painful. This is particularly true if the mother is concerned about opportunities which would be unavailable in her native country for her children, or potential discrimination faced by herself or her children.

3. Economic detriment

Economic detriment is another factor to be considered in the extreme hardship determination. Under the current rule, a showing of economic detriment, by itself, has not been sufficient to constitute extreme hardship,[304] although it is a relevant factor. Such circumstances as the inability to find work in the native country,[305] returning to a country with a lower standard of living,[306] or

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home or who associates with members of the household. Certain children are targeted more frequently, including those labeled "bad kids"; shy, lonely, and compliant children; preverbal and very young children; and emotionally disturbed or "needy" adolescents. Children with physical, emotional, or developmental disabilities are particularly vulnerable to victimization.

Children are victimized in multiple ways - sexual and physical assaults, sexual exploitation (such as forcing a child or teenager into prostitution or posing for pornography), neglect, homicide, and abduction. Their assailants are frequently their parents but may be other family members, friends, acquaintances, caretakers, and strangers. The closer the relationship of the child to the offender, the stronger the feelings of betrayal, particularly as time goes by. The longer the abuse continues, the more difficult it is for the victim to recover.

OFFICE FOR VICTIMS OF CRIME, DEP'T OF JUST., BREAKING THE CYCLE OF VIOLENCE: RECOMMENDATIONS TO IMPROVE THE CRIMINAL JUSTICE RESPONSE TO CHILD VICTIMS AND WITNESSES 4 (1999).

[304] *See, e.g.*, Urban v. INS, 123 F.3d 644, 648 (7th Cir. 1997); Kuciemba v. INS, 92 F.3d 496, 499 (7th Cir. 1996); Ramierez-Durazo v. INS, 794 F.2d 491, 498 (9th Cir. 1986) (citing Davidson v. INS, 558 F.2d 1361, 1363 (9th Cir. 1977) for the proposition that "[e]conomic disadvantage alone does not constitute 'extreme hardship'").

[305] *See* Luna-Rodriguez v. INS, 104 F.3d 313, 314 (10th Cir. 1997); Panrit v. INS, 19 F.3d 544, 547 (10th Cir. 1994); Marquez-Medina v. INS, 765 F.2d 673, 676 (7th Cir. 1985) (reliance on "general economic conditions in Mexico, not on any condition or circumstance unique" to the alien did not meet the necessary extreme hardship requirement); *In re* Chumpitazi, 16 I. & N. Dec. 629, No. A-19654637, 1978 BIA LEXIS 48, at *9 (B.I.A. Interim Decision 3230, Nov. 20, 1978).

[306] *See* Hernandez-Patino v. INS, 831 F.2d 750, 754 (7th Cir. 1987) (lack of special educational opportunities, inadequate housing, water, electricity, food stamps, and health care in Mexico insufficient to constitute extreme hardship); *In re* Anderson, 16 I. & N. Dec. 596, 598 ("[L]aying critical emphasis on the economic and political situation would mandate a grant of relief in most cases for it is a demonstrable fact that despite the beleaguered state of our own economy, the United States enjoys a standard of living higher than that in most of the other countries of the world.").

lack of employment prospects due to lack of formal education,[307] by themselves have been held not to constitute extreme hardship. However, economic detriment in concert with other factors, such as advanced age, illness, or family ties,[308] differentiates the alien's situation from the "conditions surrounding a substantial number of similar deportations."[309]

Additionally, the economic detriment by itself is sometimes so extreme as to be essentially unconscionable, as in *Santana-Figueroa v. Immigration & Naturalization Service*.[310] In *Santana-Figueroa*, the court found that removing a seventy year old alien, who was unable to work at all, to a country with widespread poverty and unemployment, constituted extreme hardship.[311] The court there differentiated between "'mere economic detriment' and 'complete inability to find employment.'"[312]

While economic detriment may not constitute extreme hardship in and of itself for most aliens, it may be far more significant to a battered spouse who is unable to find employment in her native country with which to support herself and her children. Cultural factors such as gender discrimination may affect employment opportunities for women.[313] For example, employment opportunities for women in Japan can be limited for those attempting to re-enter the job market, due to the general pattern and expectation that once a woman is married, she will leave work to become a housewife.[314] Re-entering the job-market is unusual and leads to under-employment. As one commentator noted, "most of the jobs available for re-entrants are poorly paid, unskilled positions in retailers and in small manufacturing companies."[315] Thus, re-entry is generally associated with downward occupational mobility

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[307] *See* Diaz-Salazar v. INS, 700 F.2d 1156, 1160 (7th Cir. 1983) (holding that although alien had a lack of formal education and would have a difficult time finding similar employment in Mexico, he failed to demonstrate any extreme hardship); Bueno-Carrillo v. Landon, 682 F.2d 143, 144-46 (7th Cir. 1982) (holding that the economic detriment of being virtually unemployable in Mexico due to lack of skills or education not sufficient to constitute extreme hardship).

[308] *See Anderson*, 16 I. & N. Dec. at 598 (stating that only when other factors such as advanced age, severe illness, and family ties combined with economic hardship should a deportation order be suspended).

[309] *Diaz-Salazar*, 700 F.2d at 1160 n.4.

[310] 644 F.2d 1354 (9th Cir. 1981).

[311] *See id.* at 1356.

[312] *Id.*; *see also* Urban v. INS, 123 F.3d 644 (7th Cir. 1997) (remanding case to BIA for reconsideration of circumstances similar to *Santa-Figueroa*; sixty-five year old alien, uneducated, unskilled, with heart problems requiring expensive medications unavailable in her native Poland).

[313] Virtue Memorandum, *supra* note 21, at 166 ("Cultural factors in a particular country may affect a female alien's employment opportunities.").

[314] *See* MARY SASO, WOMEN IN THE JAPANESE WORKPLACE 36-39 (1990).

[315] *Id.* at 38.

into work requiring little skill or ability. Contributing to this problem is the seniority principle, in which promotion depends upon continuous years of service.[316] This seniority system is reinforced by job advertisements that place an upper age limit on entry into a position, often between twenty-five and thirty-five years old.[317]

Additionally, while the law in Japan ostensibly provides some protection against discriminatory hiring, the reality is somewhat different. The dual categories utilized by Japanese companies, "career" and "noncareer" workers, allows discrimination in promotion and compensation by placing hirees on different tracks with separate pay scales and promotion systems.[318] Although the Equal Employment Opportunity Law for Men and Women[319] encouraged companies to hire more women in the "career" category, this split in opportunities for women still exists.[320] Moreover, the dual hiring practice has allowed targeted downsizing in a discriminatory manner, forcing clerical workers to quit by outsourcing clerical divisions or by forming a subsidiary and then only transferring career employees.[321]

Similarly, in the Philippines, legal discrimination persists despite laws banning preferential treatment of a male over a female for promotion, training, study and scholarship grants.[322] While current law makes some discrimination illegal, as in Japan, the practice continues: women are still given limited access to training opportunities and promotion, and are paid substantially less.[323]

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[316] *Id.*

[317] *Id.*

[318] *Govt to monitor firms' treatment of woman*, YOMIURI SHIMBUN/DAILY YOMIURI, June 21, 2000, Westlaw, INTNEWS Database; *Osaka court rejects women's demand for gender-equal promotion*, JAPAN WKLY. MONITOR, Aug. 7, 2000, 2000 WL 23403386 [hereinafter *Osaka Court*]. Career workers are paid and expect to be promoted as men are; noncareer workers are hired as "aids" and cannot expect the same promotion opportunities. *Id.*

[319] See Loraine Parkinson, Note, *Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 COLUM. L. REV. 604 (1989), for a detailed discussion of this law.

[320] The Equal Opportunity Law for Men and Women first took effect in 1986, only calling for management "efforts" to eradicate gender-based discrimination in the job market. *Osaka Court*, *supra* note 318. This law was recently amended in April 2000 to ban this type of discrimination entirely. *Id.* Further, remedies available to women hired under the noncareer track when the practice was still legal may be limited. Reflecting the law/reality dichotomy, one court recently dismissed a damages suit filed by two workers hired in the 1960s seeking the same promotion opportunities as men, reasoning that "[t]his hiring practice did not run contrary to social order and customs at that time, considering the then general idea that a man maintains the household and woman protects the family." *Id.* (quoting Presiding Judge Tetsuou Matsumoto).

[321] *Id.*

[322] *Bill slams 'male-wanted' ads*, MANILA STANDARD, Apr. 15, 2000, at 1.

[323] *Id.*

Further, until passage of a bill currently pending in the Philippine Congress, it remains legal to post employment ads which expressly advertise for males.[324]

A battered immigrant returning to her native country may face similar difficulties re-entering the work force, and may be unable to find employment. Although laws may exist which purport to protect against gender discrimination, as in Japan and the Philippines, they may not work in practice. Not only may she face gender discrimination, but she may also lose skills through disuse or the intervention of time. These difficulties may entail a financial burden beyond "mere economic detriment."

B. The New VAWA Factors

Although the *Anderson* factors[325] can provide some guidance for determining the existence of extreme hardship in many circumstances, domestic violence situations pose special problems not typically associated with deportation. The addition of the new VAWA factors allows a more tailored "extreme hardship" determination where there is domestic abuse.[326] The INS, while recognizing the special circumstances of domestic abuse, continues to reference the settled judicial interpretation of extreme hardship in suspension of deportation cases. Referring to the settled judicial interpretation brings in the "unusual and unique circumstances"[327] and "hardship beyond that typically associated with deportation"[328] requirements. "While the discussion in [suspension of deportation] cases is helpful, adjudicators must keep in mind the unique, sensitive nature of cases involving battered spouses or children, and evaluate the relevant factors in light of that special nature."[329] The factors promulgated by the INS for battered immigrants clearly show that the hardship experienced by domestic violence victims is unique and atypical of most deportation cases.

1. Loss of access to the U.S. courts and criminal justice system

One hardship not faced by most aliens facing deportation is the denial of protections available in U.S. courts. For a battered immigrant, such protections can be crucial. Where an alien and her batterer have children, issues

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[324] *Id.*

[325] *See supra* text accompanying note 262.

[326] *See* Virtue Memorandum, *supra* note 21, at 165.

[327] *See supra* note 22.

[328] *See* 8 C.F.R. § 240.58(b) (2000); *see also In re* O-J-O, File A23 726 233, 1996 WL 393504 (B.I.A. Interim Decision 3280, June 14, 1996) ("beyond those hardships ordinarily associated with deportation").

[329] *Id.* at 164.

arise in connection with child support, custody, and alimony. Traditionally, within the borders of the United States, domestic relations issues have been deemed within the jurisdiction of the state court; any federal action was seen as an invasion of state sovereignty.[330] Even international custody cases involving children of foreign parents have been given short shrift in federal courts.[331] Although state courts are available fora for family law claims, they may financially and logistically be out of reach for removed immigrants. Alternatively, some remedies exist within international family law.

a. Custody

Most aliens facing deportation do not deal with custody issues that may face battered immigrants. Custody disputes within a domestic violence context are difficult, even without the added uncertainty of immigration and international variables. Batterers often use the court system as a method of abuse, letting their need for power and control play out in long and painful custody disputes.[332] When children are involved, and one parent faces deportation to her native country, the family is inevitably split apart, with the child either staying with the U.S. citizen in the United States or returning to the abused immigrant's nation of origin. Either case raises complex custody issues. Enforcement of custody orders from other nations within the United States is relatively easy, although such enabling laws allow courts to base enforcement upon whether the laws and processes of the other nations comport with our own.[333] However, the removal of the child by one parent from the United

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[330] See generally Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984), for an excellent discussion of federal exercise of jurisdiction in domestic relations cases. Although domestic relations litigation may qualify under the statutory guidelines for federal subject matter jurisdiction (federal question or diversity of citizenship), federal courts have viewed cases involving divorce, alimony or child support, or child custody as beyond their competence. *Id.*

[331] These cases arguably implicate national interests given the foreign relations dimension of the case or the claims raised of a constitutional right to remain in the United States.

[332] Katherine M. Reihing, *Protecting Victims of Domestic Violence and Their Children after Divorce: The American Law Institute's Model*, 37 FAM. & CONCIL. CTS. REV. 393, 394 (1999) (noting that batterers may threaten to take the children or prove that their partners are unfit mothers, try to destroy their partners financially and economically after separation so that the victim is left homeless or is forced to give in and go back to the batterer, use custody claims to drain their victims financially and to pressure them to return to the relationship, and threaten to take custody leading abused women to waive child or spousal support).

[333] George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 COLUM. J. TRANSNAT'L L. 553, 602 (1997). This difficulty rests with the notion that "recognition of a foreign judgment or decree can only be based upon judicial action which comports with our own notions of due process of law." Bliss v. Bliss, 733 A.2d 954, 959 (D.C. 1999) (quoting Rzeszotarski v. Rzeszotarski, 296 A.2d 431, 437 (D.C. 1972)). Some courts will grant comity,

States may remove the child from the custodial parent's effective ability to pursue remedies.

Currently, issues of U.S. interstate custody fall under the Uniform Child Custody Jurisdiction Act ("UCCJA")[334] and the Parental Kidnapping Prevention Act ("PKPA").[335] These laws require that states give full faith and credit to the custody orders of other states, prevent modification to orders except under limited circumstances, and provide for emergency jurisdiction in cases of abandonment or to protect a child from abuse or mistreatment.[336] The law with respect to international custody, however, is less clear.

Assuming that a battered immigrant has access to U.S. courts, the UCCJA may provide a possibility of relief for a battered immigrant, by extending the

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analogous to full faith and credit, to "any order of a foreign court of competent jurisdiction, entered in accordance with the procedural and substantive law prevailing in its judicatory domain, when that law, in terms of moral standards, societal values, personal rights, and public policy, is reasonably comparable to that of [the U.S. state]." Oehl v. Oehl, 272 S.E.2d 441, 444 (Va. 1980) (finding the laws of England and Virginia reasonably comparable so as to grant comity to a custody order). A provision of the Uniform Child Custody Jurisdiction Act ("UCCJA") allows for extension into the international area. This provision, § 23, states:

> The general policies of this Act extend to the international area. The provisions of this Act relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and an opportunity to be heard were given to all affected persons.

UNIF. CHILD CUSTODY JURISDICTION ACT § 23 (West, WESTLAW through Annual Meeting Nat'l Conf. of Comm'rs Unif. State Laws 1999).

[334] The UCCJA has been enacted by all states, with some variations. Tina M. Fielding, Note, *The Uniform Interstate Family Support Act: The New URESA*, 20 DAYTON L. REV. 425, 432 (1994). The original UCCJA was written in 1968 by the National Conference of Commissioners on Uniform State Laws to remedy two major problems: "child abductions by family members and jurisdictional disputes arising in interstate custody or visitation matters." Joan Zorza, *The UCCJEA: What Is It And How Does It Affect Battered Women In Child-Custody Disputes*, 27 FORDHAM URB. L.J. 909, 909 (2000) ("[M]ore than half of the nation's 350,000 annual child abductions occur in the context of domestic violence, most of them perpetrated by abusive fathers. These abductions have been found to be as traumatic to children as when they are abducted by strangers, with many developing post-traumatic stress disorder"). For a history of domestic and international attempts to deal with the problem of parents taking their children to other countries in order to deprive the other parent of custody and visitation rights, see Antoinette Passanante, Note, *International Parental Kidnapping: The Call for an Increased Federal Response*, 34 COLUM. J. TRANSNAT'L L. 677 (1996).

[335] 28 U.S.C. § 1738A (2000). The UCCJA and PKPA work in tandem, although where there is conflict, the PKPA prevails. *In re* McBride, 469 So. 2d 645 (Ala. Civ. App. 1985). The PKPA, as a federal law, preempts any state's version of the UCCJA whenever the state's law is inconsistent. State v. Herndon, 704 S.W.2d 728, 729 (Tenn. Crim. App. 1985).

[336] 28 U.S.C. § 1738A(d)-(h).

term "state" to include a foreign nation.[337] While some courts have allowed enforcement under the UCCJA, others decline to extend the law into international custody disputes.[338] However, the UCCJA is available only within U.S. courts.

For a battered immigrant woman outside the United States, for whom the U.S. courts are unavailable, the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention")[339] provides a possible remedy for having a child wrongfully retained in the United States by the batterer. The United States passed the International Child Abduction Remedies Act[340] to establish procedures for the implementation of the Hague Convention in addition to those provided by the Hague Convention itself.[341] Under the Hague Convention and the International Child Abduction Remedies Act, the court is to effectuate the return of a child abducted by the non-custodial parent if the child is wrongfully abducted or retained in a country that is not the child's habitual residence.[342] Although the International Child Abduction Remedies Act only empowers courts in the United States to determine rights under the Convention and not the merits of any underlying child custody claims,[343] U.S. courts have occasionally looked to the best interests of the child under the "grave risk" exception[344] rather than strictly adhering to the Convention.[345] Such a best interests analysis, even in limited circumstances, opens the door for the abducting parent to attempt to obtain a favorable custody order in the United States, based on such factors as poor economic or legal conditions in the battered immigrant's native country.[346]

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[337] *E.g.*, Ivaldi v. Ivaldi, 685 A.2d 1319, 1323 (N.J. 1996) ("the term 'state' includes foreign countries and . . . the jurisdictional provisions of the [UCCJA] apply to international custody disputes").

[338] *E.g.*, State *ex rel.* Rashid v. Drumm, 824 S.W.2d 497, 503 (Mo. Ct. App. 1992); Schroeder v. Vigil-Escalera Perez, 664 N.E.2d 627, 636-37 (Ohio Com. Pl. 1995).

[339] Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Hague Convention], http://travel.state.gov/hague_childabduction.html (last visited Aug. 18, 2000).

[340] Pub. L. No. 100-300, § 2, 102 Stat. 437 (codified at 42 U.S.C. § 11601 (1988)).

[341] 42 § 11601(b) (West, WESTLAW through Pub. L. No. 106-180 2000).

[342] Hague Convention, *supra* note 339; 42 U.S.C. § 11601.

[343] 42 U.S.C. § 11601(b)(4).

[344] Hague Convention, *supra* note 339, art. 13(b).

[345] *See* Tahan v. Duquette, 613 A.2d 486 (N.J. Super. Ct. App. Div. 1992) (finding that the child's safety and health are considerations to be looked at when deciding whether to return the child to the child's habitual residence).

[346] *See* Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996) (outlining the circumstances under the "grave risk" exception may apply).

> [W]e believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger *prior* to the resolution of the custody dispute--*e.g.*, returning the

Additionally, should custody be awarded to the immigrant spouse with visitation to the citizen batterer, the batterer may take the child pursuant to the visitation agreement from the immigrant's native country to the United States with permission of the immigrant spouse, and then refuse to return the child at the end of the visitation period. Should the child remain in the United States with the citizen spouse, the Hague Convention, as construed by U.S. federal courts, does not provide a remedy for access rights absent a "wrongful" removal of the child.[347] Access rights[348] pose difficulties for parents who do not have custody, as the Hague Abduction Convention only considers the removal of a child in breach of custody rights as an abduction mandating immediate return.[349] For example, in *Bromley v. Bromley*,[350] a father residing in England was denied access to his children who lived in the United States by their mother, even though visitation was provided for in the U.S. divorce decree.[351] The court found that, because there was no "wrongful" removal of the children, the Hague Convention did not offer the father a remedy, and the father's alternate request for "partial custody" would require modification of the original divorce decree.[352] Further, the Hague Convention does not

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child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, *when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.*

Id. (emphasis added). Under some circumstances, a less developed nation's legal system may be accused of qualifying under this definition, to the detriment of a removed alien.

[347] Bromley v. Bromley, 30 F. Supp. 2d. 857, 860 (E.D. Pa. 1998) ("Without a breach of custody rights, the Convention cannot be invoked because removal cannot be considered 'wrongful.'").

[348] Access rights include not only visitation, but "may encompass the right to open communication with the child by means of letters, facsimile, telephone and physical visitation." *See* Priscilla Steward, Note, *Access Rights: A Necessary Corollary to Custody Rights under the Hague Convention on the Civil Aspects of International Child Abduction*, 21 FORDHAM INT'L L.J. 308, 310 n.11 (1997) (citations omitted).

[349] *See* Elisa Perez-Vera, Explanatory Report, *in* 3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION 426, 444-45, *cited in* Steward, *supra* note 348, at 311 n.18 ("stating that the majority of drafters were unwilling to place breach of access rights in [the] same category as breach of custody rights and [were] thus unwilling to make breach of access rights wrongful"). "The removal of a child to another country which ends contact between the child and the noncustodial parent is not an abduction under the Convention." *Id.* at 311.

[350] 30 F. Supp 2d. 857 (E.D. Pa. 1998).

[351] *Id.* at 857-58.

[352] *Id.* at 861.

authorize modification of custody orders,[353] so any changes regarding visitation or joint custody must be pursued through state courts.

Additionally, there are situations under which the Hague Convention does not apply.[354] In order to qualify for any remedy under the Hague Convention, the child must have been "habitually resid[ing] in a Contracting State immediately before any breach of custody or access rights."[355] Most importantly, remedies are available under the Hague Convention only when a child is wrongfully removed from one signatory country and retained in another.[356] Although the United States is a signatory,[357] Korea,[358] Japan,[359] and other Asian countries are not.

b. Child support

Enforcing financial support orders and collecting upon those orders are other hardships not faced by most aliens subject to deportation. If the child returns to the native country with the battered alien, complex problems of transnational enforcement of child support can arise. Federal legislation exists to enforce support orders between states. The federal Full Faith and Credit for Child Support Act[360] requires U.S. states to enforce child support orders of other states.[361] "State" means a state, territory, or possession of the United States.[362] It does not, therefore, expressly apply to foreign countries or in

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[353] *See* Hague Convention, *supra* note 339, art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.").

[354] Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,504 (Mar. 26, 1986) ("[T]he Convention does not cover all children who might be victims of wrongful takings or retentions. A threshold inquiry, therefore, is whether the child who has been abducted or retained is subject to the Convention's provisions.").

[355] Hague Convention, *supra* note 339, art. 4.

[356] Hague Convention, *supra* note 339, art. 1; *see also* Mezo v. Elmergawi, 855 F. Supp. 59 (E.D.N.Y. 1994) (holding that the Hague Convention and corresponding U.S. legal remedies were not available where the child was removed from the United States to non-signatory countries).

[357] Hague International Child Abduction Convention, 51 Fed. Reg. 10,494, 10,494 (Mar. 26, 1986).

[358] Hague Conference on Private International Law, *Signatures, ratifications or accessions, Republic of Korea*, http://www.hcch.ne/e/members/signrat_kr.html (last modified Nov. 19, 1998).

[359] Hague Conference on Private International Law, *Signatures, ratifications or accessions, Japan*, http://www.hcch.ne/e/members/signrat_jp.html (last modified Nov. 19, 1998).

[360] 28 U.S.C. § 1738B(b) (2000). For an excellent history of the laws that preceded the Uniform Interstate Family Support Act, see Fielding, *supra* note 334, at 425.

[361] 28 U.S.C. § 1738B(a)(1).

[362] 28 U.S.C. § 1738B(b).

situations where the alien is attempting to enforce a U.S. child support order in her native country. Also not expressly applicable are U.S. state laws such as the revised Uniform Interstate Family Support Act ("UIFSA").[363]

Although the federal Full Faith and Credit Act does not apply to international support obligations, some states have applied the UIFSA to international disputes where there is comity or reciprocity in the requesting country.[364] The legal basis for a U.S. court to enforce orders from another country is comity, or similar laws enacted in both states.[365] Under the revised UIFSA, a foreign jurisdiction must have "enacted a law or established procedures that are substantially similar to the procedures . . . [under UIFSA]."[366] Reciprocity with a foreign country is required in order for the foreign country's orders to be treated as if they had been issued by a U.S. state.[367] Within the United States, both federal[368] and state laws[369] allow enforcement of foreign money

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[363] All states have adopted UIFSA, although some with variations. *See* Nat'l Conf. of Comm'rs Unif. State Laws, *Legislative Fact Sheet: The Uniform Interstate Family Support Act*, http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-uifsa.htm (last visited Apr. 1, 2001).

[364] *See* Gloria Folger Dehart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89, 92-99 (1994); Gary Caswell, *International Child Support—1999*, 32 FAM. L.Q. 525, 537 (1998).

[365] *See* Caswell, *supra* note 364, at 537.

[366] UNIF. INTERSTATE FAMILY SUPPORT ACT § 101(19)(B) (West, WESTLAW through Annual Meeting Nat'l Conf. of Comm'rs Unif. State Laws 1999).

[367] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM INTERSTATE FAMILY SUPPORT ACT 14 (1996). There appears to be some confusion as to procedures and requirements for this treatment. *See* Caswell, *supra* note 364, at 537 n.80.

[368] 42 U.S.C. § 659a (2000). This statute provides for international support enforcement when the Secretary of State, with the agreement of the Secretary of Health and Human Services, declares a foreign country (or political subdivision) to be a foreign reciprocating country, so long as the support enforcement procedures:

> (A) The foreign country (or political subdivision thereof) has in effect procedures, available to residents of the United States—
>
> (i) for establishment of paternity, and for establishment of orders of support for children and custodial parents; and
>
> (ii) for enforcement of orders to provide support to children and custodial parents, including procedures for collection and appropriate distribution of support payments under such orders.

Id. Additionally, the statute allows states to enter into reciprocal arrangements for establishment and enforcement of support obligations with foreign countries that have not been declared a foreign reciprocating country. *Id.* Reciprocating agreements between states and approximately twenty foreign countries have been negotiated. Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. DAVIS L. REV. 647, 659 (1997).

[369] *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4 (West, WESTLAW through Annual Meeting Nat'l Conf. of Comm'rs Unif. State Laws 1999), Westlaw, ULA file. While most states have passed some version of the UFMJR, states that have not passed the

judgments and child support orders, as long as there is either a parallel legal system or the standards for determining reciprocity have been met.[370] Where no reciprocity can be established, it is not possible to get or enforce an order.[371]

Enforcing support obligations from outside the United States where no reciprocal provisions exist requires the alien to rely on international legal treaties and conventions. There are various international conventions relating to child support.[372] The United States, however, is not a signatory to any of them.[373]

c. Enforcement of U.S. restraining orders

Another hardship not typically associated with deportation or removal is the enforcement of restraining orders. One primary concern of a battered woman following a divorce or separation is safety.[374] The enforceability of restraining orders is crucial in many domestic violence situations. Sometimes the restraining order is the only barrier between the abuser and his victim,[375] and acts as a deterrent for further abuse.[376] In the United States, civil protection or

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UFMJR usually enforce foreign judgments on the basis of comity. Russell J. Weintraub, *Recognition and Enforcement of Judgments and Child Support Obligations in United States and Canadian Courts*, 34 TEX. INT'L L.J. 361, 363 n.23 (1999).

[370] Dehart, *supra* note 364, at 90-100. Determination of reciprocity when there is no clear parallel law is based on the following requirements:

> (1) the country will enforce the child support obligation, collect the money, and send it to the requesting state, whether or not there is an existing order; (2) the order will be enforced if recognizable under the laws and procedures of the country, and if it is not recognized or no order exists, an order or its equivalent will be obtained; (3) the system will deal with both in and out of wedlock children, and a determination of paternity will be made if possible in the circumstances; (4) each country will use its own laws and procedures; and (5) there will be no means test for legal services, and no charge for legal assistance or the services of government offices or personnel.

Id. at 99-100.

[371] *Id.* at 99.

[372] *Id.* at 90.

[373] John L. Saxon, *International Establishment and Enforcement of Family Support*, FAM. L. BULL., Aug. 1999, at 3, http:// www.iog.unc.edu/pubs/electronicversion/pdfs/flb10.pdf.

[374] *See* Reihing, *supra* note 332, at 394 ("[O]ne of the most critical aspects of domestic violence, and one rarely noticed by the legal profession, is that domestic violence does not end with divorce or separation."). Statistics indicate that the violence usually escalates when the batterer learns that his victim is contemplating leaving or taking steps to do so. *See id.*

[375] *See id.*

[376] *See supra* note 48. Because all fifty states now have warrantless arrests, providing police officers with the legal authority to make arrests at the scene of a domestic assault, abuse victims are removed from the decision-making role, which used to further endanger her. *See* Christine O'Connor, Note, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 942 (1999). This is significant, because she is not put into the position of

restraining orders[377] are available in all fifty states and in the District of Columbia[378] and provide battered women with a measure of protection. Additionally, the passage of VAWA 1994 mandated that states honor and enforce orders of protection, including ex parte orders.[379] Such ease in obtaining legal protection is not always the case elsewhere. The inability in foreign countries to enforce court orders, such as restraining or protective orders issued in the United States, poses a difficulty for a returning alien.[380]

Not only is enforcement of a U.S. protective order nearly impossible in other countries,[381] but obtaining one in the native country can also be difficult. Almost unconscionable circumstances may need to be shown before protection is given. For example, a Malaysian court reluctantly issued an order in *Chan Ah Moi v. Phang Wai Ann*.[382] The battered wife had been brutally attacked[383] with a long knife by her estranged husband with whom she had not lived for eight years.[384] He was sent to jail for the attack.[385] At his release, she sought protection, requesting that he not be allowed into her home,[386] and was granted a non-molestation order and an order excluding her husband from her home.[387] The court, however, had a difficult time finding authority to exclude the abuser

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deciding whether to send the police away and continue with the current abuse, or have the police arrest her husband, and be punished later.

[377] These are court orders issued by a judge in response to a written petition, usually ex parte, from a battered woman. The order is usually "no-contact," requiring the partner to stop abusing, harassing, or threatening the petitioner. *See* WILSON, *supra* note 34, at 77-80.

[378] *See id.* at 76.

[379] 18 U.S.C. § 2265 (2000). Further, VAWA 2000 provides additional protection for an abuse victim who registers her protection order in another jurisdiction by prohibiting notification that the protection order has been filed unless the party protected under the order requests, and requires that states give the order full faith and credit to a valid protection order even if it has not been registered. 18 U.S.C. § 2265.

[380] Chin Interview, *supra* note 10 (confirming that the concern over enforcement of U.S. restraining orders in the native country is very serious).

[381] *See* Rishty Testimony, *supra* note 130 (discussing the danger of traveling abroad due to losing the protection provided by U.S. civil protection orders); Orloff Testimony, *supra* note 71 (citing an example of a battered immigrant who is afraid to return to her native country because her U.S. protection order, which grants her custody of her children, is unenforceable in her native country); Campbell Testimony, *supra* note 71 (stating that battered immigrants "typically have no protection against domestic violence in their home countries, cannot access support services, and cannot enforce protection orders, custody orders, or child support awards").

[382] 1995 MLJ Lexis 797 (June 28, 1995).

[383] The victim retained permanent scars and loss of vision in one of her eyes. *See id.* at *8.

[384] The court interjected that "the marriage must have been a happy one because the petitioner bore seven children." *Id.* at *6.

[385] *Id.* at *8-9.

[386] *Id.* at *9.

[387] *Id.* at *2.

from the wife's home,[388] as it was still characterized as the "matrimonial home."[389] The court worried about where the husband was to stay after being released from jail for brutally beating his wife, and justified such a novel order because "the respondent would have [a home other than his wife's] to go to upon his release and need not worry about accommodation."[390] The court noted that although the "exclusion order may appear to be a draconian remedy, it is a necessary evil[.]"[391]

Even with the order, enforcement in Malaysia may be inadequate. Under the Malaysian Domestic Violence Act of 1994,[392] without a court order allowing police to arrest an abuser, a domestic violence call to police would result in no immediate help for the battered woman.[393] "[M]ost cases of domestic violence like punching, kicking, assaulting, etc, would fall squarely under the category of non-seizable offen[s]es" for which the police must receive an order to investigate from the deputy public prosecutor or render any evidence collected illegal.[394]

2. *Supportive services*

Extreme medical hardship is another factor to be considered by the courts in determining extreme hardship under the *Anderson* formulation.[395] The claim of extreme medical hardship needs to be established by firm evidence that necessary medical care is unavailable at any price anywhere in the country to which the alien is being deported.[396] This is an extremely high standard, especially for those battered immigrants who would not be able to afford medical care in their native country.[397]

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[388] *See id.* at *21-27. The court noted that, "There is no provision in the [Domestic Violence] Act for an exclusion order." *Id.* at *21-22.

[389] *See id.* at *9-10.

[390] *Id.*

[391] *Id.*

[392] Akta Kegansan Rumah Tangga, 1994 (Akta 521) [Domestic Violence Act, 1994 (Act 521 (1994)] [hereinafter Domestic Violence Act]. For an English translation, see DOMESTIC VIOLENCE ACT 1994, Malaysia, http://wccpenang.org/dva_act.htm (last visited Apr. 1, 2001).

[393] Domestic Violence Act, pt. 2, § 7(2).

[394] *Chan Ah Moi*, 1995 MLJ Lexis at *14.

[395] *See supra* text accompanying note 262.

[396] *See, e.g.*, Moore v. INS, 715 F.2d 13 (1st Cir. 1983) (deprivation of psychological therapy insufficient); Hee Yung Ahn v. INS, 651 F.2d 1285 (9th Cir. 1981) (finding an eye condition that would be adversely affected by return to the native country insufficient for extreme medical hardship); Bueno v. INS, 578 F. Supp. 22 (N.D. Ill. 1983) (finding that unaffordability in native country of continuous and intensive medical treatment necessary for child was not extreme medical hardship).

[397] *See* discussion *infra* section IV.A.3.

The INS's addition of the "supportive services" factor expands upon the *Anderson* factor by including other services not usually required by aliens facing deportation. Battered women and their children often require supportive services, such as medical or psychological help, which may not be available in the native country. While this factor is similar to the traditional *Anderson* evaluation of the petitioner's condition of health,[398] the potential hardship is greater for battered women and their children because the necessity for these services is more urgent, and therefore the hardship imposed when these services are lacking is more acute. Under the VAWA formulation, the threshold is "reasonably accessible,"[399] rather than the higher *Anderson* standard of "not available at any price."[400] In this way, the immigrant woman's needs and resources are more closely considered.

The need for medical services can be critical for battered spouses when the extent of the abuse is such that the alien is permanently disfigured.[401] Even something as unremarkable as dental work for reconstruction after a brutal beating may not be available in the native country.[402] Additionally, a severe psychological effect of battering in both the spouse and the children can be post traumatic stress disorder ("PTSD").[403] In Hawai'i, studies show that 33% of 164 battered women receiving support services at Family Peace Center and 55% of 50 female spouse abuse shelter residents were clinically diagnosed with PTSD.[404] While diagnosis[405] and treatment[406] are available in the United

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[398] *See supra* notes 396-397 and accompanying text.

[399] *See* 8 C.F.R. § 240.58(c)(4) (2001). This states, "The applicant's needs and/or needs of the applicant's child(ren) for social, medical, mental health or other supportive services for victims of domestic violence that are unavailable or *not reasonably accessible* in the home country." *Id.* (emphasis added).

[400] *Bueno*, 578 F. Supp. at 25 ("The requirement that a claim of extreme medical hardship be established by firm evidence that necessary medical care is unavailable (at any price) in the *country* (not the region) to which the alien is being deported is well established at INS."). *But see* 8 § C.F.R. § 240.58 (2001).

[401] *See* Chin Interview, *supra* note 10.

[402] *See id.*

[403] The Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition ("DSM-IV"), the American Psychiatric Association's official guide for diagnosis, describes PTSD-producing trauma as one that "involve[s] actual or threatened death or serious injury, or a threat to the physical integrity of self or others . . . [and] intense fear, helplessness, or horror." AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 427-28 (4th ed. 1994) [hereinafter DSM-IV].

[404] *See* Lee Stein & Julian Leigh, *Under Siege: Battered Women with Post Traumatic Stress Disorder (PTSD)*, ADVOCACY IN ACTION (Domestic Violence Clearinghouse, Honolulu, Haw.) Dec., 1998, at 2.

[405] *Id.* at 1.

> PTSD can be diagnosed a minimum of one month after a trauma when symptoms have persisted one month or more. While PTSD symptoms are most evident within three months, PTSD may have a delayed onset – when symptoms begin six months or more

States, services are unlikely to be found in the battered woman's native country.[407]

3. Laws, social practices, or customs in the foreign country

Difficulty adjusting to the native country is another *Anderson* factor[408] to be considered. For the most part, an alien's difficulty in adjusting to life in the native country is not sufficient to constitute extreme hardship,[409] because the readjustment is the type of harm suffered by most aliens who have spent time abroad and then returned to their native countries.[410] However, readjustment to the native country for a domestic violence victim poses problems above and beyond that of a typical alien.

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after the stressor . . . . PTSD is diagnosed as *acute* when symptoms persist for three months and *chronic* when symptoms persist longer.

Id. at 3. Trauma can also manifest itself in changes to the brain chemistry, causing lasting physical and emotional symptoms. *Id.* at 2. Symptoms of PTSD include:

the presence of a stressor that could provoke a traumatic response,
the development of symptoms that persists for more than one month,
measurable cognitive and memory changes,
at least three measurable avoidance symptoms, such as partial psychogenic amnesia, dissociation, and depression, and at least two measurable arousal symptoms, such as sleep or eating problems, hypervigilance, and an exaggerated startle response.

Loue, *supra* note 50, at 9 (paragraph structure altered) (citing Lenore E. Walker, *The Battered Woman Syndrome Is a Psychological Consequence of Abuse*, *in* CURRENT CONTROVERSIES 133 (Richard J. Gelles & Darileen R Loseke eds., 1993)).

[406] Treatment of PTSD is most effective immediately following the traumatic event. CURRENT: MEDICAL DIAGNOSIS & TREATMENT 977 (Lawrence M. Tierney, Jr. et al. eds., 37th ed. 1998) [hereinafter MEDICAL DIAGNOSIS & TREATMENT]. Because the trauma for a battered spouse is of human design, *see* DSM-IV, *supra* note 403, at 424, and domestic violence is chronic and long-term, the PTSD experienced by battered women can be especially severe and may require intensive therapy. *See* MEDICAL DIAGNOSIS & TREATMENT, *supra* note 406, at 977. Treatment includes behavior, social, psychologic, and medical components. *Id.* The longer the traumatic events last, the less likely the battered spouse will succeed in overcoming the disorder. *See id.*

[407] *See* Chin Interview, *supra* note 10.

[408] *See supra* text accompanying note 262.

[409] *See, e.g.*, Chokloikaew v. INS, 601 F.2d 216, 218 (5th Cir. 1979) (finding that "petitioner lived in Thailand, where his family [continued to live], until he was twenty-one years old and should not suffer 'extreme hardship' in readjusting to social and economic conditions there"); *In re* Chumpitazi, 16 I. & N. Dec. 629, No. A-19654637, 1978 BIA LEXIS 48 (B.I.A. Interim Decision, Nov. 20, 1978) (finding petitioner's assertion that he would have difficulty adjusting to life in Peru after his eleven-year stay in the United States insufficient); *In re* Uy, 11 I. & N. Dec. 159 (1965) (finding petitioner's assertion that his deportation would result in hardship to himself because he would find it difficult to adjust to a new environment outside of the United States and he would have limited opportunities in his field of academic training insufficient).

[410] *See Chumpitazi*, 16 I. & N. Dec. at 629.

VAWA expands upon the *Anderson* readjustment consideration, by including laws, social practices, or customs in the foreign country which may hinder readjustment, or which may discriminate against the returning abuse victim for leaving the relationship.[411] In some cultures, the social practices or customs essentially condone domestic violence, and a battered spouse returning to her native country can face ostracism or disapproval for violating those norms. For example, in Korean society, the traditional role of the woman is to be subservient to the man, and Korean husbands have historically seen it as their right to beat their wives, with such actions not being perceived as a crime.[412] The wife is expected to obey her husband's orders and submit to his aggression as part of her preordained sex role.[413] For Koreans,

> "[s]aving face" is a very important cultural value, and the abused woman feels an obligation not to hurt the reputation of her family. Any action she might take, such as leaving the abusive relationship, has serious repercussions for entire family lineage. Leaving her husband would be seen as a unfilial act directed against her own parents, regardless of how severe the abuse may be.[414]

The law in Korea regarding divorce has reflected this view of obligation to remain in marriages, even if there is abuse.[415] The Korean divorce law allows judges to order women who want a divorce to remain in the marriage, even though there is abuse during the marriage.[416] Additionally, in Korean family law, when a couple divorces or separates, custody reverts to the father.[417] The

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[411] 8 C.F.R. § 240.58(c)(5) (2000).

[412] Ho Kim Tong, *Cultural aspects of marital violence in first generation immigrant Korean-American families*, 5 PROGRESS: FAM. SYSTEMS RES. & THERAPY 127 (1996), http://www.pg1.edu/ho-kim.htm (last visited Feb. 22, 2000).

[413] *Id.*

[414] *Id.*

[415] *See* Byun Eun-mi, *More elderly women demanding divorces; revised family law helps women leave their husbands in twilight years*, KOREA HERALD, Jan. 28, 1999, LEXIS, Korea Herald File.

[416] *Id.* A seventy-six year-old woman, whose eighty-four year-old husband had beaten her often in recent years, refused to give her a divorce after she had decided to end her fifty-two year marriage, was ordered to remain in her marriage. *See id.* "The appellate court ruling said that it fully acknowledged that Kim was mistreated by her husband, but the judge . . . concluded that it was more proper for Kim to stay with and take care of her husband[.]" *Id.*

[417] Karl Schoenberger, *Korea: It's Suffer, Not Suffragette; Economic Progress and Democratic Reforms Have Done Little to Break Men's Centuries-Old Domination of the Society*, L.A. TIMES, Oct. 15, 1989, at A1. The Korean Family Law institutionalizes Confucian ethics. *Id.* Under the law, women are denied the right to become head of their households, a condition with profound implications for divorce, child custody and communal property ownership. *Id.* "What has resulted . . . [is that] a widow's son becomes her master, or, if she has only daughters, a paternal in-law takes charge of her legal affairs. Divorced women can and often do reside with their children, but the ex-husband maintains legal custody through the official family register. Assets and real estate, technically, belong only to the male head of the

mother's rights to visitation are highly limited until the children become adults. Should the children remain in the United States, divorce may also subject the children of the battered immigrant woman to ostracism, because the children of divorced parents may be seen as undesirable partners by other Korean-Americans.[418]

Religion also plays a strong role in determining the cultural practices and, therefore, the norms of divorce and marriage. The Philippines, with its strong Catholic influence, does not legally recognize divorce.[419] Although a controversial bill was introduced seeking to legalize divorce, strong pressure from the Catholic Church convinced many congressmen who had previously supported the bill to withdraw their sponsorship.[420] Because religion plays such a large role within the Philippines, and because women have traditionally been encouraged to assume responsibility for making the marriage work,[421] divorce may place significant social stigma on the returning alien.

In Malaysia, where the personal lives of Muslims are administered judicially by *sharia* courts, religion and the law also pose hardships for women.[422] *Sharia* courts are a parallel system of justice along with the secular, common law system.[423] Offenses to Islamic law include "close proximity," the act of

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house, and divorce courts tend to favor the men." *Id.* In 1991, there was a revision in the Korean Family Law, entitling women to a portion of the money accumulated by the couple during their marriage. *See* Eun-mi, *supra* note 415. Divorce in Korea, however, remains available only by mutual consent or when granted by the court. Family: Divorce: Republic of Korea, 1999 MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST.

[418] *See* Schoenberger, *supra* note 417, at A1.

[419] *See* Family: Divorce, 1999 MARTINDALE-HUBBLE INTERNATIONAL LAW DIGEST, Philippine Republic Law Digest.

> Divorce in Philippines was abolished by new Civil Code (R.A. 386), which took effect on Aug. 30, 1950, and in its place legal separation is authorized. Petition for legal separation may be filed on any of following grounds: (1) Repeated physical violence or grossly abusive conduct against petitioner, common child, or child of petitioner; (2) physical violence or moral pressure to compel petitioner to change religious or political affiliation; . . . (9) attempt by respondent against life of petitioner; . . . (Art. 55, E.O. 29) . . . Decree of legal separation has following effects: (1) Spouses shall be entitled to live separately from each other but marriage bonds shall not be severed[.]

Id.

[420] Volt Contreras, *Divorce bill is dead, thanks to coming polls*, PHIL. DAILY INQUIRER, Mar. 10, 2000, 2000 WL 17323196.

[421] *See* Julian Leigh, *Cultural Beliefs – Breaking the Chains: Filipino*, ADVOCACY IN ACTION (Domestic Violence Clearinghouse, Honolulu, Haw.) Fall, 1993, at 1.

[422] Simon Elegant, *Bound by Tradition: Women in one of the world's most sophisticated Muslim-dominated societies still find themselves battling discrimination and political polarization in the wake of the Anwar scandal hasn't made things easier*, FAR E. ECON. REV., Jul. 27, 2000, at 64, 2000 WL-FEER 23079466.

[423] S. Jayasankaran, *Caught in the Act: The strict religious laws governing relations between Muslim men and women in Malaysia have recently come under public scrutiny*, FAR E. ECON. REV., Oct. 28, 1999, at 60, 1999 WL-FEER 21134864.

being alone with an unrelated member of the opposite sex,[424] and "insulting Islam" which can include being at a restaurant where alcohol is served.[425] Selective enforcement of these laws, such as only charging women, "stem from a fundamental belief that women are inferior."[426] Intolerance and discrimination by these religious authorities has grown.[427] For example, *sharia* courts commonly refuse to grant divorces if the husband contests, and refuse to grant custody of children to women.[428]

4. Lack of adequate legal protection in the native country

Another distinction between battered immigrants and typical aliens facing deportation is the possibility that the batterer will follow his spouse to her native country and further abuse her or her children. Most aliens facing deportation do not have this potential hardship confronting them, although they may face difficulties due to the political climate of the native country.[429] The abuser's ability to travel to the foreign country and the ability and the willingness of foreign authorities to protect the self-petitioner and/or the self-

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[424] *Id.*

[425] Elegant, *supra* note 422, at 64.

[426] *Id.*

[427] *Id.*

[428] *Id.*

[429] Some aliens do, however, have the potential hardship of political persecution upon returning to their native country. For these aliens, asylum represents another method of remaining in the United States. In order to qualify for asylum, a petitioner would need to show "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2000) (amended 2000). Courts have held, however, that domestic violence does not rise to this level of persecution. *See, e.g.*, Lirio-Biscocho v. INS, No. 95-70820, 1997 U.S. App. LEXIS 8654, at *5 (9th Cir. Apr. 24, 1997). ("Being yelled at by a spouse, slapped perhaps once, and threatened frequently but never hit with a belt, rises considerably less far toward the level which would be classified as persecution . . . ."). In response to one such case decided by the BIA, the Department of Justice published a proposed rule to provide guidance on allowing domestic violence victims to qualify under asylum laws. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76588, 76589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208). Courts are divided as to whether the political climate of the native country should be weighed in the "extreme hardship" balance. *See, e.g.*, Farzad v. INS, 802 F.2d 123, 126 (5th Cir. 1986) (finding "the latest authority from the Ninth Circuit makes it expressly clear that the Board does not abuse its discretion when it concluded that claims of political persecution have no relation to determining whether 'extreme hardship' exists, which would warrant suspension of deportation . . ."). *But see* Blanco v. INS, 68 F.3d 642, 646 (2d Cir. 1995) (finding that the Board abused its discretion by not considering "violence and threats that fail to establish the political, religious, or ethnic motivation necessary for asylum may nonetheless be probative of extreme hardship qualifying for suspension of deportation").

petitioner's child from future abuse are important circumstances to be considered when evaluating extreme hardship in domestic violence situations.

The abuser's ability or willingness to travel to the petitioner's native country is often a function of the nationality of the abuser, and the availability of resources to which the abuser has access.[430] One possible concern of a battered spouse who has been returned to her country of origin is that her former spouse will follow her to harm her or to abduct their children. Some countries may not recognize domestic abuse as a crime. In countries that do, enforcement may still be a problem. Going to the police may entail further abuse. In Latin America, "women in police stations were raped, abused or dismissed by law enforcement officers when reporting domestic violence."[431] "Many women cite instances where increased threats of violence from abusers were ignored or handled inappropriately by police. Still others say going to the police entails just as much risk as staying home."[432]

VII. CONCLUSION

In 1994, with the passage of VAWA, the United States took a step forward in recognizing and eradicating the problem of domestic violence in this country. In October 2000, Congress took another vital step in protecting battered immigrants by removing the extreme hardship requirement for self-petitioning battered immigrants. Another step remains, however: the removal or replacement of the onerous extreme hardship showing in cancellation of removal cases for battered immigrants. Although characterizing the battered immigrant provisions as "remedial measures" and admonishing adjudicators reviewing battered spouse and child petitions to "be mindful" of the nature of the provision,[433] the fact remains that the INS requires a battered spouse to satisfy the extreme hardship showing. Satisfaction of the requirement, which is still somewhat ambiguous for all concerned,[434] remains a significant hurdle.

Promulgation of domestic violence-specific factors in the hardship determination is not enough to counter-balance the settled judicial interpretation of the "extreme hardship" standard, because the language requiring the hardship to be unique and beyond that typically associated with deportation remains. Battered immigrants facing removal or deportation are clearly subject to unique and atypical hardships. Additionally, the repercussions of the abuse itself, such as the physical and emotional scars, along with the social

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[430] *See* Millibergity Interview, *supra* note 151.

[431] Baham, *supra* note 35.

[432] *Id.*

[433] Virtue Memorandum, *supra* note 21, at 166.

[434] *See id.* at 167 ("There is no 'scorecard' that can be provided to determine whether a particular alien's removal from the United States would lead to extreme hardship.").

and economic consequences of returning to the native country, are difficult to evaluate under the settled judicial interpretation of extreme hardship. Extreme hardship for battered immigrants facing removal is qualitatively distinct from that of suspension of other deportation applicants. Retaining this language invites the INS, with its broad grant of discretionary authority and limited judicial review of its decisions, to require that a battered spouse show that her hardship is beyond that associated with other battered spouses. The traditional extreme hardship determination was never meant to apply to battered immigrants, and is not appropriate now.

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Unfair Punishment of the Mentally Disabled? The Constitutionality of Treating Extremely Dangerous and Mentally Ill Insanity Acquittees in Prison Facilities.

I. INTRODUCTION

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.
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> Justice Marshall, *Powell v. Texas* [1]

> We recognize, of course, that psychiatric professionals are not in complete harmony . . . disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. As we have explained regarding congressional enactments, when a legislature "undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation."
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> Justice Thomas, *Kansas v. Hendricks* [2]

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[1] 392 U.S. 514, 536 (1968) (choosing not to articulate particular mental states that would prevent *mens rea* formation and thereby preclude the state's punitive interest).

[2] 521 U.S. 346, 360 n.3 (1997) (citations omitted) (holding that a Kansas statute permitting civil commitment of sexually violent predators (deemed to have a "mental abnormality") satisfied substantive due process requirements).

Each state has full discretion as to whether the insanity defense is offered,[3] its legal definition[4] and its legal effect.[5] If a state chooses to offer the defense and the defendant is awarded acquittal by reason of insanity status, the state then has a legitimate option to confine the acquittee "for the purposes of treatment and the protection of society."[6] Confinement remains a legitimate

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[3] Some states have abolished the defense. *See* IDAHO CODE § 18-207(1) (MB, LEXIS through 2000 Cum. Supp.) (mental condition not a defense to criminal charges); MONT. CODE ANN. § 46-14-102 (LEXIS through 2000 Spec. Sess.)(mental illness admissible as evidence to prove state of mind as missing element of the offense).

Additionally, a number of states have enacted the "guilty but mentally ill" verdict, allowing the state to retain its punitive interest over the defendant. *"Guilty but Mentally Ill" Statutes: Validity and Construction*, 71 A.L.R.4th 702 (2000). *See e.g.*, ALASKA STAT. § 12.47.030 (MB, WESTLAW through 1999 1st Spec. Sess.); ARIZ. REV. STAT. ANN. § 13-502(A) (West, WESTLAW through 1999 2d. Spec. Sess.); DEL. CODE ANN. tit. 11, § 408 (West, WESTLAW through 1999 1st Spec. Sess.); GA. CODE ANN. § 17-7-131(c)(2) (West, WESTLAW through 2000 Gen. Assemb.); 725 ILL. COMP. STAT. ANN. 5/115-2 (MB, LEXIS through 2000 Pub. Act 91-925 2000), 730 ILL. COMP. STAT. ANN. 5/5-2-6 (MB, LEXIS through 2000 Pub. Act 91-925 2000); IND. CODE ANN. § 35-36-2-5 (MB, LEXIS through 2000 2d Reg. Sess.); KY. REV. STAT. ANN. § 504.130 (West, WESTLAW through 2000 Reg. Sess.); MICH. COMP. LAWS ANN. § 768.36 (West, WESTLAW through P.A. 2000); NEV. REV. STAT. 176.127 (West, WESTLAW through 1999 Reg. Sess.); N.M. STAT. ANN. §§ 31-9-3, 31-9-4 (MB, LEXIS through 2000 2d Spec. Sess); 18 PA. CONS. STAT. ANN. § 314, 42 PA. CONS. STAT. ANN. § 9727 (West, WESTLAW through Act 2000-68); S.C. CODE ANN. § 17-24-20 (West, WESTLAW through 1999 Reg. Sess.); S.D. CODIFIED LAWS § 23A-7-16 (West, WESTLAW through 2000 Reg. Sess.); UTAH CODE ANN. § 77-13-1(5) (MB, LEXIS through 2000 UT 86).

[4] *Powell*, 392 U.S. at 536. "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536; *see also* Leland v. Oregon, 343 U.S. 790 (1952)(finding no due process violation where State chooses one test for legal insanity over another).

[5] Foucha v. Louisiana, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring). "Consistent with the general rule that the definition of both crimes and defenses is a matter of state law . . . the States are free to recognize and define the insanity defense as they see fit." *Id.* at 96 (Kennedy, J., dissenting); *see also infra* note 9 for a discussion of "least restrictive" conditions.

[6] Jones v. United States, 463 U.S. 354, 366 (1983).

> We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

Id. at 370.

option for as long as the acquittee continues to be both dangerous[7] *and* mentally ill.[8]

Where and how the acquittee is detained is a more troublesome issue.[9] A history of abuse of the mentally ill led civil rights activists to begin lobbying for deinstitutionalization forty-five years ago.[10] Since its origins in the mid-

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[7] For a showing of dangerousness with regard to pre-trial arrestees charged with certain serious felonies, the Supreme Court has required that "the Government [demonstrate] . . . by clear and convincing evidence that [the arrestee poses an extreme threat of danger such that] no conditions of release can reasonably assure the safety of the community or any person." United States v. Salerno, 481 U.S. 739, 750 (1987) (citations omitted). *See infra* note 106.

For purposes of analysis, this article assumes the insanity acquittee is extremely dangerous. Although statistics indicate this situation occurs relatively rarely, the constitutional issues that such situations raise are worthy of exploration. "Contrary to popular belief, insanity is pleaded in less than one percent of all felony cases and is successful in only one-quarter of the cases in which it is pleaded. Thus, for every 1000 felony cases, insanity is pleaded in approximately nine cases and is successful in only two." Grant H. Morris, *Placed in Purgatory: Conditional Release of Insanity Acquittees*, 39 ARIZ. L. REV. 1061, 1063 (1997).

Furthermore, predicting violence by insanity acquittees is an imperfect science. *See* MACARTHUR RESEARCH NETWORK ON MENTAL HEALTH AND THE LAW, *MacArthur Violence Risk Assessment Study, at* http://ness.sys.Virginia.edu/macarthur/violence.html (last modified Apr. 1999); Kirk Heilbrun & Gretchen Witte, *Article: The MacArthur Risk Assessment Study: Implications for Practice, Research, and Policy*, 82 MARQ. L. REV. 733 (1999); Warren J. Ingber, Note: *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 300 (1982).

[8] Kansas v. Hendricks, 521 U.S. 346, 358 (1997). "We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* (citations omitted).

[9] *See* Olmstead v. Zimring, 527 U.S. 581 (1999). *Olmstead* interpreted the anti-discrimination provision found within the public services portion of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (1990) ("ADA"), to require placement of the mentally disabled in non-institutional settings if the State's treatment professionals determine the less restricted setting is appropriate, the individual agrees to the transfer, and the state is able to reasonably accommodate the placement given available resources and needs of others. *Id.* at 587. For analytical purposes, this article assumes: 1) state treatment professionals agree that increasing the number of community-based facilities is the best use of state resources; 2) the acquittee is found by appropriate procedures to be extremely dangerous to society and self; and 3) a community-based facility is an inappropriate placement for a dangerous acquittee who requires a level of security found only in extremely high security institutions, be that a state mental hospital dedicated solely to the mentally ill or a forensic hospital located within a prison.

[10] "Deinstitutionalization" refers to a civil rights reform movement dedicated "to the release of [mentally ill] institutionalized individuals from institutional care to care in the community." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 304 (10th ed. 1999). For more background on the policies behind the movement, see 145 CONG. REC. S8295-01 (daily ed. July 12, 1999) (statement of Sen. Moynihan calling attention to the "horrific effects" of deinstitutionalization policy) (reprinting E. Fuller Torrey & Mary T. Zdanowicz, *Deinstitutionalization Hasn't Worked*, WASHINGTON POST, July 9, 1999; Fox Butterfield, *National Report – Prisons Brim with Mentally Ill, Study Finds*, N.Y. TIMES, July 12, 1999) [hereinafter "Sen. Moynihan"].

1950's, however, a multitude of funding and political issues have frustrated the original goals of the movement. Consequently, deinstitutionalization has reduced the number of high security, institutional mental health facilities available for detainment.[11] At the same time, the mentally ill are over represented in the criminal system.[12] Unfortunately for some states, this inverse relationship may create a deficit in the number of high security, mental health treatment spaces available to meet the increased demand.[13]

Alternative methods of resource allocation, however, might more effectively serve the state's mentally ill population. For example, if the dangerous insanity acquittee is a relatively rare occurrence, providing costly secure facilities outside of prisons for this small population may not be the best use of mental health resources,[14] particularly when there is a greater need for treatment facilities within the prisons themselves.

Ultimately, funding high security, mental health treatment facilities within prisons may be a more effective use of resources, and thereby more beneficial to the larger mentally ill population as a whole. Under this scenario, more mandatory treatment would be made available to the (currently over represented) mentally ill in our prison populations. Additionally, economies of scale resulting from running high security mental health facilities within existing secure prisons could free up more resources for funding of community-based facilities.

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[11] Since 1955, ninety-three percent of the nation's state psychiatric hospital beds have closed. *Id.* (citing Torrey & Zdanowicz, *Deinstitutionalization Hasn't Worked*, *supra* note 10).

[12] Some 283,800 inmates (about 16%) in the nation's prisons and jails suffer from mental illness, at an enormous public cost of $8.5 billion per year. *Id.*

[13] For example, a 1991 settlement agreement between the State of Hawai'i and the Department of Justice required significant improvements to be made to the Hawai'i State Hospital. United States v. Hawai'i, Civ. No. 91-00137DAE (D. Haw. Oct. 30, 2000). In response, the Hawai'i Department of Health ("HDOH") proposed to reduce the number of beds in the state hospital in an effort to redirect those resources into a more sustainable mental health delivery system that would place patients in less restricted, community-based, private facilities. As of December 1999, the hospital had closed twenty-five beds. Helen Altonn, *State hospital has improved services*, HONOLULU STAR-BULLETIN, Dec. 18, 1999, *at* http://starbulletin.com/1999/12/18/news/story4.html. Hawai'i, with a population of 1.2 million, has only 145 beds in the State Hospital and a proposed a target number of 108. *See* Andrew J. Weaver, *Closing State Hospital needs public debate*, HONOLULU STAR-BULLETIN, Apr. 27, 1999, *at* http://starbulletin.com/1999/04/27/editorial/viewpoint.html. To meet the national average, would require 348 beds. *See infra* note 71. In 1999, roughly eighty percent of patients at the state hospital were forensic cases (criminal patients committed by the courts). Craig Gima & Helen Altonn, *State mental facility may close*, HONOLULU STAR-BULLETIN, Mar. 31, 1999, *at* http://starbulletin.com/1999/03/31/news/story5.html.

[14] According to Dr. Alan Hawk, Hawai'i State Hospital's Chief of Psychiatry, holding a patient in high security at the hospital costs about $190,000 per year. Tanya Bricking, *State Hospital offers Uyesugi's best hope*, HONOLULU ADVERTISER, June 4, 2000, *at* http://the.honoluluadvertiser.com/2000/Jun/04/localnews13.html.

Many mental health advocates consider lack of available treatment a primary cause of the overrepresentation of the mentally ill in the criminal system.[15] Certainly more preventative treatment available through lower cost community-based treatment[16] would prevent criminal behavior by the mentally ill in the first place.[17] More mental health treatment facilities within prisons would increase availability of treatment for the mentally ill prison population, thereby benefiting the larger population of mentally ill as a whole.

Accordingly, this comment concludes that under some circumstances it may be in the best interest of state resource management to detain extremely dangerous and mentally ill insanity acquittees in mental health treatment facilities located within prisons. Constitutional limits require statutory precautions safeguarding due process and equal protection rights of the acquittees. Also, a state must avoid detainment circumstances and conditions that might amount to unconstitutional punishment. Part II of this comment provides a brief overview of legal and societal issues affecting the state's responsibility to the mentally ill. Part III addresses Constitutional issues influencing detainment of a dangerous and mentally ill insanity acquittee and possible alternatives for states. Part IV concludes that a state with limited resources may create mental health treatment facilities within prisons for the detainment of extremely dangerous and mentally ill insanity acquitees provided two conditions are met. First, an appropriate statute must exist, carefully limiting the practice and securing the rights of the acquittee. Second, this alternative must be the least restrictive, most efficient allocation of resources for providing services to the states' entire mentally ill population.

II. THE INSANITY ACQUITTAL

Although not convicted of a crime, the insanity acquittee does not have true civil status.[18] Clearly use of the affirmative defense diminishes the full set of

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[15] *See* Sen. Moynihan, *supra* note 10.

[16] Community-based treatment costs roughly $60 per day versus jails and prisons at approximately $140 per day. TREATMENT ADVOCACY CENTER, *Criminalization of Americans with Severe Psychiatric Illnesses, at* http://www.psychlaws.org/GeneralResources/fact3.htm (last visited Apr. 24, 2001) [hereinafter *Criminalization*].

[17] "[D]elays in treatment can exacerbate [the mentally ill's] mental and physical conditions." U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, *Managing Mentally Ill Offenders in the Community: Milwaukee's Community Support Program*, Mar. 1994, 4. "[The individual's] own untreated, often psychotic behavior may [be] the cause of their being arrested in the first place." *Id.* at 2. Many mental health advocates believe lack of treatment for the mentally ill has lead to an increase in crime by this population that might not exist if appropriate treatment were more widely available. *See, e.g., Criminalization, supra* note 16.

[18] Foucha v. Louisiana, 504 U.S. 71, 87 (1992) (O'Connor, J., concurring). "Although insanity acquittees may not be incarcerated as criminals or penalized for asserting the insanity

rights constitutionally guaranteed to a mentally ill person who is subject to civil commitment.[19] Yet the specific set of rights retained by the insanity acquittee are uncertain at best.[20]

While incarceration may follow a criminal conviction for the purposes of retribution, deterrence, and rehabilitation, "[d]ifferent considerations underlie commitment of an insanity acquittee."[21] As the defendant "was not convicted, he may not be punished."[22] According to Supreme Court precedent, however, confining acquittees in mental health treatment facilities within prisons is not necessarily equivalent to punishment if certain criteria are met.[23]

Traditionally, whether confinement functions as punishment or regulation is determined by a number of factors.[24] These include for example, whether confinement operates to "promote the traditional aims of punishment – retribution and deterrence," whether an alternative purpose for the confinement is rationally attributable to it, and whether the confinement is an excessive implementation of the alternative purpose.[25] Although, the Supreme Court has clearly stated *punishment* without conviction is not permitted, no clear guidelines have emerged regarding appropriate conditions of incarceration for the dangerous and mentally ill insanity acquittee.[26]

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defense this finding of criminal conduct sets them apart from ordinary citizens." *Id.* (citations omitted).

[19] Jones v. United States, 463 U.S. 354, 366 (1983). Acquittal by insanity justifies immediate commitment to a mental health facility without regard to further due process proceedings or any correlation to the length of time the acquittee could have been sentenced to if convicted. *Id.* at 366-69. "This holding accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." *Id.* at 370.

[20] *See Jones*, 463 U.S. at 373-74 (Brennan, J., dissenting).

> The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing insanity acquittees, because they are neither blameworthy nor the appropriate objects of deterrence. In addition, insanity and *mens rea* stand in a close relationship which this Court has never fully plumbed.

Id. at 374 n.4 (citations omitted).

[21] *Jones*, 463 U.S. at 369.

[22] *Id.*

[23] *See e.g.*, Kansas v. Hendricks, 521 U.S. 346, 368-69 (1997); Seling v. Young, 531 U.S. 250,__, 121 S.Ct. 727, 734 (2001).

[24] *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1962) (citations omitted).

[25] *Id.*

[26] *See, e.g.*, Seling, 531 U.S. 250,__, 121 S.Ct. 727, 735 (2001). "Unlike a fine, confinement is not a fixed event. . . . it extends over time under conditions that are subject to change. *Id. But see infra* note 9.

A. Not Guilty by Reason of Insanity as an Affirmative Defense

Generally, legal insanity may prevent formation of *mens rea*, an element necessary for every criminal conviction,[27] by interfering with defendant's capacity to form intent.[28] Alternatively, some state statutes create an affirmative defense of legal insanity that triggers acquittal after all criminal elements are proven by the state.[29]

As an affirmative defense, not guilty by reason of insanity requires the state to first satisfy the burden of proving every element of criminal responsibility beyond a reasonable doubt.[30] Once the state has satisfied the *In re Winship* burden, according to Chief Justice Rehnquist and Justice Kennedy's interpretation of Supreme Court precedent, the state then has the authority to "incarcerate on any reasonable basis" even if the defendant is subsequently acquitted by reason of insanity.[31]

Currently, several states do not offer an insanity defense.[32] But once the state chooses to offer the affirmative defense of not guilty by reason of insanity, the state has created a substantive right to acquittal of the criminal charges and *thereby relinquishes its punitive interest* in criminal incarceration.[33] To avoid this limitation, a number of states have added the Guilty but Mentally Ill ("GBMI") verdict that allows a state to retain its criminal jurisdiction (punitive interest) over a defendant.[34] The Supreme Court has not yet ruled on the constitutionality of GBMI.[35]

The GBMI verdict provides states with more sentencing options than the insanity acquittal because the verdict functions as a conviction. The conviction allows the state to provide treatment to a mentally ill offender and also retain its punitive interest over the individual for the length of the

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[27] *In re* Winship, 397 U.S. 358, 364 (1970) (holding state must first satisfy the burden of proving every element of criminal responsibility beyond a reasonable doubt).

[28] Foucha v. Louisiana, 504 U.S. 71, 91 (1992) (Kennedy, J., dissenting).

[29] *Id.* For a description of the insanity defense history, theory and purpose see WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW §§ 4.1-4.3 (2d ed. 1986).

[30] *See Winship*, 397 U.S. at 363; *Foucha*, 504 U.S. at 91 (Kennedy, J., dissenting).

[31] *Foucha*, 504 U.S. at 93 (Kennedy, J., dissenting) (citing Chapman v. United States, 500 U.S. 453, 465 (1991); Williams v. Illinois, 399 U.S. 235, 243 (1970)); *see also Foucha*, 504 U.S. at 118 n.13 (Thomas, J., dissenting).

[32] *See* IDAHO CODE § 18-207(1) (MB, LEXIS through 2000 Cum. Supp.) (mental condition not a defense to criminal charges); MONT. CODE ANN. § 46-14-102 (LEXIS through 2000 Spec. Sess.) (mental illness only admissible as evidence to prove state of mind as missing element of the offense).

[33] Jones v. United States, 463 U.S. 354, 369 (1983). "As [the insanity acquittee] was not convicted, he may not be punished." *Id.*

[34] *See supra* note 3.

[35] *But see Foucha*, 504 U.S. at 88-89 (O'Connor, J., concurring) (stating majority opinion "casts no doubt on laws providing for prison terms after verdicts of 'guilty but mentally ill'").

sentence.[36] The state no longer is required to prove the detainment is not punishment.[37] The individual convicted by a GBMI verdict may initially be placed in the custody of the Department of Health or Human Services for treatment if found to be mentally ill.[38] Should the individual become sane while the penal sentence is still in effect, the state has then retained its punitive interest and has the option to transfer that individual to a prison facility under the terms of the original conviction.[39]

B. The Significance of Conviction

> Conviction is, of course, a significant event. But I am not sure that it deserves talismanic significance. Once a State proves beyond a reasonable doubt that an individual has committed a crime, it is, at a minimum, not obviously a matter of federal constitutional concern whether the State proceeds to label that individual "guilty," "guilty but insane," or "not guilty by reason of insanity." A State may just as well decide to label its verdicts "A," "B," and "C." It is surely rather odd to have rules of federal constitutional law turn entirely upon the label chosen by a State.[40]

Generally, incarceration requires a conviction based on proof beyond reasonable doubt that a person has committed a crime.[41] Yet, in some narrow and limited circumstances a state's interest in maintaining community safety may justify detainment of a dangerous individual without the formality of a criminal trial and conviction.[42]

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[36] *See, e.g.*, 730 ILL. COMP. STAT. ANN. 5/5-2-6 (LEXIS through 2000 Pub. Act 91-925 2000).

[37] *See id.* (declaring that "[t]he court may impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who had been convicted of the same offense without a finding of mental illness"); *Foucha*, 504 U.S. at 89 (O'Connor, J., concurring).

[38] *See* 730 ILL. COMP. STAT. 5/5-2-6(c) (LEXIS through 2000 Pub. Act 91-925 2000).

[39] *Id.* at 5/5-2-6(d)(1).

[40] *Foucha*, 504 U.S. at 118 n.13 (Thomas, J., dissenting) (citing Ry. Express Agency, Inc. v. Virginia, 358 U.S. 434, 441 (1959) for the proposition that the constitutionality of state action should not turn on "magic words"). Justice Thomas further clarified his position when he wrote the majority opinion for *Kansas v. Hendricks*, 521 U.S. 346 (1997) (holding that a Kansas statute that permitted civil commitment of sexually violent predators (defined as a mental abnormality) satisfied substantive due process requirements). "Indeed, we have never required State legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Id.* at 359.

[41] *Foucha*, 504 U.S. at 83.

[42] *Hendricks*, 521 U.S. at 365-66 (stating "[w]e have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law") (citing Allen v. Illinois, 478 U.S. 364, 373 (1986); United States v. Salerno, 481 U.S. 739, 748-49 (1987)).

For example, the government may legitimately detain pre-trial arrestees charged with certain serious felonies "if the Government demonstrates by clear and convincing evidence after an adversary hearing that [the arrestee poses an extreme threat of danger such that] no release conditions 'will reasonably assure . . . the safety of any other person and the community.'"[43] Other circumstances in which the Supreme Court has upheld detainment without criminal trial and conviction include mentally ill defendants found incompetent to stand trial,[44] juvenile pretrial detention,[45] detainment of potentially illegal aliens prior to deportation hearings[46] and most recently, confinement of sexual predators.[47]

In the context of civil commitment of a mentally ill individual, the government must demonstrate by clear and convincing evidence that an individual is both mentally ill and dangerous to the community prior to civil commitment in a mental health facility.[48] Furthermore, the Supreme Court has determined an insanity acquittee may be automatically civilly committed based on the criminal trial findings without additional hearings normally required as procedural safeguards for a civil commitment.[49]

Nevertheless, the Supreme Court has also limited the extent to which procedural protections may be waived for civil commitment. At minimum, the state must prove *continued* mental illness and dangerousness in order to justify continued confinement of an acquittee.[50] Similarly, to satisfy the due process requirement, any statute authorizing detainment of insanity acquittees in prison

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[43] *Salerno*, 481 U.S. at 741 (citations omitted).

[44] Jackson v. Indiana, 406 U.S. 715 (1972). Due process "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

[45] Schall v. Martin, 467 U.S. 253 (1984) (holding New York statute authorizing pretrial detention of juveniles presenting serious risk of committing offense is constitutional).

[46] *See* Reno v. Flores, 507 U.S. 292, 306 (1993) (noting that Congress has authority to detain aliens suspected of entering the country illegally pending deportation hearings) (citing Carlson v. Landon, 342 U.S. 524, 538 (1952)).

[47] *See Hendricks*, 521 U.S. at 356 (holding that Kansas civil commitment statute that defines mental abnormality to include sexually violent predators satisfied substantive due process requirements).

[48] Addington v. Texas, 441 U.S. 418 (1979).

[49] Jones v. United States, 463 U.S. 354, 366-67 (1983) (noting that civil commitment of insanity acquittees is permitted if the government demonstrates by clear and convincing evidence that the individual is both mentally ill and dangerous to the community).

[50] Foucha v. Louisiana, 504 U.S. 71, 78 (1992) (stating that "keeping [an acquittee] against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness"). In *Foucha*, the Court struck down a Louisiana statutory scheme permitting continued confinement of an insanity acquittee who was no longer mentally ill because it violated the acquittee's constitutional liberty interest. *Id.* at 86.

facilities requires a very narrow formulation that directs a specific and limited manner of implementation.[51]

C. Impact of the Insanity Acquittal on Civil Status

The insanity acquittee has not been convicted of a crime. He may not therefore be punished.[52] The Supreme Court, however, has not clearly defined the exculpatory effects of an insanity acquittal.[53] At minimum, the Supreme Court[54] (and statutes in most states)[55] mandates that commitment of an insanity acquittee must serve the dual purpose of treatment and protection.[56] Although protocols defining acceptable "treatment" have also not been defined,[57] the *Olmstead* decision instructs the state to administer treatment in the least restrictive environment given the state's available resources.[58]

Once the state relinquishes its punitive interest by granting the insanity defense,[59] the state must comply with due process requirements found in the involuntary confinement of a civilian. The due process clause of the

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[51] *Compare Hendricks*, 521 U.S. at 357 (upholding Kansas statute that permitted civil commitment of sexual predators), *with Foucha*, 504 U.S. at 81-82 (striking down Louisiana's statutory scheme that permitted detainment of acquittees who were no longer mentally ill); *see also infra* notes 99-107 and accompanying text.

[52] *Jones*, 463 U.S. at 369. "[S]ociety may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense." *Id.* at 369 n.18 (citations omitted).

[53] *Jones*, 463 U.S. at 370 (stating that "insanity acquittees constitute a special class that should be treated differently from other candidates for commitment"); *see supra* note 31. "Although Louisiana has chosen not to punish insanity acquittees, the State has not surrendered its interest in incapacitative incarceration." *Foucha*, 504 U.S. at 98 (Kennedy, J., dissenting). "While a State may renounce a punitive interest by offering an insanity defense, it does not follow that, once the acquittee's sanity is 'restored,' the State is required to ignore his criminal act, and to renounce all interest in protecting society from him." *Id.* at 110 (Thomas, J., dissenting).

[54] *Jones*, 463 U.S. at 366.

[55] *See, e.g.*, HAW. REV. STAT. ANN. § 704-411(1)(a) (LEXIS through 1999 Reg. Sess. 2000).

[56] To further safeguard the presence of satisfactory treatment, the state should implement a legislatively enacted Treatment Act (i.e., securing individualized medical and psychological evaluations; commitment to progress the individuals to less restrictive environments when appropriate; procedural safeguards for administering medications without consent, etc.). *See, e.g.*, Colorado's Care and Treatment of the Mentally Ill Act, COLO. REV. STAT. § 27-10-101, *et. seq. discussed in* Neiberger v. Hawkins, 70 F. Supp. 2d 1177, 1181-82 (1999).

[57] Kansas v. Hendricks, 521 U.S. 346, 368 n.4 (1997) (citations omitted). "We have explained that the States enjoy wide latitude in developing treatment regimens." *Id. But see* Langton v. Johnston, 928 F.2d 1206, 1214 (1st Cir. 1991).

[58] *See supra* note 9.

[59] Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Jones v. United States, 463 U.S. 354, 369 (1983)). *Cf. supra* note 53 and accompanying text.

Constitution mandates that no person be deprived of life, liberty, or property without due process of law.[60] In order to demonstrate due process compliance, the state must prove that the confinement reasonably relates to a legitimate regulatory goal.[61] This requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[62]

Preventing danger to the community is a legitimate state regulatory goal.[63] Thus, if an acquittee remains mentally ill and also continues to pose a serious threat of danger to the community,[64] the acquittee's incarceration in secure facilities (with treatment provided) is an exercise of "permissible regulation" rather than "impermissible punishment."[65] But the state must demonstrate the rational connection to the alternative purpose for the confinement, *and* show the confinement is not an excessive implementation of that alternative purpose.[66]

In view of these constraints, a state may confine an insanity acquittee to a mental health facility within a prison under three conditions. First, no other less restrictive alternative may be available in the state.[67] For example, a state funded mental health hospital capable of providing both the necessary

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[60] U.S. CONST. amend. V (as applied to federal government) and amend. XIV, § 1 (as applied to states). Most state constitutions contain similar clauses as well. *See, e.g.*, HI. CONST. art. I, § 5.

[61] *Jones*, 463 U.S. at 368.

[62] Jackson v. Indiana, 406 U.S. 715, 738 (1972). For example, a person found incompetent to stand trial may not be held, without appropriate civil commitment proceedings, for longer than the reasonable period of time needed to determine if he will become competent to stand trial. *Id.*

[63] Kansas v. Hendricks, 521 U.S. 346, 363 (1997). "The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate non-punitive governmental objective and has been historically so regarded." *Id.*; *see also* United States v. Salerno, 481 U.S. 739, 747 (1987) (citing Schall v. Martin, 467 U.S. 253, 269 (1984)).

[64] *See supra* note 7.

[65] *Salerno*, 481 U.S. at 747 (citing *Schall*, 467 U.S. at 269).

> The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

Allen v. Illinois, 478 U.S. 364, 373 (1986) (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)) (internal quotations omitted).

[66] *Salerno*, 481 U.S. at 747 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). *See, e.g., Hendricks*, 521 U.S. at 363. "Far from any punitive objective, the confinement's duration is instead linked to the stated purpose of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others." *Id.*

[67] Olmstead v. Zimring, 527 U.S. 581, 587 (1999).

protection and treatment.[68] Second, there must be statutorily defined procedural limits to the length and manner of the detention.[69] Third, treatment must be provided if available. [70]

III. DETAINMENT OF A DANGEROUS AND MENTALLY ILL INSANITY ACQUITTEE

Deinstitutionalization pressures and state hospital closures across the country have resulted in a significant reduction in the number of high security beds available for safely detaining those found to be dangerous and mentally ill.[71] Unfortunately, while closures resulted in a ninety-three percent overall reduction in state mental hospital beds, no corresponding increase in community-based services followed as originally planned.[72] The effect was thousands of mentally ill individuals with no place to go and a larger number of the mentally ill entering the criminal system.[73] As a result, "jails and prisons have become the nation's new mental hospitals."[74]

As institutional beds decrease and the number of mentally ill in the criminal system increase, an alternative option exists. Extremely dangerous and mentally ill insanity acquittees could be confined in mental health facilities located within prisons if the facilities are operated by the Department of Health and segregated from prisoners.[75] Additionally, this option provides another

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[68] Compliance with the Court's interpretation of the ADA as set forth in *Olmstead*, 527 U.S. at 587, requires placement in the least restrictive alternative given the state's available resources. *See supra* note 9.

[69] Foucha v. Louisiana, 504 U.S. 71, 83 (1992); *Hendricks*, 521 U.S. at 368-69. *See, e.g.*, Langton v. Johnston, 928 F.2d 1206, 1209-10 (1st Cir. 1991) (outlining statutory framework under Massachusetts law for commitment of a sexually dangerous person).

[70] *Hendricks*, 521 U.S. at 366.

[71] Since the beginning of the deinstitutionalization movement in the mid-1950's, the national average of available hospital beds has decreased from 339 to 29 per 100,000 population. H.R. Lamb, *Deinstitutionalization at the Beginning of the New Millennium*, HARV. REV. OF PSYCHIATRY, Vol. 6, 1-10 (1998).

[72] Sen. Moynihan, *supra* note 10.

[73] *See supra* note 12.

[74] Sen. Moynihan, *supra* note 10. In 1998, about sixteen percent of the inmates (roughly 283,800) in U.S. prisons and jails suffered from mental illness. U.S. DEP'T OF JUSTICE, *Mental Health and Treatment of Inmates and Probationers* 2 (1999).

[75] In 1996, Senator Hatch proposed to allow Federal insanity acquittees in the District of Columbia to be transferred to mental hospitals within prison facilities as a more secure and cost effective alternative to civil mental hospitals that were, at the time, in a state of disrepair due to inadequate funding. 142 CONG. REC. S12295 (daily ed. Oct. 3, 1996) (statement of Sen. Hatch). In his speech, Senator Hatch noted of the twenty-six Federal defendants acquittees housed in the aging hospital (one of which was John Hinckley, Jr., Ronald Reagan's attempted assassin), three had escaped in the prior two years, including one acquittee who molested two three year old girls before being apprehended. *Id.* In 1996, Senator Orin Hatch's proposal was

source of formal legal authority to administer treatment to a dangerous and mentally ill individual (*whether acquitted or convicted*) in need of both treatment and protection.[76]

Often delayed treatment exacerbates the mentally ill's mental and physical conditions.[77] Indeed, the U.S. Department of Justice recognizes that the individual's "own untreated, often psychotic behavior may [be] the cause of their being arrested in the first place."[78] A mental health facility run within a prison could very well provide an opportunity to reach the underserved mentally ill population (both those convicted of crimes and those acquitted).[79] Mental health facilities within prisons might also serve to screen out mentally ill in need of mental health services, thereby aiding recovery to functioning civil status.[80]

A. Recent Supreme Court Decisions Affecting the Mentally Ill

Foucha v. Louisiana[81] is the most recent U.S. Supreme Court case specifically addressing insanity acquittees as a group.[82] *Foucha* highlighted the diverse views held by the Justices regarding the Constitutional rights of insanity acquittees and the State's authority to detain dangerous and mentally ill acquittees. *Foucha*'s majority opinion[83] applied strict scrutiny analysis[84] to strike down a Louisiana statute as a violation of an acquittee's due process

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amended to the Insanity Defense Reform Act of 1984. *See* Insanity Defense Reform Act, P.L. 104-294, 18 U.S.C. § 4243(i) (LEXIS through 106-263 2000).

[76] *See* Steven S. Sharfstein & Mary Zdanowicz, *Courts must be able to order help*, BALTIMORE SUN, Mar. 1, 2001, at 19A (discussing need for court ordered *outpatient* treatment (as opposed to the inpatient treatment discussed in this paper) in order to avoid preventable violence by mentally ill).

[77] U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *Managing Mentally Ill Offenders in the Community: Milwaukee's Community Support Program*, Mar. 1994, 4.

[78] *Id.*

[79] *See supra* notes 17 and 74.

[80] *Id.*

[81] 504 U.S. 71 (1992).

[82] *Id.* at 125. Also relevant are the more recent cases *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Seling v. Young*, 531 U.S. 250, 121 S.Ct. 727 (2001) that concerned the civil commitment of previously convicted sexual predators.

[83] *Foucha*'s majority opinion was written by Justice White and joined by Justices Blackmun, Stevens, O'Connor and Souter with respect to Parts I and II (holding that a Louisiana statute violated due process by permitting an insanity acquittee to be detained after being found no longer mentally ill). *Id.* at 72.

[84] *Id.* at 81. Satisfying strict scrutiny requires that the detainment arise as a narrowly focused, least drastic alternative to remedy an overwhelming, compelling governmental interest. *See id.* (citing United States v. Salerno, 481 U.S. 739, 747-50 (1987)).

guarantees.[85] Under the Louisiana statute, an acquittee found no longer mentally ill could suffer "indefinite detention" solely for dangerousness.[86] Furthermore, in order to gain release the acquittee bore the burden of proof to show non-dangerousness (as opposed to the state carrying the burden to prove continued dangerousness).[87]

Significant to the case are two strong dissents, one written by Justice Kennedy[88] and the other by Justice Thomas.[89] Both dissents argued that the Court should defer to state created laws governing detainment of dangerous insanity acquittees, whether or not the acquittee has continuing mental illness.[90]

Five years later, Justice Thomas wrote the majority opinion in *Kansas v. Hendricks*.[91] The *Hendricks* Court held that a Kansas State statute providing for civil commitment of sexually violent predators satisfied the Fourteenth Amendment's due process requirements and did not violate the *double jeopardy* or *ex post facto* clauses.[92] The Court deferred to the state's determination on how to best protect its citizens from the threat of someone deemed to be a "sexual predator," even where the predator had civil status.[93]

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[85] *Foucha*, 504 U.S. at 81. It is unclear if the heightened standard of review applied because the acquittee was no longer under civil commitment standard or because a "fundamental right" had been violated, thereby triggering strict scrutiny. *Id.* at 116-19 (Thomas, J., dissenting). Notably, Justice Thomas' strong dissent in *Foucha* and subsequent majority opinion in *Hendricks* suggests the incarceration of an insanity acquittee need only be reasonably related to a legitimate state regulatory goal. *See id.* at 119 (arguing that "this Court has never applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill, much less to laws involving the confinement of insanity acquittees"); *Hendricks*, 521 U.S. at 360 n.3 (noting that "legislatures have been afforded the widest latitude in drafting [civil commitment] statutes").

[86] *Foucha*, 504 U.S. at 83.

[87] *Id.*

[88] *Id.* at 90-102 (Kennedy, J., dissenting) (joined in part by Chief Justice Rehnquist).

[89] *Id.* at 102-26 (Thomas, J., dissenting) (joined by Justice Scalia and in part by Chief Justice Rehnquist).

[90] *See, e.g., id.* at 93 (Kennedy, J., dissenting) (stating that "[i]t is well settled that upon compliance with *In re Winship*, the State may incarcerate on any reasonable basis") (citations omitted); *id.* at 110 (Thomas, J., dissenting) (arguing that "[w]hile a State may renounce a punitive interest by offering an insanity defense, it does not follow that, once the acquittee's sanity is 'restored,' the State is required to ignore his criminal act, and to renounce all interest in protecting society from him").

[91] 521 U.S. 346 (1997) (Justices Rehnquist, Kennedy, Scalia and O'Connor joined the opinion). Notably, Justices Rehnquist, Kennedy, Scalia and Thomas dissented in *Foucha*. *Foucha*, 504 U.S. at 90-126.

[92] *Hendricks*, 521 U.S. at 371.

[93] *Id.* at 365-66.

Subsequent to *Hendricks*, the Court in *Olmstead v. Zimring*[94] interpreted the anti-discrimination provision found within the public services portion of the Americans with Disabilities Act of 1990 ("ADA") as it applies to the mentally disabled.[95] The Court held this provision required placement of the mentally disabled in non-institutional settings if: the State's treatment professionals determine the less restricted setting is appropriate; the individual agrees to the transfer; and the state is able to reasonably accommodate the placement given available resources and needs of others.[96] Justice Thomas authored the dissenting opinion.[97] The *Olmstead* dissent supported deference to the states and "fear[ed] that the majority's approach impose[d] significant federalism costs [and directed] States how to make decisions about their delivery of public services."[98] Here again, the same Justices emphasize state control in the area of mental health.

B. Procedural Due Process Issues

Procedural due process issues arise whenever detainment is at issue.[99] The Supreme Court has examined the following issues when determining whether detainment without conviction meets procedural due process requirements: Does the controlling statute meet the rigorous strict scrutiny standard?[100] If such statute exists, does it carefully limit the circumstances and duration of

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[94] 527 U.S. 581 (1999).

[95] 104 Stat. 337, 42 U.S.C. § 12132 (1990).

[96] *Olmstead*, 527 U.S. at 587.

[97] *Id.* at 615 (Thomas, J., dissenting). Justice Thomas, in his dissent (joined by Justices Rehnquist and Scalia), opposed a definition of "discrimination" under the ADA that applied to different categories of persons protected by the ADA (i.e., "[t]emporary exclusion from community placement does not amount to 'discrimination' in the traditional sense of the word"). *Id.* at 616.

[98] *Id.* at 624 (Thomas, J., dissenting). "[T]he appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities." *Id.* at 625.

[99] *See* United States v. Salerno, 481 U.S. 739, 746 (1987) (upholding a statute permitting pretrial detention of dangerous arrestees in part based on the statute's limited manner of implementation). *Id.* at 747-48; *see also Foucha*, 504 U.S. at 77-79.

[100] *See Salerno*, 481 U.S. at 750. Strict scrutiny requires that the detainment arises as a narrowly focused, least drastic alternative to remedy an overwhelming, compelling governmental interest. *Id.*

confinement?[101] Finally, is the detainee provided an opportunity for a prompt hearing?[102]

The Supreme Court's decision in *United States v. Salerno*[103] is instructive. *Salerno* concerned a statute permitting pretrial detainment of dangerous arrestees prior to conviction.[104] The *Salerno* Court upheld the statute, noting "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."[105] Yet the Court pointed out that "[t]he judicial officer is not given unbridled discretion in making the detention determination" since an applicable statute specified factors relevant to the determination.[106] Furthermore, the statute in *Salerno* carefully limited situations to which it applied.[107]

Similarly, before treating an insanity acquittee within prison facilities, in order to meet Constitutional requirements the statute authorizing such detainment should pass strict scrutiny.[108] Focusing on individuals who have committed extremely serious offenses is a starting point. To isolate this specific group of acquittees, a "full-blown adversary hearing" should be provided at which the state demonstrates by clear and convincing evidence[109] that the acquittee poses an "identified and articulable threat" such that extreme

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[101] *See id.*; Kansas v. Hendricks, 521 U.S. 346, 364 (1997) (noting that "[t]he numerous procedural and evidentiary protections afforded [in the civil commitment statute for sexual predators] demonstrate[s] that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards"). *Cf. Foucha*, 504 U.S. at 81-82 (striking down a Louisiana scheme of confinement that was "not carefully limited").

[102] *See id. Foucha* held the Louisiana statute violated procedural due process because the detainee had the burden of proof to prove he was not dangerous. *Id.* at 82-83. The Court noted to justify continued detainment, the burden of proof must be on the state to prove continued dangerousness. *Id.* Furthermore, since the state carried no burden of proof to justify the detention, the circumstances and duration of confinement were not limited to a narrow situation. *Id.*; *see also Salerno*, 481 U.S. at 747; Schall v. Martin, 467 U.S. 253, 263-68 (1984).

[103] 481 U.S. 739 (1987).

[104] *Salerno*, 481 U.S. at 741.

[105] *Id.* at 748.

[106] *Id.* at 742. "These factors include the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release." *Id.*

[107] *Id.* at 747.

[108] *Id. But see supra* note 85 (noting recent Supreme Court decisions are unclear as to the applicable standard of review for such a statute).

[109] *Salerno*, 504 U.S. at 81. A court order placing the acquittee under custody of the Department of Health should follow. Kansas v. Hendricks, 521 U.S. 346, 368 (1997) (noting as significant "that Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services").

dangerousness warrants detainment in high security facilities.[110] Furthermore, the state procedure must document that no alternative conditions of confinement (i.e., less restrictive, community-based facilities) could reasonably assure the community's safety.[111]

Moreover, the statute should articulate specific procedural mechanisms limiting the circumstances and length of time for which insanity acquittees could be incarcerated without a hearing.[112] Periodic review of the initial determination of dangerousness and mental illness would ensure a potential limit on the duration of the detainment.[113] The statute should also specify relevant, applicable factors to avoid "unbridled discretion" in the judicial officer's determinations on detention.[114] Implementing these types of procedural safeguards is the first step toward satisfying due process requirements and avoiding unlimited or arbitrary detainment.[115]

C. Substantive Due Process Issues

In addition to procedural due process, substantive due process prohibits the government from conducting activity that "shocks the conscience."[116] Detaining insanity acquittees in prison *would* violate substantive due process *if* the purpose was reformatory in nature (punishment); a more appropriate facility were available; acquittees were held with prisoners convicted of crimes; or the individual was found to be not dangerous.[117]

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[110] *Salerno*, 481 U.S. at 751.

[111] *Id.* at 747. "[T]he punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *Id.* (citations and internal quotes omitted). "Conversely, if a restriction or condition is not reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." Bell v. Wolfish, 441 U.S. 520, 538 (1979) (citations, footnote omitted).

[112] *See Hendricks*, 521 U.S. at 363-64.

[113] *See id.* at 364.

[114] *Salerno*, 481 U.S. at 742. *Salerno* concerned detainment of pretrial detainees. There, the "factors include[d] the nature and seriousness of the charges, the substantiality of the Government's evidence against the arrestee, the arrestee's background and characteristics, and the nature and seriousness of the danger posed by the suspect's release." *Id.* at 742. In the case of insanity acquittees, similar factors could be used.

[115] *Bell*, 441 U.S. at 538-39.

[116] Foucha v. Louisiana, 504 U.S. 71, 125 (1992) (Thomas, J., dissenting) (quoting Rochin v. California, 342 U.S. 165, 172 (1952)).

[117] *Hendricks*, 521 U.S. at 363-64; *see also* Hansen v. Haugh, 260 Iowa 236 (1967) (analyzing factors relevant to determining when detainment of an insanity acquittee in a penal institution functions as punishment).

Another inquiry important to substantive due process protection is "whether alternative procedures more protective of individual interests, [available] at a reasonable cost, were likely to accomplish the State's legitimate objectives."[118] The regulatory purpose of confining an insanity acquittee is both protection of the acquittee and others as well as treatment for the acquittee's mental illness.[119] Thus, the "conditions of confinement . . . [must] 'appear to reflect the regulatory purposes relied upon by the' Government" and account for the individual's interest in being detained elsewhere.[120] Factors relevant to this analysis include the physical separation between the inmates and mental facility patients; application of hospital rules rather than prison rules to acquittees; lack of other in-state maximum-security hospitals; and potential solutions planned or attempted by the state in order to remedy the lack of non-prison facilities available for treating acquittees.[121]

Although courts must consider all of these factors, the lack of non-prison facilities has an important impact on a state's resource allocation. Funding to support the needs of the mentally ill is limited. As a consequence, the state must make hard choices regarding resource allocation and this should be reflected in the state statutory scheme.[122] Furthermore, any intervention by federal courts must be "conducted with the clear understanding that the autonomy of these governmental entities should be safeguarded to the maximum extent possible."[123] The Supreme Court, on the other hand, has clearly stated that remedies for failure to provide adequate treatment and conditions of confinement (as outlined under applicable state statutes) should be available through state courts if a valid cause of action exists.[124]

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[118] Jones v. United States, 463 U.S. 354, 381 (1983) (Brennan, J., dissenting) (citations omitted).

[119] *Id.* at 366.

[120] United States v. Salerno, 481 U.S. 739, 747-48 (1987) (quoting Schall v. Martin, 467 U.S. 253, 270 (1984)).

[121] *Id.*; *Hendricks*, 521 U.S. at 363-64.

[122] This "target population requires a continuum of care provided by a variety of service professionals." U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, *Coordinating Community Services for Mentally Ill Offenders: Maryland's Community Criminal Justice Treatment Program*, 3 (Apr. 1999). The Maryland Community Criminal Justice Treatment Program (MCCJTP) has successfully combined Federal, State and local funding to coordinate community services for mentally ill offenders. *Id.* at 5. A MCCJTP goal is to combat the repeated "system cycling" of the mentally ill through the health, mental health, social service, and criminal justice system due to lack of coordinated care. *Id.* at 3. "Created to serve the jailed mentally ill, the program now also targets individuals on probation and parole." *Id.* at 2.

[123] Langton v. Johnston, 928 F.2d 1206, 1221 (1st Cir. 1991). "[O]ne of the most important considerations governing the exercise of [federal] equitable power is a proper respect for the integrity and function of local government institutions." *Id.* (quoting Missouri v. Jenkins, 495 U.S. 33, 51 (1990)).

[124] Seling v. Young, 531 U.S. 250,__, 121 S.Ct. 727, 736 (2001).

D. Equal Protection

The Fourteenth Amendment's equal protection clause ensures that when a state creates a generally available substantive right, it cannot then, arbitrarily, deny this right to some while at the same time granting it to others.[125] Nevertheless, equal protection principles allow differences in treatment based on classifications that "have some relevance to the purpose for which the classification is made."[126] For example, acquittal by reason of insanity is not equivalent to a simple "not guilty" verdict.[127] Therefore, if due process rights are satisfied,[128] for equal protection purposes there is a rational basis for incarcerating some insanity acquittees in mental treatment facilities within prison rather than less restrictive community-based facilities.[129]

The issue of treatment, however, is analyzed differently. The Supreme Court, along with most state statutes creating the insanity defense, mandates that all insanity acquittees be provided with treatment.[130] Accordingly, once the state creates this statutory right to treatment, it must make treatment generally available to all in that classification.[131] Thus, by arbitrarily incarcerating some insanity acquittees without any attempt to provide treatment for their mental illness, the state would be in violation of ADA requirements as articulated by the Supreme Court, and in many cases its own statutory procedure, and would blatantly violate equal protection principles.[132]

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[125] Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

[126] *Id.* (quoting Walters v. City of St. Louis, 347 U.S. 231, 237 (1954)).

[127] Foucha v. Louisiana, 504 U.S. 71, 121 (1992) (Thomas, J., dissenting). "Although they have not been convicted of crimes, neither have they been exonerated, as they would have been upon a determination of 'not guilty' simpliciter. Insanity acquittees thus stand in a fundamentally different position from persons who have not been adjudicated to have committed criminal acts." *Id.*

[128] For example, findings that the acquittee poses an extreme danger to the community invokes the states *parens patriae* power to protect society and the acquittee from that danger. *See supra* section III.B-C (particularly note 65).

[129] *See* Jones v. United States, 463 U.S. 354, 364 (1983) (permitting insanity acquittees to be treated different from civilly committed persons).

[130] *Supra* notes 54-56 and accompanying text.

[131] *See* Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

[132] *Id.*; *see also supra* note 9. *Cf.* Kansas v. Hendricks, 521 U.S. 346, 366 (1997). The *Hendricks* Court stated:

> [I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.

Id. (citing Greenwood v. United States, 350 U.S. 366, 375 (1956), O'Connor v. Donaldson, 422

For this reason, it is important that the state provides treatment and/or documents any justification it may have for not providing treatment.[133]

Treatment issues and equal protection violations are particularly important where an insanity acquittee remains mentally ill and dangerous for an extended period of time. Thus, it is important for a state to document that it has at least attempted to satisfy its "obligation to provide available treatment."[134] As in *Kansas v. Hendricks*,[135] if no known treatment is available for the particular condition afflicting the acquittee, the state may be excused from providing the treatment.[136] Nevertheless, even if no treatment is available to alleviate the acquittee's condition, the state must create a procedural process to document the concerns that provide the rational basis for distinguishing this group of acquittees.[137]

E. Alternatives Available for the States

Due to limited resources, states often need to choose between creating additional space at secure, mental institutions and developing less costly community-based facilities. A State could place insanity acquittees in penal institutions[138] if the confinement constituted a legitimate regulatory goal, where the primary goal is to protect society and the secondary goal is to provide treatment of illness.[139] Where a state lacks appropriate secure facilities, placement of dangerous acquittees in a separate wing of a prison facility specifically staffed by the Department of Health for treatment purposes, may not be an excessive "alternative purpose."[140]

Creating a high security mental health treatment facility within a prison serves dual purposes: The first is to protect society from the dangerous and insane. The second is to provide more beneficial treatment to the larger group of mentally ill that are "system cycling."[141] In addition to providing treatment

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U.S. 563, 584 (1975) (Burger, C.J., concurring)).

[133] *See Hendricks*, 521 U.S. at 367-68 (noting that no treatment was available for a repeat sex offender).

[134] *See id.* at 366, 368 n.4; *see also* Jones v. United States, 463 U.S. 354, 366 (1983).

[135] 521 U.S. 346 (1997).

[136] *Id.* at 366.

[137] *See supra* note 132.

[138] Allen v. Illinois, 478 U.S. 364, 373 (1986). Housing sexually dangerous persons in a maximum-security facility that also houses prisoners in need of psychiatric care "does not transform the State's intent to treat into an intent to punish." *Id.*

[139] *See* Jones v. United States, 463 U.S. 354, 368 (1983); Kansas v. Hendricks, 521 U.S. 346, 368-69 (1997); *see also supra* section III.B-C for discussion of constitutional issues.

[140] Allen v. Illinois, 478 U.S. 364, 373 (1986); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1962).

[141] *See supra* note 122.

to acquittees, a secure mental health treatment facility could provide prisoners with access to mental health treatment as well. In this manner, the state may focus on the larger group of mentally ill offenders (whether acquitted or convicted of a crime) in an attempt to provide this larger group with adequate treatment.

Under *Olmstead v. Zimring*,[142] states must reallocate resources to less restrictive settings in order to comply with the ADA. This may require the state to choose between more costly high security hospitals or less expensive community-based facilities.[143] Reallocating funds to full-fledged mental health facilities located within prisons but staffed by Department of Health would ultimately provide mental health services to pretrial detainees, mentally ill prisoners and any other individual found to be mentally ill and dangerous. In this manner, better access to mental health treatment would also be available to prisoners in need of treatment.[144] As mandated by *Olmstead*, community-based facilities for those that can live safely in the community should be funded as well.[145]

Treatment is rarely legally mandated for the mentally ill.[146] By administering treatment within the prison system, the state has the opportunity to provide treatment to the sixteen percent of the incarcerated population that is mentally ill.[147] Prior to carrying out such a plan, however, the state must secure strict procedural safeguards.

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[142] 527 U.S. 581 (1999). *See supra* notes 94-98 and accompanying text; *see also* JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, *Under Court Order: What the Community Integration Mandate Means for People with Mental Illnesses, available at* http://bazelon.org/lcruling.html (1999) (discussing the implications of *Olmstead v. Zimring*, 527 U.S. 581 (1999) on services to the mentally ill population).

[143] A patient in a high security hospital in Hawai'i costs taxpayers $190,000 per year (6 times the cost of prison) versus $22,000 for community based facilities. *See supra* notes 14 and 16.

[144] Research in 1990 concluded that mental health needs of inmates could be more effectively addressed "as a community problem requiring the involvement of an array of service providers in addition to detention center staff." U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, *Coordinating Community Services for Mentally Ill Offenders: Maryland's Community Criminal Justice Treatment Program*, Apr. 1999, 7 (citing to H.J. Steadman, U.S. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, *Effectively Addressing the Mental Health Needs of Jail Detainees* 3 1990). This requires less focus on crisis treatment (i.e., suicide watch or drug detoxification), and more emphasis on a pro-active, coordinated effort between the mental health, social service and criminal justice systems. *See supra* note 122.

[145] Olmstead v. Zimring, 527 U.S. 581, 587 (1999).

[146] *See* Sen. Moynihan, *supra* note 10 (stating treatment is only mandatory when the civil commitment standard is met).

[147] *See supra* note 12.

F. Avoiding "Punishment"

The Supreme Court has suggested that imposing the same conditions of confinement upon felons and acquittees, with no "relevant differences," presents a problem.[148] Yet the mere fact that acquittees are housed in the same facility with prisoners does not automatically equate to punishment.[149]

Placing dangerous acquittees in maximum-security facilities without treatment, if none is available,[150] may not render confinement punitive if the measure is taken in an attempt to protect society.[151] Thus, if the state were to convert a portion of the prison facility into a mental health treatment facility and make all efforts to provide the acquittee with treatment, then confinement of the acquittee is not likely to constitute punishment.[152] Also, a segregated unit run by trained staff affiliated with the Department of Health, rather than the Department of Corrections, would further strengthen the non-punitive argument.[153]

The Supreme Court has also noted that incarceration for a potentially indefinite duration is not necessarily evidence of punitive intent.[154] Rather, "duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."[155] Thus if the governing statute provides for regular judicial review to document a continuing threat and to limit the amount of time an acquittee can be held pursuant to one particular judicial proceeding, the state meets its burden of regulating intent and procedural and substantive due process will be protected.[156]

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[148] *See* Allen v. Illinois, 478 U.S. 364, 373 (1986). Certain types of confinement conditions are "incompatible with the State's asserted interest in treatment" of sexually dangerous persons, i.e., treating them in an essentially identical manner as felons without a need for psychiatric treatment. *Id.*; *see also* Kansas v. Hendricks, 521 U.S. 346, 368 (1997) (noting that "[w]hat is significant, however, is that Hendricks was placed under supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by employees of the Department of Corrections, but by other trained individuals").

[149] *Allen*, 78 U.S. at 373.

[150] *See Hendricks*, 521 U.S. at 366.

[151] *Allen*, 78 U.S. at 373 (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)).

[152] Bell v. Wolfish, 441 U.S. 520, 537 (1979). "Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain" and "confinement does not convert the conditions or restrictions of detention into 'punishment.'" *Id.*

[153] *Hendricks*, 521 U.S. at 368.

[154] *Id.* at 363.

[155] *Id.* at 363-64 (contrasting Jones v. United States, 463 U.S. 354, 368 (1983)).

[156] *Id.* at 364.

In *Kansas v. Hendricks*[157] the U.S. Supreme Court held that civil commitment of sexual predators within prison facilities did not constitute punishment.[158] The Court explained that non-punitive intent was demonstrated by the "particularly dangerous" nature of the detained group (sexual predators), segregation of the offenders from the general prison population, and the state's attempt to provide treatment.[159] Furthermore, assurance of "strict procedural safeguards" provided detainees with civil commitment status and "immediate release upon a showing that the individual is no longer dangerous or mentally impaired[.]"[160] Additionally, the Court found that the Constitution permitted a state to protect its citizens from a sexually dangerous predator (labeled a "mental abnormality").[161]

Similarly, a state should be able to regulate a dangerous insanity acquittee in a non-punitive manner if treatment is provided. Due process protection may be ensured via application of an appropriate statutory scheme. Appropriate protections include retaining civil status for detainees, creating a procedural evaluation of both mental illness and dangerousness that provides for immediate release upon determination that the acquittee is sane or no longer dangerous, and physical segregation of the acquittees from the general prison population.[162] If available, provisions for treatment should also be included.[163] By carefully maintaining these differences the state may demonstrate a regulatory rather than punitive purpose.

IV. CONCLUSION

Although the state is empowered with the initial discretion whether or not to offer the insanity defense and to provide for its legal effects, once it has created these substantive rights it must implement them according to principles of due process and equal protection.[164] Generally, an insanity acquittal should ensure the acquittee is placed in an appropriate institution and provided with

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[157] 521 U.S. 346 (1997).

[158] *Id.* at 368-69.

[159] *Id.*

[160] *Id.*

[161] *See id.* at 366.

[162] *See Hendricks*, 521 U.S. at 368-69; Allen v. Illinois, 478 U.S. 364, 373 (1986) (noting that housing sexually dangerous persons in a maximum-security facility that also houses prisoners in need of psychiatric care "does not transform the State's intent to treat into an intent to punish").

[163] *See id.*

[164] U.S. CONST. amend. V (as applied to federal government) and amend. XIV, § 1 (as applied to states). Most state constitutions contain similar clauses as well. *See, e.g.*, HI. CONST. art. I, § 5.

treatment.[165] Exactly what constitutes "appropriate institution" may vary depending on the individual and the facilities provided by the state.[166]

To ensure procedural due process is satisfied the insanity acquittees must be assured a prompt initial hearing. Subsequent reviews declaring the acquittee poses an extreme threat of danger to the community must be held in the event of continued detainment. This determination should indicate that placement in a mental health facility within a penal institution is the only alternative left to the state. Furthermore, once the acquittee is placed in a mental health facility within a prison, the state must provide adequate facilities separate from convicted prisoners and offer treatment if available while there. With these safeguards in place, the state satisfies both due process and equal protection guarantees, while at the same time freeing up funds for community-based programs that might prevent the mentally ill from entering the criminal system in the first place.

Chris Kempner[167]

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[165] *See Jones*, 463 U.S. at 366.

[166] *See supra* note 9.

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Russ Francis v. Lee Enterprises: Hawai'i Turns Away From Tortious Breach of Contract

I. INTRODUCTION

In the seventies and early eighties, Hawai'i was at the forefront of a national movement attempting to reach beyond the strict confines of traditional contract law—toward better compensating plaintiffs in contract disputes. However, in the past decade, most states have not followed this liberalizing approach to contract law, and instead embraced more traditional doctrines. In *Francis v. Lee Enterprises*,[1] the Hawai'i Supreme Court abandoned a rule allowing broader contract damages in certain circumstances and rejoined the overwhelming majority of states that refuse to recognize tortious breach of contract as a cause of action in an employment context.[2] In doing so, the court overturned a quarter century of case law that allowed plaintiffs to receive emotional distress and punitive damages in contract disputes involving willful and wanton breaches.[3]

This note discusses Hawai'i's judicial decision to fall into line with other courts and reject emotional distress and punitive damages for most breach of contract cases. Part II of this casenote reviews the historical development of "tortious breach of contract," both within Hawai'i and in national contract law. Next, Part III delves into the facts of *Francis v. Lee Enterprises*, and analyzes the Hawai'i Supreme Court's opinion, detailing the new rule for receiving non-pecuniary damages in Hawai'i. Last, Part IV examines how *Francis* will affect contract disputes and damage awards in Hawai'i. In particular, this section provides a few scenarios whereby a Hawai'i court may still allow non-pecuniary contract damages.

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[1] Russ Francis v. Lee Enter., Inc., 89 Hawai'i 234, 971 P.2d 707 (1999).

[2] *Id.* at 235, 971 P.2d at 708.

[3] *Id.* at 239, 971 P.2d at 712.

II. THE DEVELOPMENT OF TORTIOUS BREACH OF CONTRACT

A. Divisions Between Contract and Tort

Traditionally there has been a rigid doctrinal distinction between tort law and contract law.[4] This distinction derives from the fact that the two areas of law have different objectives.[5] A primary purpose of contract law is to enforce the intentions of the parties to the agreement.[6] On the other hand, an important objective of tort law is to further social policy.[7]

This distinction naturally extends to the nature of damages that are recoverable in tort and contract.[8] Under tort law, appropriate damages are those that compensate the victim for the injury received,[9] while contract damages are traditionally appropriate only as far as they protect the expectations of the non-breaching party.[10] In determining the expectations of the non-breaching party, a court looks at what damages were foreseeable at the time the parties entered into the contract.[11] The English case of *Hadley v. Baxendale*,[12] announced the rule that became a cornerstone of contract damage doctrine, limiting recovery to:

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[4] *See* Barry Perlstein, *Crossing the Contract-Tort Boundary: An Economic Argument for the Imposition of Extracompensatory Damages for Opportunistic Breach of Contract*, 58 BROOKLYN L. REV. 877, 877 (1992); *see also* Deli v. Univ. of Minnesota, 578 N.W.2d 779, 782 (Minn. Ct. App. 1998) (explaining that it is necessary to preserve a boundary between contract and tort law in order to protect each areas' specific interests and expectations).

[5] WILLIAM LLOYD PROSSER, THE LAW OF TORTS § 92, 613 (4th ed. 1971) (explaining that the distinction between tort and contract is based on the divergent objectives and interests they respectively protect).

[6] E. ALLEN FARNSWORTH, CONTRACTS 118-21 (2d ed. 1990); *see also* KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 240 (1990)(stating that the main purpose of contract law is the realization of the parties' reasonable expectations).

[7] PROSSER, *supra* note 5, § 92, at 613 (stating that "[t]ort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties.").

[8] *See* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454, 460-61 (Cal. 1994) (noting that contract damages are usually limited to those within the contemplation of the parties when the contract was entered into whereas tort damages are awarded to fully compensate the victim for the injury suffered).

[9] *See* PROSSER, *supra* note 5, § 1, at 6 (noting a unifying theme of tort law is "unreasonable interference with interests of others" and its primary purpose is to compensate for the injuries a party suffers as the result of another's conduct).

[10] JOHN EDWARD MURRAY, MURRAY ON CONTRACTS 683-88 (3d ed. 1990); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 351 (2001).

[11] MURRAY, *supra* note 10, at 683-88.

[12] 9 Ex. 341 (Eng. 1854).

> such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.[13]

Thus contract damages are typically limited to those that, by virtue of their natural connection to the contract or contemplation of the parties, were foreseeable at the time of formation.[14] The Restatement (Second) of Contracts follows this rule as it directs that, "[d]amages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."[15]

Contract law has long recognized that emotional distress may often be a foreseeable result of a breach of contract. As one scholar explained, "[w]hen a defendant breaches a contract, this may and often does cause pecuniary loss to the other party, at least temporarily. It is a common experience of mankind that pecuniary loss almost invariably causes some form and degree of mental distress."[16] Given such foreseeability, emotional distress would logically seem to fall within the rule for contract damages.[17]

However, courts have usually disallowed non-pecuniary damages under the assumption that the parties did not foresee or contemplate them.[18] Courts apparently premise this narrow construction of the rule on the belief that to do otherwise would give the plaintiff a potential windfall because of the difficulty in proving and measuring such damages.[19] As the Washington Supreme Court

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[13] *Id.* at 354.

[14] *Id.*; *see also* FARNSWORTH, *supra* note 6, at 912-16.

[15] RESTATEMENT, *supra* note 10, § 351(1). Section 351(2)(a-b) provides that a loss may be foreseeable if it follows from the breach "in the ordinary course of events," or as a result of special circumstances that the breaching party had reason to know. *Id.*

[16] DAN B. DOBBS, REMEDIES 819 (1973); *see also* Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 SUFFOLK U. L. REV. 935, 951 (1992).

[17] DOBBS, *supra* note 16, at 819; *see also* Amy H. Kastely, *Compensation for Lost Aesthetic and Emotional Enjoyment: A Reconsideration of Contract Damages for Nonpecuniary Loss*, 8 U. HAW. L. REV. 1, 16 n.78 (1986)(citing to C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 145, at 592-93 (1935) "[w]hen such a bargain [commercial contract] is made, it may well be contemplated that, if one party fails to carry it out, financial loss may be inflicted on the other, and that he will sustain disappointment and mental suffering therefrom"); *see also* Brown v. Fritz, 699 P.2d 1371, 1373-74 (Idaho 1985) (citing Hatfield v. Max Rouse & Sons N.W., 606 P.2d 944, 952 (Idaho 1980), for the proposition that "the breach of *any* contract which the party considers important predictably will lead to some emotional distress").

[18] *See* Kastely, *supra* note 17, at 14 n.62 (citations omitted); FARNSWORTH, *supra* note 6, 934 (noting that "[a] limitation more firmly rooted in tradition is that generally denying recovery for emotional disturbance, or 'mental distress,' resulting from breach of contract[.]").

[19] FARNSWORTH, *supra* note 6, at 934; *see also* Valentine v. Gen. Am. Credit, Inc., 362 N.W.2d 628, 630 (Mich. 1985)(quoting GRISMORE, CONTRACTS (rev. ed.), at 320) ("Yet the

explained, "[m]ost courts take a more restrictive approach because, under a literal application of the rule as stated in *Hadley v. Baxendale*, damages for emotional distress would be recoverable in nearly every breach of contract action."[20]

The Restatement (Second) of Contracts also strictly interprets this rule, stating that, "[r]ecovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result."[21] The accompanying comment elaborates, "[d]amages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure."[22]

B. Contort: The Blurring of the Distinctions Between Contract and Tort

In the 1970's, Professor Grant Gilmore predicted the death of contract.[23] Professor Gilmore claimed that as courts attempted to be more flexible — in order to better deal with each case's particular merits — contract law would gradually lose its classical distinctions.[24] As doctrinal rigidity faded, Gilmore predicted that contract law would be "reabsorbed into the mainstream of 'tort.'"[25] Gilmore dubbed this increasingly blurry area between contract and tort as "contort."[26]

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general rule, with few exceptions, is to 'uniformly [deny]' recovery for mental distress damages although they are 'foreseeable within the rule of *Hadley v. Baxendale*.'"); John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based Upon Contract: Toward Achieving the Objective of Full Compensation*, 33 U.C.L.A.L. REV. 1565, 1587 (1986) (contending that courts are masking policy decisions when they deny recovery for mental suffering under the assumption that they are unforeseeable).

[20] Gaglidari v. Denny's Rest., Inc., 815 P.2d 1362 (Wash. 1991); *see also* DOBBS, *supra* note 16, at 814 (explaining that the foreseeability test has almost no meaning because "[t]he idea is so readily subject to expansion or contraction that it becomes in fact merely a technical way in which the judges can state their conclusion").

[21] RESTATEMENT, *supra* note 10, § 353.

[22] *Id.* § 353 cmt. a.

[23] GRANT GILMORE, THE DEATH OF CONTRACT 103 (1974).

[24] *Id.*

[25] *Id.* at 87. Professor Gilmore explained that before the development of contract law, "tort had always been the residual category of civil liability. As the contract rules dissolve, it is becoming so again." *Id.*

[26] Michael Dorff, *Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort*, 28 SETON HALL L. REV. 390, 390 (1997) "In The Death of Contract, Grant Gilmore argued that the once separate fields of contract and tort had merged into one more general area of 'contort.' The term 'contort' has since been more broadly applied to many different areas dealing with the 'border' between contract and tort." *Id.*

One area where the distinctions began to blur was the area of contract damages.[27] Where plaintiffs' injuries were of a non-pecuniary nature, the traditionally rigid and narrowly defined contract damages undercompensated them.[28] To remedy this situation, courts tried approaches such as labeling the plaintiffs' claim as a tort, rather than as a contract claim.[29] Other courts simply expanded the types of damages allowable for contract disputes to include punitive and emotional distress damages.[30]

C. Hawai'i Courts Liberalize Contract Remedies

Similar to other jurisdictions in the 1970's, Hawai'i courts also experimented with the liberalization of damage rules to yield more appropriate recovery for non-breaching parties in contract disputes. In *Goo v. Continental Casualty Company*,[31] the Hawai'i Supreme Court first addressed the issue of non-pecuniary damages for breach of contract. The court noted that a growing number of jurisdictions allowed punitive damages in select contract cases.[32] The court also acknowledged that some situations represent a merging of the

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[27] Perlstein, *supra* note 4, at 890. "Despite traditional differences between tort and contract, courts have grappled with the idea that sometimes tort damages are appropriate in cases involving breach of contract." *Id.*; *see also* Jeffery O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 MICH. L. REV. 659, 661 (1977)(quoting GILMORE, *supra* note 23 at 87) (stating that "damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields . . . are gradually merging and becoming one"). *Id.*

[28] *See* Sebert, *supra* note 19, at 1565-66 (explaining that "traditional contract remedies leave many victims of contract breach (probably a substantial majority) undercompensated"); *see also* Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in the Commercial Realm*, 86 COLUM. L. REV. 377, 381 (1986) (stating that "traditional remedies for breach of contract result in undercompensation for injured plaintiffs. The problem of undercompensation is inherent in a system of remedies that requires the nonbreaching party to prove the certainty and foreseeability of damages, and permits virtually no extra-economic relief").

[29] *See* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 637-38 (1999) (explaining that "[t]he expansion of punitive damages for breach of contract began in earnest in the 1970s and 1980s, with some states allowing plaintiffs to recover punitive damages directly in contract actions and others achieving the same result indirectly by characterizing some contractual breaches as torts").

[30] *See* Sebert, *supra* note 19, at 1569 (concluding that "[i]n recent years . . . there has been a notable trend toward permitting recovery of punitive damages in some actions based upon contract, together with some movement (albeit less marked) toward more frequent awards for nonpecuniary elements such as mental anguish . . . .").

[31] 52 Haw. 235, 473 P.2d 563 (1970).

[32] *Id.* at 240, 473 P.2d. at 566.

tort and contract and might warrant punitive damages.[33] However, the court concluded that such damages were not suited to the facts of the *Goo* case.[34]

In 1972, a suitable case finally came before the court. In *Dold v. Outrigger Hotel*,[35] the Hawai'i Supreme Court adopted the rule allowing emotional distress damages for breach of contract.[36] In *Dold*, the plaintiffs, Mr. and Mrs. D. F. Dold, were on vacation in Hawai'i.[37] Upon arriving at the Outrigger Hotel, where they had booked accommodations, the management told plaintiffs that the hotel was overbooked and transferred them to a hotel in a less desirable location, out of Waikiki and away from the beach.[38] The Dolds subsequently sued for breach of contract, seeking compensatory and punitive damages.[39] The Dolds won[40] and their award included damages for emotional distress.[41] However, the court denied them a jury instruction on punitive damages, prompting an appeal on that issue.[42]

The Hawai'i Supreme Court denied the request for punitive damages, but upheld the lower court's ruling allowing emotional distress damages.[43] In its holding, the court declared that "certain situations are so disposed as to present a fusion of the doctrines of tort and contract."[44] The court concluded that in such "situations," the traditional compensatory contract damages were insufficient to compensate the aggrieved party.[45] Accordingly, the court created a new rule, stating:

> where a contract is breached in a wanton or reckless manner as to result in a tortious injury, the aggrieved person is entitled to recover in tort. Thus, in

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[33] *Id.* at 240-41, 473 P.2d. at 567.

[34] *Id.* at 241, 473 P.2d at 567.

[35] 54 Haw. 18, 501 P.2d 368 (1972).

[36] *Id.* at 22-23, 501 P.2d at 372.

[37] *Id.* at 18-19, 501 P.2d at 369-70.

[38] *Id.* at 19-20, 501 P.2d at 370. The Outrigger regularly transferred "overflow" guests to the Pagoda Hotel which was not located on the beach. *Id.* at 19-20, 501 P.2d at 370.

[39] *Id.* at 18, 501 P.2d at 369-70. The Dolds' complaint alleged three counts for recovery, breach of contract, fraud, and breach of an innkeeper's duty to accommodate guests. *Id.* at 18, 501 P.2d at 369.

[40] *Id.* at 19, 501 P.2d at 370. The jury awarded $600 to the Dolds. *Id.*

[41] *Id.* at 21, 501 P.2d at 371. The Dolds voluntarily dismissed their fraud complaint, but it was not specified on which of the other two complaints their award was based. *Id.* at 18-19, 501 P.2d at 370.

[42] *Id.* at 18, 501 P.2d at 370.

[43] *Id.* at 22-23, 501 P.2d at 371-72 (holding that the Dolds could not recover punitive damages but, in addition to damages for out-of-pocket losses, could recover in tort for emotional distress and disappointment).

[44] *Id.* at 22, 501 P.2d at 372.

[45] *Id.*, 501 P.2d at 371-72. The court did not want the plaintiffs to be "limited to the narrow traditional contractual remedy of out-of-pocket losses alone." *Id.*

addition to damages for out-of-pocket losses, the jury was properly instructed on the issues of damages for emotional distress and disappointment.[46]

The Hawai'i Supreme Court later expanded the *Dold* rule in 1980 to include commercial contracts. In *Chung v. Kaonohi Center Co.*,[47] the plaintiffs signed a lease to operate a fast-food restaurant at a soon-to-be-constructed shopping mall.[48] While the Chungs proceeded to expend time and money in preparation for starting the restaurant,[49] the defendant continued to negotiate with other parties and eventually awarded the restaurant space to one of them.[50] Because the defendant knew about the Chungs' efforts and expressly denied that there were ongoing negotiations with other parties, the court concluded that his actions were "reprehensible and clearly amounted to wanton and/or reckless conduct sufficient to give rise to tort liability."[51] In expanding the *Dold* rule to the commercial context, the court stated that "[w]e do not think that the dispositive factor in allowing damages for emotional distress is the nature of the contract. The dispositive factor is, rather, the wanton or reckless nature of the breach."[52]

D. Majority of States Move to Limit Emotional Distress Damages in Contract Disputes.

Since the mid-eighties, the contort wave that many thought would subsume contract has not only failed to materialize,[53] but has in fact receded. One scholar mourned, "[i]n eight of nine far-west states . . . courts have substantially abandoned the interventionist, egalitarian contract jurisprudence of the 1960s and 70s, substituting a far more classical, conceptualist ethic

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[46] *Id.* at 22-23, 501 P.2d at 372.

[47] 62 Haw. 594, 618 P.2d 283 (1980).

[48] *Id.* at 596, 618 P.2d at 286. The plaintiffs negotiated with defendant's agent, William Prosser, and executed a contract to lease the Chinese kitchen at the Pearlridge Mall. *Id.*

[49] *Id.* at 597, 618 P.2d at 286. The plaintiffs arranged for financing, hired chefs and staff, and ordered equipment and furnishings in anticipation of starting the restaurant. *Id.*

[50] *Id.* Prosser knew of the plaintiff's preparations, but continued to negotiate with two other parties, one of whom eventually obtained the lease to the entire food court operation. *Id.*

[51] *Id.* at 602, 618 P.2d at 289.

[52] *Id.*

[53] *See* Dodge, *supra* note 29, at 635.

> Although the 1970s and early 1980s witnessed an increased willingness on the part of several states to permit punitive damages for breach of contract, for the past ten years the trend clearly has been in the other direction, with many of the leading cases allowing punitive damages either limited or overruled.

Id. Professor Gilmore acknowledged this possibility when he wrote, "[c]ontract is dead—who knows what unlikely resurrection the Easter-tide may bring?" GILMORE, *supra* note 23, at 103.

emphasizing once again 'freedom of contract' and marketplace economics."[54] This conservative trend is particularly evident in the area of remedies, with the distinctions between tort and contract damages becoming more defined.[55] The majority of courts have followed the Restatement view of limiting non-pecuniary damages in contract disputes.[56] Even California, which at one point led the way in allowing tort-type damages in contract disputes,[57] eventually changed course and moved to restrict such damages.[58] In 1999, the Hawai'i Supreme Court acquiesced to this weight of authority and abandoned its previous position of allowing non-pecuniary damages for breach of contract actions.[59]

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[54] Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1133 (1995); *see also* John H. Bauman, *Insurance Law Annual: Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 DRAKE L. REV. 717 (1998) (describing the waning support for the "tortification" of contract law).

[55] *See* Eileen Scallen, *Promises Broken v. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897, 899 (1993) (explaining that courts "appear to be narrowing the circumstances under which plaintiffs may state a cause of action for tort damages . . . arising from a contractual setting").

[56] *See generally*, Gaglidari v. Denny's Rest., Inc., 815 P.2d 1362, 1370 (Wash. 1991) ("Since the adoption of Restatement (Second) of Contracts in 1981, all states considering the question, except Colorado, have adhered to the longstanding rule which denies emotional distress damages in breach of employment contract cases"); *see also* Patton v. Univ. of Chicago Hosp., 706 F. Supp. 627, 631-32 (N.D. Ill. 1989) (denying mental distress damages under breach of contract claim); Bourque v. Wausau Hosp. Ctr., 427 N.W.2d 433, 436-37 (Wis. Ct. App. 1988) (breach of employment contract damages limited to lost wages and expenses); Myrtle Springs Reverted Indep. Sch. Dist. v. Hogan, 705 S.W.2d 707, 710 (Tex. Ct. App. 1985) (holding that emotional damages not foreseeable in employment contract so not recoverable); Brown v. Fritz, 699 P.2d 1371, 1377 (Idaho 1985) (holding that there can be no recovery of emotional distress damages for breach of a contractual relationship); Deli v. Univ. of Minnesota, 578 N.W.2d 779, 782 (Minn. 1998) (stating, "[t]he preservation of a boundary between contract and tort law is necessary to protect the specific interests and expectations each embodies").

[57] Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158 (Cal. 1984). The California Supreme Court allowed nonpecuniary damages in a contract dispute because of the "special relationship" of the parties. *Id.* at 1167.

[58] Foley v. Interactive Data Corp., 765 P.2d 373, 395-97 (Cal. 1988). The California Supreme Court reversed its earlier ruling in *Seaman's* and held against allowing tortious breach for cases outside of the insurance field. *Id.*

[59] Francis v. Lee Enters., 89 Hawai'i 234, 235-36, 971 P.2d 707, 708-09 (1999).

III. THE HAWAI'I SUPREME COURT OVERTURNS *DOLD-CHUNG*

A. The Facts of Francis v. Lee

On January 18, 1996, KGMB, the Honolulu CBS affiliate, hired Russ Francis as its sports director.[60] Approximately one year later, KGMB terminated Francis's employment contract.[61] Subsequently, Francis filed suit in the First Circuit Court for breach of contract, tortious breach of contract, promissory estoppel, wrongful termination in violation of public policy, and punitive damages.[62] KGMB removed the case to the United States District Court for the District of Hawai'i and then on December 29, 1997, moved to dismiss the tortious breach of contract claim.[63] The federal district court granted KGMB's motion on the grounds that the Hawai'i courts had not expressly recognized tortious breach of contract in the employment context.[64] On March 20, 1998, Francis filed a motion for reconsideration or, in the alternative, for certification of this question to the Hawai'i Supreme Court.[65] On April 24, 1998, the federal district court withdrew its order and granted the motion for certification.[66]

B. The Francis Opinion

On January 21, 1999, the Hawai'i Supreme Court answered the certified question by holding that "Hawai'i law does not recognize tortious breach of contract actions in the employment context."[67] Instead of stopping there, the court went on to hold that the *Dold-Chung* rule "unnecessarily blurs the distinction between—and undermines the discrete theories of recovery relevant to—tort and contract law."[68] The court then laid out the new rule that to recover in tort, the conduct in question would have to both breach a duty independently recognized in tort and transcend the breach of contract.[69]

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[60] *Id.* at 236, 971 P.2d at 709.

[61] *Id.*, 971 P.2d at 709.

[62] *Id.*, 971 P.2d at 709.

[63] *Id.*, 971 P.2d at 709. KGMB argued that Hawai'i law does not recognize tortious breach of contract in the employment contract, while Francis argued that the dispositive factor was whether the contract was breached in a willful, wanton, or reckless manner. *Id.* at 235, 971 P.2d at 708.

[64] *Id.* at 236, 971 P.2d at 709.

[65] *Id.*, 971 P.2d at 709.

[66] *Id.*, 971 P.2d at 709.

[67] *Id.* at 235, 971 P.2d at 708.

[68] *Id.*, 971 P.2d at 708.

[69] *Id.*, 971 P.2d at 708.

The court began its holding with an explanation of why it was proper to overturn its previous ruling.[70] The court explained that although it always accords precedent great consideration, if the prior decision causes unintended injury, it must be corrected.[71] The court elaborated with a passage from *Parke v. Parke*,[72] that "[i]t is generally better to establish a new rule than to follow a bad precedent."[73]

The Hawai'i Supreme Court next mapped out the development of the *Dold-Chung* rule.[74] After setting out the reasoning behind the *Dold-Chung* rule,[75] the court distinguished it from the tort of bad faith.[76] Because of some confusion as to whether Francis claimed bad faith as a cause of action,[77] the court emphasized that the question of whether the tort of bad faith was allowable as a cause of action in an employment context was not an issue in the case.[78] The court then discussed the ruling in *Best Place v. Penn America Insurance Co.*,[79] in which Hawai'i recognized the tort of bad faith in the first-party insurance context.[80] In distinguishing the bad faith tort from tortious breach of contract, the court explained that the holding in *Best Place* was premised on special aspects of insurance contracts, namely their adhesionary nature and the relationship between the insurer and the insured.[81] These aspects created special duties and thus allowed the non-breaching party to seek

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[70] *Id.* at 236, 971 P.2d at 709.

[71] *Id.*, 971 P.2d at 709 (citing Espaniola v. Cawdrey Mars Joint Venture, 68 Haw. 171, 182-83, 707 P.2d 365, 373 (1985)).

[72] 25 Haw. 397 (1920).

[73] *Id.*, 971 P.2d at 709 (citing *Parke*, 25 Haw. at 401).

[74] *Francis*, 89 Hawai'i at 236-37, 971 P.2d at 709-10 (briefly describing the procedural history and the rulings from *Dold* and *Chung*).

[75] *See* discussion *supra* section II.C.

[76] *Francis*, 89 Hawai'i at 237, 971 P.2d at 710.

[77] *Id.*, 971 P.2d at 710. Francis' complaint alleged that KGMB's breach had been "wilfully, wanton, recklessly and/*or in bad faith*," but his opening brief explained that the claim was for tortious breach of contract, *not bad faith*. *Id.*, 971 P.2d at 710 (emphasis added).

[78] *Id.*, 971 P.2d at 710. The court explained that "our decision today does *not* affect this court's prior decisions recognizing the tort of bad faith in the first-party insurance context." *Id.*, 971 P.2d at 710. The court further stated that "whether a bad faith cause of action lies for the termination of a written employment contract is *not* before the court." *Id.*, 971 P.2d at 710 (emphasis added).

[79] 82 Hawai'i 120, 920 P.2d 334 (1996).

[80] *Id.* at 123, 920 P.2d at 337 (holding that an insured was allowed to recover damages after his insurance company tortiously breached the implied covenant of good faith and fair dealing).

[81] *See id.* at 132, 920 P.2d at 346.

traditional tort damages.[82] The *Francis* court cited to several other jurisdictions as following the same reasoning in allowing the tort of bad faith.[83]

The supreme court posited that because the majority of jurisdictions recognizing the tort of bad faith limited it to the insurance context, it could be reasoned that those jurisdictions would not allow tort damages for "willful, wanton, or reckless breach of contract."[84] Thus, the court established that the *Dold-Chung* rule, based on such a definition of tortious breach of contract,[85] lacked support among the other jurisdictions.[86] In the court's words, the rule was "an aberration in the fabric of American law."[87] The court concluded that the *Dold* and *Chung* courts "failed adequately to consider the differing policy considerations and distinct theories of recovery relevant to tort and contract law."[88]

After overturning the *Dold-Chung* rule, the supreme court set about defining the new *Francis* rule. The court explained that although tort damages were usually not appropriate for contract disputes, they were allowable in a few special cases.[89] The first exception is where the emotional distress

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[82] *Francis*, 89 Hawai'i at 238, 971 P.2d at 711 (quoting the court in *Best Place*: "[T]he tort of bad faith is not a tortious breach of contract, but rather a separate and distinct wrong which results from the breach of a duty imposed as a consequence of the relationship established by contract").

[83] *Id.*, 971 P.2d at 711. The court cited to Great Am. Ins. Co. v. General Builders, Inc., 934 P.2d 257, 263 (Nev. 1997) (refusing to extend bad faith tort to action by contractor against surety); Buzzard v. Farmers Ins. Co., Inc., 824 P.2d 1105, 1109 (Okla. 1991) (explaining tort of bad faith in insurance context and noting prior refusal to extend the tort to commercial loan setting); ARCO Alaska, Inc. v. Akers, 753 P.2d 1150, 1153 (Alaska 1988) (holding that punitive damages are not recoverable for breach of implied covenant of good faith and fair dealing in employment context); Foley v. Interactive Data Corp., 765 P.2d 373, 374 (Cal. 1988) (holding that there is no cause of action in tort for breach of an implied covenant of good faith and fair dealing in an employment contract); Wagenseller v. Scottsdale Mem'l Hosp., 710 P.2d 1025, 1040-41 (Ariz. 1985) (expressly refusing to extend the bad faith recovery available in actions on insurance contracts to the employment contract context); Martin v. Fed. Life Ins. Co., 440 N.E.2d 998, 1006 (Ill. App. Ct. 1982) ("Care must be taken to prevent the transmutation of every breach of contract into an independent tort action through the bootstrapping of the general contract principle of good faith and fair dealing.").

[84] *Francis*, 89 Hawai'i at 239, 971 P.2d at 712. In support of this contention, the court cited *Motorists Mut. Ins. Co. v. Said*, 590 N.E. 2d 1228, 1232 (Ohio 1992) (recognizing the tort of bad faith in insurance context, the court stated that "[t]he tort of bad faith is not a tortious breach of contract, for no matter how willful or malicious the breach, it is no tort to breach a contract").

[85] *See* discussion *supra* note 46.

[86] *Francis*, 89 Hawai'i at 239, 971 P.2d at 712. "The rule has not gathered support in other jurisdictions in the years since Dold and Chung were decided . . . ." *Id.*

[87] *Id.*, 971 P.2d at 712.

[88] *Id.*, 971 P.2d at 712.

[89] *Id.* at 240, 971 P.2d at 713.

accompanies a bodily injury.[90] The second exception is where "the contract is of such a kind that serious emotional disturbance is a particularly foreseeable result. . . ."[91] As examples of the latter exception, the court pointed to a breach of a promise to marry[92] and breach of a promise to prepare a body for burial.[93] In this way, the court shifted the emphasis from "the *manner* of the breach to the *nature* of the contract."[94] Instead of looking at whether the breach was "willful, wanton, or reckless," the important question is whether the parties expected emotional distress damages.[95] The court concluded that this new rule would help insure predictability in contract disputes,[96] especially those in the employment context.[97] Soon after the *Francis* decision, the Hawai'i State Legislature codified the ruling in Hawai'i Revised Statute Section 663-1.2.[98]

IV. EFFECT OF THE *FRANCIS* RULE ON HAWAI'I

Since the *Francis* decision in 1999, courts applying Hawai'i law have followed *Francis* and rejected tortious breach of contract claims.[99] However, courts have not yet had occasion to consider which contracts are of a type that justify recovery of emotional distress damages. In the few instances in other jurisdictions where courts have allowed such damages, the mitigating factor has not been the fiscal importance of the contract, but rather its emotional importance.[100] The rationale is that in contracts dealing with particularly

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[90] *Id.*, 971 P.2d at 713.

[91] *Id.*, 971 P.2d at 713.

[92] *Id.*, 971 P.2d at 713 (citing Brown v. Bannister, 14 Haw. 34 (1902), in which the court allowed damages relating to the "humiliation" suffered by the plaintiff).

[93] *Id.*, 971 P.2d at 713 (citing Wilson v. Houston Funeral Home, 50 Cal. Rptr. 2d 169, 173 (Cal. Ct. App. 1996), in which the court held that mental anguish is reasonably foreseeable where a mortician has breached a contract to prepare a body for burial).

[94] *Id.*, 971 P.2d at 713 (emphasis added).

[95] *Id.* at 241, 971 P.2d at 714.

[96] *Id.*, 971 P.2d at 714 (emphasizing that by limiting damages to those that were expected, the parties could more accurately predict the cost of their contractual relationships).

[97] *Id.*, 971 P.2d at 714. The court emphasized that employment contracts, being of primarily of an economic nature, would be unlikely to result in emotional damages. *Id.*

[98] Hawai'i Revised Statutes § 663-1.2 reads: "No person may recover damages, including punitive damages, in tort for a breach of a contract in the absence of conduct that: (1) Violated a duty that is independently recognized by principles of tort law; and (2) Transcended the breach of contract." HAW. REV. STAT. § 663-1.2 (2000).

[99] *See generally* Matsuda v. Wada, 101 F. Supp. 2d 1315 (D. Haw. 1999); CIM Ins. Corp. v. Masamitsu, 74 F. Supp. 2d 975 (D. Haw. 1999).

[100] Stewart v. Rudner, 84 N.W.2d 816, 823 (Mich. 1957) (stating that "not all contracts are purely commercial in their nature. Some involve rights we cherish, dignities we respect, emotions recognized by all as both sacred and personal. In such cases the award of damages for mental distress and suffering is a commonplace.").

personal or sensitive matters, it is foreseeable that a subsequent breach would cause mental distress.[101] These types of contracts involve "peace of mind and freedom from worry."[102] Thus, if the defendant breaches, he "should pay for the agony suffered as an obvious consequence."[103]

In *Francis*, the court acknowledged the existence of such emotion-laden contracts when it set out the exception for cases of a particularly personal nature. Although the court listed cases of broken promises to marry and mishandling of corpses as examples,[104] it did not limit non-pecuniary damages to *only* such contracts.[105] Other jurisdictions have found foreseeable emotional distress in a range of contracts[106] such as those dealing with medical procedures, house construction, travel services, family matters, and privacy.[107] The common bond among such contracts is that they are all of a highly personal nature and deal with peace of mind.[108]

The *Francis* court explained that emotional distress damages are allowable for breached contracts involving bodily injury. Other courts have allowed emotional distress damages in such contracts based on the personal nature of the contract. In *Sullivan v. O'Connor*,[109] the Massachusetts Supreme Court allowed an award of damages for the plaintiff's mental suffering.[110] The court explained that in contracts dealing with medical operations, *psychological* as

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[101] Campbell v. Shearson/Am. Express Inc., 829 F.2d 38, 1987 U.S. App. LEXIS 12102 (6th Cir. 1987) (unpublished opinion) (explaining that exemplary damages are available when a breached contract deals with an interest that is primarily personal rather than pecuniary in nature).

[102] Douglas J. Whaley, *Paying for the Agony: The recovery of emotional distress damages in contract actions*, 26 SUFFOLK U. L. REV. 935, 953 (1992).

[103] *Id.*

[104] *Francis*, 89 Hawai'i at 240, 971 P.2d at 713.

[105] *Id.*, 971 P.2d at 713.

[106] Campbell v. Shearson/Am. Express Inc., 829 F.2d 38, 1987 U.S. App. LEXIS 12102, *10 (6th Cir. 1987) (unpublished opinion). As examples of personal contracts, the Sixth Circuit Court of Appeals listed "contracts to marry, contracts between carriers and passengers, contracts of innkeepers and guests, contracts for the disposition of dead bodies, contracts for the delivery of death messages, contracts for public entertainment or amusement, and contracts to provide care, room and board." *Id.*

[107] *See* discussion, *infra* notes 109-42.

[108] Stewart v. Rudner, 84 N.W.2d 816, 824 (Mich. 1957); *see also Campbell*, 829 F.2d at *4 (quoting Professor Arthur Corbin's explaination that cases allowing non-pecuniary damages are those dealing with matters where "personal feelings are most deeply involved and in which mental suffering is likely to be most poignant . . . ."); Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. PITT. L. REV. 867, 903 (1985).

[109] 296 N.E.2d 183 (Mass. 1973) (holding that emotional distress damages are foreseeable for the breach of a contract for a medical operation). *Id.* at 185.

[110] *Id.*

well as physical injury may be expected to result from breach.[111] *Stewart v. Rudner*[112] is another case involving the breach of a medical contract.[113] In this case, the Michigan Supreme Court allowed recovery of emotional distress damages where a doctor breached a contract to perform a Caesarean section operation.[114] The court declared that no reasonable person could doubt that mental pain and suffering were within the contemplation of the parties, given the contract subject matter.[115] Of course, a Hawai'i court could rely on *Sullivan* and *Stewart* to allow non-pecuniary damages based not only on foreseeability, but also physical harm.[116]

Some courts have considered contracts dealing with house construction to be an area where emotional distress is highly foreseeable. In *B & M Homes, Inc. v. Hogan*,[117] the Supreme Court of Alabama allowed damages for mental anguish in a contract case dealing with building a house.[118] The court held that it was "reasonably foreseeable" to the breaching party, that faulty construction of plaintiffs' home would cause severe mental anguish.[119] The court explained that "[t]he largest single investment the average American family will make is the purchase of a home. The purchase of a home by an individual or family places the purchaser in debt for a period ranging from twenty (20) to thirty (30) years."[120] The court later expanded this ruling in *Sexton v. St. Clair Federal Savings Bank*.[121] This case involved a bank's breach of a contract for a house loan.[122] The court held that emotional distress damages were

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[111] *Id.* at 189. The court explained, "[I]t is all a question of the subject matter and background of the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances." *Id.*

[112] 84 N.W.2d 816 (Mich. 1957) (holding that mental distress damages are allowable in medical services contracts). *Id.* at 463.

[113] *Id.* at 463-64.

[114] *Id.* at 475-76.

[115] *Id.* at 472-73.

[116] *See* discussion *supra* note 90. *Francis* allows emotional distress damages if the breach involves bodily injury. *Id.*

[117] 376 So. 2d 667 (Ala. 1979) (holding that emotional distress damages are reasonably foreseeable for breach of a house construction contract). *Id.* at 672.

[118] *Id.*; *see also* Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297, 306 (Ala. 1986) (holding that emotional distress damages were foreseeable, and therefore allowable, where the plaintiff "became the subject of joking and derision among his friends" because of the defendant's failure to deliver his mobile home); Jeffery C. Nickerson, Comment, *When that Dream Home Becomes a Nightmare: Should Emotional Distress be a Compensable Damage in Construction Defect Cases?*, 3 SAN DIEGO JUST. J. 297, 305-06 (1995).

[119] *B & M Homes*, 376 So. 2d at 672.

[120] *Id.*

[121] 653 So. 2d 959 (Ala. 1995) (holding that emotional distress damages are allowable for breach of a contract for a house loan). *Id.* at 959-60.

[122] *Id.*

recoverable because "a reasonable construction lender could easily foreseee" that they would occur.[123] Courts in Hawai'i might follow these cases, especially considering the incredibly high cost of houses in the state.[124]

Courts have also considered travel contracts to be of such a personal nature as to make emotional distress foreseeable upon breach. In *Odysseys Unlimited, Inc. v. Astral Travel Service*,[125] the Supreme Court of New York allowed recovery of non-pecuniary damages for the plaintiffs' "inconvenience, discomfort, humiliation and annoyance" as a result of the breach of a contract for travel agency services.[126] Although the now overturned *Dold* ruling involved a breached travel contract,[127] a Hawai'i court might still allow recovery of emotional distress damages in such a situation. *Dold* was overturned because it relied on a willful and wanton breach standard.[128] This does not mean that it was unforeseeable that the breach of such a contract would cause emotional distress. Accordingly, a Hawai'i court might allow non-pecuniary damages for a breach of a travel contract.

Courts have also allowed recovery of emotional distress damages for the breach of contracts involving family matters. *Wynn v. Monterey Club*,[129] involved an unusual contract wherein the plaintiff agreed to pay his wife's gambling debts in exchange for the defendant casinos not allowing her to gamble anymore at their establishments.[130] The California Court of Appeal allowed emotional distress damages.[131] The court explained that the contract "by its nature put the defendants on notice that a breach thereof would result in emotional and mental suffering by the plaintiff."[132] The court seemed particularly concerned about the strain that the breached contract placed on the plaintiff's marriage.[133] Although gambling is not legal in Hawai'i, a court in this jurisdiction could allow emotional distress damages for similar contracts dealing with family harmony.

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[123] *Id.* at 962.

[124] *See* Tim Ruel, *Honolulu Falls to 4th Among Priciest Home Markets*, THE HONOLULU STAR BULLETIN, Feb. 13, 2001, *at* http: //starbulletin.com/2001/02/12/business/story3.html (explaining that the median resale price for a single family home in Honolulu is the 4th most expensive in the United States). The median resale price in Honolulu is $292,500 while the national average is $139,600. *Id.*

[125] 354 N.Y.S.2d 88 (N.Y. Sup. Ct. 1974).

[126] *Id.* at 92.

[127] Dold v. Outrigger Hotel, 54 Haw. 18, 18-19, 501 P.2d 368, 370 (1972).

[128] Francis v. Lee Enter., 89 Hawai'i 234, 239, 971 P.2d 707, 712 (1999).

[129] 168 Cal. Rptr. 878 (Cal. Ct. App. 1980) (holding that emotional distress damages are allowable in a contract involving family matters). *Id.* at 884.

[130] *Id.* at 880.

[131] *Id.* 883-84.

[132] *Id.* at 884.

[133] *Id.* at 880.

On a similar note, courts might find non-pecuniary damages foreseeable for contracts dealing with paternity rights. *Dunkin v. Boskey*[134] dealt with a contract granting the plaintiff paternity rights to a child conceived by artificial insemination.[135] Although the California Court of Appeals disallowed non-pecuniary damages, the court did state that, "emotional harm to appellant from denial of his parental rights may have been entirely foreseeable . . . ."[136] In a similar case, a Hawai'i court might allow non-pecuniary damages based on its foreseeability.

A last contract area involving highly personal matters are contracts dealing with privacy. In *Huskey v. NBC, Inc.*,[137] the Federal District Court of Illinois allowed emotional distress damages for a prison inmate whom NBC videotaped without getting his permission.[138] NBC had a contract with prison officials not to film any inmates without first obtaining consent.[139] The court held that NBC breached this contract and that the inmate plaintiff was an intended third party beneficiary.[140] The court concluded that, "contracts not to invade privacy are contracts whose breach may reasonably be expected to cause emotional disturbance."[141] Although this unusual fact pattern is unlikely to reoccur, *Huskey* could be used for any contract dealing with a party's privacy.

These cases from other jurisdictions provide some idea how the new Hawai'i rule might be interpreted. However, despite the fact that these courts allowed emotional distress damages, they are the exception, not the rule. A court following the new Hawai'i rule will be loathe to award non-pecuniary damages for the reason that the *Francis* court set out, namely insuring predictability in contract disputes.[142]

VI. CONCLUSION

In establishing the *Dold-Chung* rule, the Hawai'i Supreme Court attempted to break free of the strict confines of traditional contract doctrine. At the time

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[134] 98 Cal. Rptr. 2d 44 (Cal. Ct. App. 2000) (holding that emotional distress damages are foreseeable, but not allowable, for breach of a contract relating to paternity rights). *Id.* at 58-59.

[135] *Id.* at 47.

[136] *Id.* at 58-59. The court ruled that the damages were inappropriate on public policy grounds. *Id.* at 59.

[137] 632 F. Supp. 1282 (N.D. Ill. 1986) (holding that emotional distress damages are foreseeable for breach of a contract dealing with privacy). *Id.* at 1293.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See* Russ Francis v. Lee Enter., Inc., 89 Hawai'i 234, 241, 971 P.2d 707, 714; *see also* discussion *supra* notes 18-22.

of its creation, the *Dold-Chung* rule seemed to be the next logical step in contract law's blurring with tort law. Nevertheless, in the years since its inception, the rule has not been embraced, and in fact the majority of other jurisdictions have rejected its reasoning. In overturning the *Dold-Chung* rule, the Hawai'i Supreme Court has brought Hawai'i law back into line with the mainstream.

Still, the *Francis* decision and its subsequent statutory codification have not altogether eliminated tortious breach of contract in Hawai'i. Under certain highly personal contracts, courts may be willing to allow non-pecuniary damages because of their foreseeability.

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Rotella v. Wood: The Supreme Court Eliminates Another Accrual Rule For Civil RICO

I. INTRODUCTION

An American Bar Association task force report described the law surrounding the civil Racketeer Influenced and Corrupt Organizations Act (RICO) limitations period as "confused, inconsistent and unpredictable."[1] In *Rotella v. Wood*,[2] the United States Supreme Court had the opportunity to establish a definitive accrual rule for civil RICO claims. The question posed to the Court was essentially whether the limitations period should begin to accrue upon a plaintiff's discovery of the injury only, or upon discovery of both the injury *and* the pattern of racketeering that is essential to a RICO claim.[3] The Court's resolution of this issue would have settled a deep split among the circuits and offered some degree of certainty for RICO plaintiffs. Instead, for the second time,[4] the Court eliminated one method of accrual without establishing a definite rule. The implications for the RICO plaintiff are continued uncertainty and unpredictability.[5]

This casenote will discuss and analyze *Rotella*. Part II will describe the facts and procedural history of *Rotella* as well as two previous Supreme Court decisions that are relevant. Part III will recount the Court's analysis. Part IV presents two criticisms of the Court's approach. The first argues that the unique and complex nature of RICO's pattern requirement warrants a more lenient accrual rule than the Court seems inclined to adopt. The second criticizes the Court's "process of elimination" approach as creating uncertainty for both litigants and lower courts. This paper concludes by summarizing the Court's holding in *Rotella* and its effect on future RICO litigation.

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[1] Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 148 (1987) (quoting Report of the Ad Hoc Civil RICO Task Force, A.B.A. SECTION OF CORPORATION, BANK. AND BUS. LAW 391 (1985)).

[2] 528 U.S. 549 (2000).

[3] *See id.* at 554.

[4] The first occasion was *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). *See infra* section II.B.

[5] Erwin Chemerinsky, *Plaintiffs' Use of RICO Limited*, 36 JUL-TRIAL 123 (2000) ("The results are continued litigation and confusion over the question of when the statute of limitations begins to run on a RICO claim.").

II. THE ROAD TO *ROTELLA*

A. Racketeer Influenced and Corrupt Organizations Act

Congress passed RICO as part of the Organized Crime Control Act of 1970.[6] The statute originally targeted the infiltration of organized crime into legitimate businesses.[7] Despite this intent, Congress never made a defendant's membership in organized crime a prerequisite to conviction under the statute.[8] Instead, Congress structured the statute to target "conduct, not status."[9] The import of this omission is that *anyone* who engages in the conduct specified in the statute can be sued under RICO, regardless of ties to organized crime.[10] Furthermore, RICO gives quasi-prosecutorial power to private plaintiffs through a civil scheme set out in 18 U.S.C. § 1964 (c), which provides a civil cause of action for "any person injured in his business or property by reason of a violation" of the statute; as an additional incentive, civil RICO awards automatic treble damages, costs and attorneys' fees to a victorious plaintiff.[11] Because the civil RICO statute permits "[a]ny person"[12] to bring suit, and defines a person as "any individual or entity capable of holding a legal or beneficial interest in property,"[13] the statute "creates a broad class of potential plaintiffs."[14] Since invocation of the statute is not restricted to suits against members of organized crime, it creates a broad class of defendants as well.

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[6] Pub. L. No. 91-452, 84 Stat. 922 (1970); *see also* GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 2 (2d ed. 2000).

[7] JOSEPH, *supra* note 6, at 3. Congress's action followed a 1967 report that found "organized crime was 'extensively and deeply involved' in these legitimate organizations and that it 'employ[ed] illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out and control lawful ownership and leadership.'" Douglas E. Abrams, *Crime Legislation and the Public Interest: Lessons from Civil RICO*, 50 SMU L. REV. 33, 35 (1996) (citing President's Comm'n on Law Enforcement and Admin. of Justice, The Challenge of Crime in a Free Society (1969)).

[8] Abrams, *supra* note 7, at 36. This omission was deliberate; Congress felt that proving organized crime membership would be difficult, if not impossible in some cases, and that outlawing such membership might subject RICO to constitutional challenges for creating a status offense. *Id.* (citing 116 CONG. REC. 35, 343-46 (1970)).

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

[10] *See id.*

[11] 18 U.S.C.A. § 1964(c) (West 2000). The drafters of civil RICO envisioned civil plaintiffs serving as "private attorneys general," supplementing governmental efforts to combat organized crime. *See* Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 151 (1987) (noting that RICO employs a "private attorneys general" concept).

[12] 18 U.S.C.A. § 1961(3) (West 2000).

[13] 18 U.S.C.A. § 1964(c).

[14] Abrams, *supra* note 7, at 56.

A private plaintiff must show that the RICO defendant engaged in one of four types of activity prohibited by 18 U.S.C. § 1962: (1) using or investing income received from a pattern of racketeering to acquire an interest in an enterprise (§ 1962(a)); (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering (§ 1962(b)); (3) conducting an enterprise through a pattern of racketeering (§ 1962(c)); or (4) conspiring to violate one of the above (§ 1962(d)).[15] A RICO "enterprise" is defined in 18 U.S.C.A. § 1961 and "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[16] Section 1961 also defines "racketeering activity" by means of an extensive list of state and federal offenses such as extortion, embezzlement, gambling, mail or wire fraud.[17] These offenses comprise the "predicate acts" enumerated in the statute.[18] Two or more predicate acts combine to form the "pattern of racketeering activity" targeted by the statute.[19]

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[15] *See* Lisa Pritchard Bailey et al., *Racketeer Influenced and Corrupt Organizations*, 36 AM. CRIM. L. REV. 1035, 1037 (1999). One way to explain the difference between the § 1962 subsections is to show how the role of the enterprise varies. "In subsections (a) and (b), the enterprise is an investment vehicle or target, sometimes denominated the 'prize' or 'victim' of the RICO defendant's misconduct. Under subsection (c), the enterprise is itself the malefactor." JOSEPH, *supra* note 6, at 72. Civil RICO also has a criminal counterpart set forth in 18 U.S.C. § 1963, which imposes imprisonment, fines and forfeiture on violators. *See* 18 U.S.C.A. § 1963 (West 2000); *see also* Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 483 (1985).

[16] *See* 18 U.S.C.A. § 1961(4); *see also* JOSEPH, *supra* note 6, at 67 (noting that the choice of the word "includes" renders the list illustrative, not exhaustive). The definition of "enterprise" is significant because it encompasses both organized criminal groups and mainstream organizations. In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court held that the term "enterprise" extended to both legitimate and illegitimate organizations. *Id.* The Court's ruling meant RICO suits clearly extended beyond the organized crime context.

[17] *See* 18 U.S.C.A. § 1961(1). Unlike the term "enterprise," *see supra* note 16, the list of offenses set forth in § 1961(1) is exhaustive. The language provides specifically that "'racketeering activity' *means*" the following crimes. JOSEPH, *supra* note 6, at 80. Accordingly, "no unenumerated act can constitute a predicate offense, regardless of how similar it may be to any specified offense . . . ." *Id.*

[18] *See* JOSEPH, *supra* note 6, at 79. Violations of mail and wire fraud are "the most frequently alleged predicate acts." *Id.* at 82. The inclusion of these offenses under the definition of racketeering activity is the "'single most significant'" reason why civil RICO has become a general federal antifraud remedy." Abrams, *supra* note 7, at 61-62. "Because nearly all business dealings involve some use of the mails or interstate wires, civil RICO plaintiffs can allege mail fraud or wire fraud . . . against defendants having no connection with organized crime and racketeering." *Id.* at 62.

[19] Frederick B. Lacey, *Civil RICO Update*, SE99 A.L.I.-A.B.A. 301, 305 (2000); *see also Sedima*, 473 U.S. at 495 (stating that "'racketeering activity' consists of no more and no less than the commission of a predicate act").

B. Relevent Supreme Court Decisions Preceding Rotella

The RICO statute is silent on the length of a limitations period. In *Agency Holding Corp. v. Malley-Duff & Associates*,[20] the Court established a four year limitations period for civil RICO by analogizing the statute to antitrust actions brought under the Clayton Act[21] and adopting a similar limitations scheme.[22] Because the Court relied heavily on the Clayton Act analogy both in *Malley-Duff* and later opinions including *Rotella*, the Court's opinion is worth repeating in some detail. The Court found that:

> [b]oth RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorneys fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.[23]

The Court also cited to various places in civil RICO's legislative history demonstrating Congress's clear reliance on the Clayton Act model.[24] Though setting a four year limitations period in *Malley-Duff*, the Court declined to establish when the period begins to accrue.[25] In the absence of such direction from the Court, a three way split developed among the circuits.[26]

The First, Second, Fourth, Fifth, Seventh and Ninth Circuits adopted an "injury discovery rule."[27] Under this method, the limitations period begins to

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[20] 483 U.S. 143 (1987). The Court noted that where a statute is silent on a limitations period, it is not assumed Congress intended no limitations period but that the Court should borrow the most appropriate rule from state, and in limited circumstances, federal law. *Id.* at 146. Here the Court determined that federal law presented a more suitable comparison than state law. *Id.* at 150.

[21] 38 Stat. 731, *as amended*, 15 U.S.C. § 15.

[22] *Malley-Duff*, 483 U.S. at 150.

[23] *Id.* at 151.

[24] *Id.* at 150-52. For example, the Court cited an ABA report that quoted one senator as saying the proposed RICO bills took "'the novel approach of adapting antitrust concepts to thwart organized crime.'" *Id.* at 151.

[25] *Id.* at 156-57 ("Because it is clear that Malley-Duff's RICO claims accrued within four years of the time the complaint was filed, we have no occasion to decide the appropriate time of accrual for a RICO claim.").

[26] Lacey, *supra* note 19, at 306 (quoting Detrick v. Panalpina, Inc., 108 F.3d 529 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 52 (1997), noting "[t]he Supreme Court's lack of guidance on the accrual issue . . . generated a split amongst the federal courts of appeals and district courts").

[27] Rotella v. Wood, 528 U.S. 549, 553 (2000) (citing Grimmett v. Brown, 75 F.3d 506, 511 (9th Cir. 1996); McCool v. Strata Oil Co., 972 F.2d 1452, 1464-65 (7th Cir. 1992); Rodriguez v. Banco Central Corp., 917 F.2d 664, 665-66 (1st Cir. 1990); Bankers Trust Co. v. Rhoades,

accrue when a plaintiff knew or should have known of his injury.[28] The Sixth, Eighth, Tenth and Eleventh Circuits applied an "injury plus pattern" discovery rule.[29] The limitations period begins to run under this rule when the plaintiff discovers both his injury and the pattern of racketeering activity to which it gives rise.[30] The Third Circuit adopted the "last predicate act" rule, which incorporated the "injury plus pattern" rule of discovery but allowed the limitations period to begin running anew with each predicate act.[31]

In *Klehr v. A.O. Smith Corp.*,[32] the Court struck down the Third Circuit's "last predicate act" rule.[33] The *Klehr* Court proffered two reasons for its holding.[34] First, such a rule would allow a limitations period to stretch on longer than Congress could have intended[35] and would violate the principle of repose[36] that was the purpose of a limitations rule.[37] Second, the Court

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859 F.2d 1096, 1102 (2d Cir. 1988); Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (4th Cir. 1987)).

[28] *Rotella*, 528 U.S. at 553.

[29] *Id.* at 553-54 (citing Caproni v. Prudential Sec., Inc., 15 F.3d 614, 619-20 (6th Cir. 1994); Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991); Bivens Gardens Office Bldg. Inc. v. Barnett Bank, 906 F.2d 1546, 1554-55 (11th Cir. 1990); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820-21 (10th Cir. 1990)).

[30] *Rotella*, 528 U.S. at 553-54; *see* Granite Falls Bank v. Henrikson, 924 F.2d 150, 154 (8th Cir. 1991). In *Granite Falls Bank*, "the last alleged predicate act of racketeering occurred no later than December 1982. The Bank, however, was not injured, and consequently did not discover its injury, until April 1985. And it did not discover until January 1989 that defendants had engaged in a pattern of racketeering activity." *Id.* at 151. The Eighth Circuit Court of Appeals applied the injury plus pattern discovery rule in that case, acknowledging that "[t]he primary source of RICO's unique character is its pattern requirement." *Id.* at 153. The court also noted the lack of consensus among the circuits on the civil RICO accrual issue, but stated "that is only to be expected, because so far we lack clear guidance from the Supreme Court and any guidance at all from Congress." *Id.* at 152.

[31] *Rotella*, 528 U.S. at 554 (citing Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130 (3d Cir. 1988)).

[32] 521 U.S. 179 (1997).

[33] *Id.* at 187.

[34] *Id.*

[35] *Id.* The Court held that because a series of predicate acts could extend on indefinitely (provided that no more than ten years occur between two acts, in accordance with RICO's statutory requirements), allowing the limitations period to begin running anew with each predicate act would consequently allow the limitations period to extend on indefinitely. *Id.*

[36] BLACK'S LAW DICTIONARY defines "repose" as a "cessation of activity; temporary rest" or "a statutory period after which an action cannot be brought in court, even if it expires before the plaintiff suffers any injury." BLACK'S LAW DICTIONARY 1303 (7th ed. 1996).

[37] *Klehr*, 521 U.S. at 187. The Court stated that the last predicate act rule would allow a plaintiff to "wait, 'sleeping on their rights,'as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the 'memories of witnesses have faded or evidence is lost.'" *Id.* (citations omitted). The Court was unable to find in civil RICO a "compensatory objective that would warrant so significant an extension of the limitations

revisited the Clayton Act analogy and concluded the last predicate act rule was inconsistent with the rule used there, which focused on a plaintiff's injury.[38]

The *Klehr* decision eliminated the "last predicate act" approach, but the Court noted, "We recognize that our holding . . . does not resolve other conflicts among the Circuits."[39] As in *Malley-Duff*, the Court's narrow ruling did not establish a proper method of accrual. After *Klehr*, the federal circuits were left to ponder at least two possible methods of accrual—the injury discovery rule and the injury plus pattern discovery rule.[40] Against this backdrop of confusion, *Rotella* presented another opportunity for the Court to resolve the remaining circuit split and establish a clear, fair accrual rule.

III. *ROTELLA V. WOOD*

A. Facts

In February 1985, petitioner Mark Rotella entered the Brookhaven Psychiatric Pavillion for depression.[41] During his stay, Rotella repeatedly requested a discharge but each time withdrew the request before the ninety-six hour waiting period for such requests expired.[42] Rotella claimed he was coerced by hospital personnel into withdrawing his requests, a move which forced him to endure "inappropriate and abusive" treatment at the hospital until he was released in 1986, at age eighteen.[43]

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period," and found that it contradicted the objective of civil RICO to encourage investigation of claims. *Id.*

[38] *Id.* at 188.

[39] *Id.* at 191.

[40] In an opinion concurring in part and concurring in the *Klehr* judgment, Justice Scalia suggested an additional possibility, the straight "injury" rule used in the Clayton Act. *Id.* at 197 n.1 (Scalia, J., concurring). Under this rule, the limitations period begins to accrue upon occasion of the injury, notwithstanding a plaintiff's discovery of the injury. *Id.* at 198. In *Rotella*, the Court called this the "injury occurrence" rule. Rotella v. Wood, 528 U.S. 549, 554 n.2 (2000). Although acknowledging its existence in a footnote, the *Rotella* Court did not spend any time examining the rule, probably because no circuits employ the injury occurrence rule.

[41] *Rotella*, 528 U.S. at 551.

[42] Rotella v. Pederson, 144 F.3d 892, 894 (5th Cir. 1998). Rotella's mother and therapist checked him into Brookhaven following a suicide threat, but in order to avoid a commitment proceeding, Rotella changed his admission from involuntary to voluntary. *Id. Rotella v. Pederson*, 114 F.3d 892 (5th Cir. 1998), was a related suit for slander filed by doctors at the hospital against Rotella and his attorney, arising out of comments allegedly made by them suggesting that the doctors received a $10,000 bonus for each bed filled over the Christmas holidays. *Id.*

[43] *Id.* He also claimed certain personal items were never returned to him and that he was "fraudulently billed for hundreds of days in unnecessary treatment." Petitioner's Brief, Rotella v. Wood, 528 U.S. 549 (2000) (No. 98-896), 1999 WL 775828, at *3.

Rotella first learned of misconduct by doctors at the hospital in April 1994, when another former patient at Brookhaven contacted him.[44] Two months later, the institution's parent company and its regional director pleaded guilty to charges of criminal fraud and conspiracy for extending patient stays to maximize insurance payments.[45] Although Rotella was aware of the company's plea agreement in 1994, he did not file his civil RICO claim against the respondents until 1997.[46] By this time over twelve years had passed since he was a patient at Brookhaven, but only three since he learned of the company's illegal activities.

The defendants filed a motion for summary judgment and raised the affirmative defense that Rotella's claim had expired under the statute of limitations.[47] They argued that Rotella's injury was his hospitalization in 1986, commencing a four year limitations period that expired in 1990.[48] While conceding that his injury occurred in 1986 when he was hospitalized, Rotella argued he did not discover the *pattern of racketeering activity* until 1994, when he learned of the criminal charges against the company.[49] Because the pattern of racketeering forms the basis of a RICO cause of action, Rotella argued, the correct method of accrual was the "injury plus pattern" discovery rule.[50] Under this rule, the four year limitations period began to run in 1994, when Rotella became aware of the pattern of racketeering. Rotella's lawsuit, filed in 1997, was within the limitations period and therefore timely.[51]

B. Lower Court Proceedings

The district court agreed with the defendants and granted their motion for summary judgment.[52] The court applied an injury discovery rule, under which the limitations period began to run when Rotella discovered his injury in 1986,

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[44] *Rotella*, 144 F.3d at 894.

[45] *Id.* Rotella claimed this was accomplished, in part, through actions by Brookhaven's parent company that included: "providing 'incentive bonuses' to doctors based on the average daily census of the hospital; entering into personal service contracts with doctors who referred patients to the hospitals; disguising incentive payments to doctors and paying doctors for services they were not expected to perform; and falsifying time and attendance records to disguise inflated compensation based on admissions to the hospital." Petitioner's Brief, *Rotella* (No. 98-896), 1999 WL 775828, at *3.

[46] *Rotella*, 528 U.S. at 551.

[47] *Id.* at 552.

[48] Petitioner's Brief, *Rotella* (No. 98-896), 1999 WL 775828, at *6.

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

[50] *Id.*

[51] *Id.*

[52] *Rotella*, 528 U.S. at 552.

and expired in 1990.[53] Rotella appealed to the Court of Appeals for the Fifth Circuit.[54] In a three-paragraph opinion, the Fifth Circuit affirmed the district court's grant of summary judgment and held that the lower court's application of the injury discovery rule was the "correct rule of law."[55] Circuit Judge Garza commented in his opinion that this decision "place[d] the Fifth Circuit on record as in line with the First, Second, Fourth, Seventh and Ninth Circuits' choice of the injury discovery rule of accrual for civil RICO causes of action."[56] Rotella appealed to the U.S. Supreme Court, which granted his petition for writ of certiorari.[57]

C. The Supreme Court's Analysis

In a unanimous opinion authored by Justice Souter, the Court struck down the "injury plus pattern" accrual rule.[58] The Court articulated three general reasons for its decision. First, as in *Klehr*, the Court held that such a rule would violate the "basic policies" of a limitations period: "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities."[59] Because the RICO statute permits a maximum ten-year span between predicate acts, even an injury discovery rule would allow claims occurring fourteen years after an initial injury.[60] An injury plus pattern discovery rule could extend this period further, because a plaintiff might not discover the pattern of racketeering until even later.[61] For this reason, the Court held that an injury plus pattern discovery rule would be an extension of the traditional injury discovery rule used in federal courts, and was "unwarranted by the injury discovery rule's rationale."[62] Emphasizing the significance of the injury element, the Court stated that "we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock."[63]

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[53] *Id.*

[54] Rotella v. Wood, 147 F.3d 438 (5th Cir. 1998).

[55] Rotella v. Pederson, 147 F.3d 438, 439 (5th Cir. 1998). After adopting the injury discovery rule in a string of unpublished decisions, the court applied this rule publicly for the first time in its *Rotella* opinion. *Id.* at 440.

[56] *Id.*

[57] Rotella v. Wood, 526 U.S. 1003 (1999).

[58] *Rotella*, 528 U.S. at 554.

[59] *Id.* at 555.

[60] *Id.* The RICO statute provides that predicate acts may occur no more than ten years apart. *See* 18 U.S.C.A. § 1961(5) (West 2000). This maximum time span between predicate acts, plus a four year limitations period, equals fourteen years.

[61] *Rotella*, 528 U.S. at 555.

[62] *Id.*

[63] *Id.*

Second, the Court compared a RICO claim to one brought for medical malpractice.[64] The Court determined that both types of plaintiffs face difficulty in identifying an injury and its cause, but concluded that this difficulty is an insufficient reason to extend the limitations period.[65] A medical malpractice plaintiff has the burden of discovering the existence of a claim before it expires, even though the injury may be unknown to him and information about its cause may be under the defendant's control.[66] The Court reasoned that "the prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury . . . [t]here are others who can tell him if he has been wronged, and he need only ask."[67]

In analogizing RICO to medical malpractice claims, the Court recognized RICO's unique pattern requirement, as well as the nature of predicate acts to be often "complex, concealed, or fraudulent,"[68] but decided that "identifying professional negligence may also be a matter of real complexity, and its discovery is not required before the statute starts running."[69] Moreover, the court reasoned that although a malpractice plaintiff "need only ask" another doctor whether he has been harmed, identifying the existence of a cause of action still required investigation of a potential claim.[70] Similarly, "[a] RICO plaintiff's ability to investigate the cause of his injuries is no more impaired by his ignorance of the underlying RICO pattern than a malpractice plaintiff is thwarted by ignorance of the details of treatment decisions or of prevailing standards of medical practice."[71] Therefore, the Court saw "no good reason for accepting a lesser degree of responsibility on the part of a RICO plaintiff."[72]

Third, leaving behind its medical malpractice analogy, the Court determined that the more lenient rule proffered by Rotella would be inconsistent with the Clayton Act's injury discovery rule.[73] "In rejecting a significantly different focus under RICO," the Court posited, "we are honoring an analogy that

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[64] *Id.*

[65] *Id.* at 556.

[66] *Id.* at 555-56.

[67] *Id.* at 556 (quoting United States v. Kubrick, 444 U.S. 111, 122 (1979)).

[68] *Id.* The Court also dismissed Rotella's argument that a less restrictive discovery rule was warranted due to the number of RICO claims that allege fraud, which has a different accrual rule. *Id.* at 557. Fraud usually has a discovery rule, under which the limitations period begins to toll once a plaintiff discovers, or should have discovered, the fraud. Petitioner's Brief, *Rotella* (No. 98-896), 1999 WL 775828, at *16. In *Rotella*, the Court stated that it already considered that argument in *Malley-Duff* and found it an insufficient ground for extending the limitations period. *Id.* (citing Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 149 (1987)).

[69] *Rotella*, 528 U.S. at 556 (quoting *Kubrick*, 444 U.S. at 122, 124).

[70] *Id.*

[71] *Id.* at 556-57.

[72] *Id.* at 556.

[73] *Id.* at 557.

Congress itself accepted and relied upon, and one that promotes the objectives of civil RICO as readily as it furthers the objects of the Clayton Act."[74] Noting that the similar method employed by both RICO and the Clayton Act—utilizing a "private attorneys general" concept to complement government litigation—mandates prompt action, the Court concluded that it would be "strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize."[75] Congress's comparison of the Clayton Act to RICO, the Court stated, demonstrated an intention to reject any longer period of limitations for RICO.[76] The Court concluded that "whatever disputes may arise about pinpointing the moment a plaintiff should have discovered an injury to himself would be dwarfed by the controversy inherent in divining when a plaintiff should have discovered a racketeering pattern[]."[77] Moreover, the Court reasoned that an injury discovery rule, like that used in Clayton Act suits, would minimize confusion over when a civil RICO limitations period begins to run due to the inherent complexity of the statute itself.[78] The murkiness of the pattern requirement in civil RICO would only be aggravated by a pattern-focused limitations rule.

In closing, the Court refuted several of Rotella's arguments. First, the Court addressed Rotella's assertion that the Court itself weakened the Clayton Act analogy by holding in a previous case that RICO lacked a racketeering injury requirement parallel to the Clayton Act's antitrust injury requirement.[79] The Court noted that the absence of this element makes a RICO claim comparatively simpler than one filed under the Clayton Act, which in turn argues for, rather than against, a simpler limitations rule.[80] Next, the Court considered Rotella's argument that Federal Rules of Civil Procedure Rule ("FRCP") 9(b), which requires that fraud be plead with particularity,[81] conflicted with a stricter discovery rule that forces a plaintiff to bring suit before all his facts are known. Although acknowledging that FRCP 9(b) "will exact some cost,"[82] the Court concluded that it was balanced by FRCP

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[74] *Id.* The Court also noted that the provision in civil RICO allowing treble damages is premised on the expectation that such suits will reduce racketeering activity, which the Court said is "an object pursued the sooner the better." *Id.* at 558.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *See id.* at 559. The Court noted that the difficulties surrounding RICO's pattern requirement "only reinforces our reluctance to parlay the necessary complexity of RICO into worse trouble in applying its limitations rule." *Id.*

[79] *Id.* at 560. The earlier case was *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). *Id.*

[80] *Id.*

[81] *See* FED. R. CIV. P. 9(b).

[82] *Rotella*, 528 U.S. at 560.

11(b)(3), which permits pleadings based on evidence reasonably anticipated after further investigation.[83] Finally, the Court noted that elimination of the injury plus pattern discovery rule did not preclude application of equitable tolling principles where, in spite of diligent investigation, a plaintiff is unable to uncover a pattern of racketeering.[84]

IV. ANALYSIS

The Court's holding in *Rotella* was narrow and limited. Although striking down the "injury plus pattern" discovery rule, the Court was careful to state its refusal to decisively resolve the accrual issue, noting "we do not, however, settle upon a final rule."[85] Nor does the Court's decision mean the injury plus pattern discovery rule is dead. A careful reading of *Rotella* suggests that a resurrection of the rule is not precluded under appropriate facts. In a footnote, the Court acknowledged the concerns raised by some circuits that under any rule other than the injury plus pattern discovery rule, a plaintiff's cause of action could expire before a pattern even forms.[86] This situation could arise where a plaintiff knowingly is injured before the second predicate act needed to form a pattern takes place.[87] Since under the facts in *Rotella* "the quandary is hypothetical here," the Court refused to decide the applicable rule when an injury precedes the second predicate act.[88] While the Court held that this possibility failed to justify the imposition of a general pattern discovery rule,[89] it seems to suggest that in limited circumstances a plaintiff could argue for the application of an injury plus pattern discovery rule, perhaps on equitable grounds.[90]

The Court's holding in *Rotella*, therefore, seems limited to a denouncement of the injury plus pattern discovery rule under these facts and under facts where the injury did not precede the formation of a pattern of racketeering. The Court's opinion does not resolve the persistent question of a proper rule

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[83] *Id.*

[84] *Id.* at 560-61.

[85] *Id.* at 554 n.2.

[86] *Id.* at 559 n.4.

[87] *See* Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1553 (11th Cir. 1990) (noting that under the Clayton Act injury rule, a plaintiff injured by one predicate act but not a second until five years later will be unable to recover for injuries caused by the first predicate act, because a pattern of racketeering had not formed at that time).

[88] *Rotella*, 528 U.S. at 559 n.4. The Court acknowledged the respondents' rebuttal, that "this overlooks the cardinal principle that a limitations period does not begin to run until the cause of action is complete." *Id.*

[89] *Id.*

[90] *See id.* at 561 (noting that rejection of the injury plus pattern accrual rule does not preclude application of equitable principles of tolling).

of accrual, and it acknowledges but fails to adequately address the ambiguity of the pattern concept in civil RICO, and how this affects a plaintiff's ability to identify a pattern of racketeering before the expiration of the limitations period. These criticisms are the subject of discussion in the following sections.

A. The Unique and Complex Nature of RICO's Pattern Requirement Warrants a Lenient Accrual Rule

The pattern element is a complicated but central component of any RICO claim. The Court has recognized as much in previous decisions. In *Agency Holding Corp. v. Malley-Duff & Associates*,[91] the Court noted that "the heart of any RICO complaint is the allegation of a pattern of racketeering."[92] Similarly, in *H.J. Inc. v. Northwestern Bell Telephone Co.*,[93] the Court called the pattern element a "key requirement" of the statute.[94] In *Rotella*, the Court acknowledged both of these prior statements, then discounted the unique and complex nature of RICO's pattern requirement by analogizing a RICO suit to one brought for medical malpractice, which lacks any pattern element.[95] The purpose of the Court's comparison was to rebut Rotella's argument that the tendency of a pattern of racketeering activity to be "complex, concealed, or fraudulent" mandated a more lenient accrual rule.[96] The Court noted that "professional negligence may also be a matter of real complexity, and its discovery is not required before the statute starts running."[97] The Court then stated that "[t]he fact, then, that a considerable effort may be required before a RICO plaintiff can tell whether a pattern of racketeering is demonstrable does not place him in a significantly different position from the malpractice victim."[98]

The Court's comparison neglects the reality that while uncovering a medical malpractice injury may be difficult, and the injury often concealed from the plaintiff, a malpractice plaintiff can easily obtain a "second opinion." The Court itself recognizes that a medical malpractice plaintiff "need only ask" if he has a cause of action, though prior investigation may be required.[99] A RICO plaintiff is not similarly situated. Civil RICO's complexity, particularly

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[91] 483 U.S. 143 (1987).

[92] *Id.* at 154.

[93] 492 U.S. 229 (1989).

[94] *Id.* at 236. For a discussion of the Court's decision in *H.J. Inc.*, *see infra* note 112 and accompanying text.

[95] Rotella v. Wood, 528 U.S. 549, 555-56 (2000).

[96] *Id.* at 556.

[97] *Id.*

[98] *Id.*

[99] *Id.* (quoting United States v. Kubrick, 444 U.S. 111, 122 (1979)).

as manifested in its pattern requirement, has confused even experienced jurists.[100] This complexity may warrant an accrual rule more lenient than the injury discovery rule. The Court's decision in *Rotella* suggests that the injury discovery rule is the favored approach,[101] but of four potential accrual rules only the injury occurrence rule is less forgiving.[102] This characteristic even became a selling point—the Court felt that an injury-focused rule would be less confusing than one centering on a plaintiff's discovery of a pattern, due to the very reason Rotella argued for its application—that a pattern of racketeering is often "complex, concealed or fraudulent."[103] An injury-focused rule may shift attention away from the pattern requirement, however, but does not cure the pattern element's ambiguity. The Supreme Court's own struggle to identify and define a pattern of racketeering, described below, reflects the difficulty of this task and the need for a lenient accrual rule.

The Court first addressed the meaning of "pattern" in *Sedima S.P.R.L. v. Imrex Co.*,[104] where it held that it was the presence of "continuity plus relationship" that created a pattern, rather than the acts of racketeering themselves.[105] Although Justice White's majority opinion attributed RICO's extensive use outside the organized crime context to, among other things, the "failure of Congress and the courts to develop a meaningful concept of 'pattern,'"[106] the Court's decision did not remedy this problem. Rather than clarify the meaning of the pattern requirement, the *Sedima* decision generated confusion over the Court's "relationship plus continuity" language and "produced the widest and most persistent Circuit split on an issue of federal law in recent memory."[107]

For example, in interpreting *Sedima*'s "relationship plus continuity" aspect of the pattern element, the Eighth Circuit understood the requirement to mean

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[100] *See* Abrams, *supra* note 7, at 64-65. The District of Columbia Circuit branded RICO "'one of the most confusing crimes ever devised by Congress.'" *Id.* Other courts have labeled the statute "'intricate,' 'agonizingly difficult and confusing,' and 'unusually confusing and convoluted'" or as characterized by "'amorphous legal standards' and 'murky language.' The Supreme Court has referred to the 'complexities of civil RICO actions.'" *Id.* (internal citations omitted).

[101] Lacey, *supra* note 19, at 305.

[102] *Id.* (calling the injury occurrence rule the "strictest of the possible accrual rules"). The injury occurrence rule is a harsher rule than the injury discovery rule, which allows for a plaintiff's *discovery* of his injury before the limitations period begins to run. *See id.* at 306. Under the injury occurrence rule, the limitations period begins to run whether or not the plaintiff is even aware of his injury. *Id.*; *see also supra* note 40 (defining the injury occurrence rule).

[103] *Rotella*, 528 U.S. at 559; *see also supra* notes 77 and 78 and accompanying text.

[104] 473 U.S. 479 (1985).

[105] *Id.* at 497 n.14. Note that the Court placed this language in a footnote to the opinion, rendering it essentially dictum.

[106] *Id.* at 500.

[107] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 251 (1989) (Scalia, J., concurring).

that multiple *schemes* were necessary, rather than multiple acts within a single scheme.[108] In the Seventh Circuit, the court decided that multiple *factors* should be taken into account, such as the number of illegal acts, victims, occurrence of distinct injuries, and the length of time over which the acts were carried out.[109] The Ninth Circuit declined to follow the *Sedima* Court's opinion on the matter pending further explanation from the Court, reasoning that *Sedima* was only "suggestive."[110] That circuit determined that multiple acts within a single criminal episode constitute a pattern, disregarding altogether the concept of continuity.[111]

The persistent confusion among the circuits may have prompted the Court to hear *H.J. Inc. v. Northwestern Bell Telephone Co.*,[112] four years after *Sedima*, in which the Court again grappled with the pattern requirement.[113] The majority opinion rejected the Eighth Circuit's interpretation that a pattern is formed only when the predicate acts are part of "separate illegal schemes."[114] By examining RICO's legislative history, the Court determined that a RICO plaintiff must show "that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity."[115] Elaborating further, the Court stated that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by

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[108] H.J. Inc. v. Northwestern Bell Tel. Co., 829 F.2d 648 (8th Cir. 1987), *rev'd*, 492 U.S. 251 (1989).

[109] Morgan v. Bank of Waukegan, 804 F.2d 970, 975-76 (7th Cir. 1986).

[110] Cal. Architectural Bldg. Prod., Inc. v. Franciscan Ceramics Inc., 818 F.2d 1466, 1469 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988). In that case, the defendants argued that their offenses were part of a single criminal episode and therefore failed *Sedima*'s "relationship plus continuity" requirement. The Ninth Circuit disagreed, finding that "the plain words of RICO preclude [such an interpretation]. RICO defines 'pattern of racketeering activity' without mentioning continuity . . . . The dictum in *Sedima* is suggestive, but without additional explication by the Supreme Court we decline to follow its lead." *Id.*

[111] *Id.*

[112] 492 U.S. 229 (1989). In *H.J. Inc.*, customers filed a class action against Northwestern Bell Telephone Co., members of the Minnesota Public Utilities Commission (MPUC), and other unnamed individuals and corporations alleging that respondents engaged in multiple acts of bribery constituting a pattern of racketeering. *Id.* at 233-34. The district court granted the respondents' motion to dismiss, holding that the allegations were part of a "'single scheme to influence MPUC commissioners to the detriment of Northwestern Bell's ratepayers'" and therefore failed the Eighth Circuit's multiple scheme test. *Id.* at 234-35 (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 648 F. Supp. 419 (Minn. 1986)). The Eighth Circuit affirmed. *Id.* at 234.

[113] *Id.* at 232.

[114] *Id.* at 236.

[115] *Id.* at 239.

distinguishing characteristics and are not isolated events."[116] Despite the Court's elaboration, the pattern requirement remained unclear.[117] In his concurring opinion, Justice Scalia commented that the pattern element required something more than mere multiple acts of racketeering activity, "[b]ut what that something more is, is beyond me."[118]

The pattern element remains something of an enigma for both courts and litigants.[119] "Since *Sedima*, . . . the confusion over what level of wrongful activity is required to trigger RICO liability has increased. [T]he effort to define this concept adequately . . . has bitterly divided both courts and commentators."[120] The significance of this struggle for *Rotella* lies in the Court's assertion that adopting a pattern-conscious accrual rule would impose "a lesser degree of responsibility on a RICO plaintiff" than upon a malpractice plaintiff.[121] Imposing a more lenient rule would not require less responsibility on the part of RICO plaintiffs. It would simply recognize the ambiguous and complex nature of the pattern element that is unique to RICO[122] and that has befuddled even the United States Supreme Court. If the courts struggle to identify a pattern, hope is dim for even a diligent plaintiff laboring under a strict injury discovery rule.

Although the application of equitable tolling principles, as suggested by the Court,[123] may rescue the doomed claim of a plaintiff unable to discover a pattern within the limitations period, the fact remains that unless the pattern

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[116] *Id.* at 240. The Court's comment pertained to the "relationship" prong of the "relationship plus continuity" test articulated in *Sedima*. As for proving continuity, the Court attempted to delineate the concept but ultimately stated that proof "may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity." *Id.* at 241.

[117] *See id.* at 243. The Court stated:

> [T]he precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists. The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope.

[118] *Id.* at 255.

[119] *See* Bailey et al., *supra* note 15, at 1043 (discussing *H.J. Inc.*, "[e]ven with this guidance, the courts of appeals have reached varying conclusions regarding what conduct constitutes a pattern of racketeering").

[120] JOSEPH, *supra* note 6, at 104 (quoting Note, *Clarifying a 'Pattern' of Confusion: A Multi-Factor Approach to Civil RICO's Pattern Requirement*," 86 MICH. L. REV. 1745, 1748 (1988)).

[121] Rotella v. Wood, 528 U.S. 549, 556 (2000).

[122] *Id.* (stating that "[i]t is true, of course, as Rotella points out, that RICO has a unique pattern requirement . . . .").

[123] *Id.* at 560-61.

element is better articulated,[124] equitable tolling principles applied as an exception may become the rule. The large number of civil RICO claims litigated each year[125] suggests plaintiffs do uncover patterns; however, the figures fail to reflect the number of honest plaintiffs who have lost their day in court due to the unfortunate combination of an ambiguous pattern concept and a strict limitations rule. A more lenient rule would simply address the reality of the pattern problem until it is resolved.

B. The Court's "Process of Elimination" Approach Creates Uncertainty for RICO Litigants and the Courts

Although the pattern element's ambiguity may frustrate RICO plaintiffs, the Court's approach to resolving the accrual issue imposes uncertainty and unpredictability on both litigants and lower courts. In three cases—*Malley-Duff*, *Klehr* and *Rotella*—the Court addressed the limitations issue without establishing the correct rule. Instead, the Court took a process of elimination approach, striking down possible applications of the accrual rule without venturing to say what the proper rule might be. Leaving plaintiffs guessing as to the timeliness of their claims is inconsistent with the "private attorneys general" method employed by civil RICO,[126] a concept that encourages private litigation to supplement government crime-fighting efforts.

As in *Klehr*, the *Rotella* Court chose to eliminate one accrual method without establishing a definite rule.[127] After striking down the "last predicate act" rule in *Klehr*[128] and the "injury plus pattern" discovery rule in *Rotella*,[129] the Court leaves only two accrual rules untouched. As one commentator noted, "[b]y process of elimination, and by implication, it would seem that the Court has finally chosen a rule for when RICO claims accrue: when the injury is or should have been discovered. However, in an important footnote to *Rotella*, [the Court] explicitly rejected doing so."[130] In this footnote, the Court

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[124] *See* JOSEPH, *supra* note 6, at 103 ("Twice the Supreme Court has attempted to elucidate what constitutes a 'pattern' within this provision, yet the concept remains elusive.").

[125] Civil RICO filings exploded in the 1980s, and topped out at approximately 1,000 per year between 1987 and 1988. Abrams, *supra* note 7, at 63. The number of current filings is lower, "but remains near the high-water mark of the late 1980s." *Id.* In 1991, the Director of the Administrative Office of the United States Courts created a separate category for civil RICO filings in the summary of the Judicial Business of the United States Courts section of the Annual Report. *Id.*

[126] *See* Agency Holding Corp. v. Malley-Duff & Assoc., 483 U.S. 143, 151 (1987).

[127] *Rotella*, 528 U.S. at 554, n.2.

[128] *Klehr*, 521 U.S. at 187.

[129] *Rotella*, 528 U.S. at 554.

[130] Chemerinsky, *supra* note 5.

carefully stated that "we do not, however, settle upon a final rule."[131] In his concurring opinion to *Klehr*, Justice Scalia, joined by Justice Thomas, criticized the Court for taking the same approach in that case.[132] After acknowledging that twice during the 1997 term[133] the Court had the opportunity to resolve the accrual question, Justice Scalia noted, "we do not reach it today for no particular reason except timidity—declining to say what the correct accrual rule is, but merely rejecting one of four candidates under which these petitioners could recover."[134] Despite Justice Scalia's chiding, the Court repeated this approach in *Rotella*.[135]

After *Rotella*, RICO litigants can guess with a fair degree of certainty that some sort of injury-focused rule applies, but the Court's refusal to identify a definite rule leaves the issue stubbornly unresolved. Those circuits that previously applied the "injury plus pattern" discovery rule must now decide whether to adopt the injury discovery rule or the injury occurrence rule. With either option, the Court may invalidate their choice at a later date, when it must inevitably address the issue again to further whittle down the remaining rules.

Justice Scalia considered this very possibility in *Klehr*, commenting that the majority's decision meant that:

> in the remaining Circuits litigants will have to guess which of the three [accrual rules] to follow; and in all of the Circuits no one will know for sure which rule is right—until, at some future date, we receive briefing and argument a third or fourth time, and finally summon up the courage to "unravel," as one commentator has put it, "the mess that characterizes civil RICO accrual decisions."[136]

This criticism stands after *Rotella*.

The experience of the Third Circuit illustrates the uncertainty this approach creates for both litigants and lower court judges. After the *Malley-Duff* decision failed to articulate when the four year limitations period for civil RICO actions begins to run, the Third Circuit adopted the "last predicate act"

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[131] *Rotella*, 528 U.S. at 554 n.2.

[132] Klehr, 521 U.S. at 196 (Scalia, J., concurring).

[133] In addition to *Klehr*, the Court received full briefing and heard oral argument in *Grimmett v. Brown*, 519 U.S. 233 (1997), but then dismissed the writ of certiorari as improvidently granted. *Id.* In *Grimmett*, the plaintiff appealed the dismissal of her civil RICO claim under the injury discovery rule and argued for application of the injury plus pattern rule. *See* Grimmett v. Brown, 75 F.3d 506 (9th Cir. 1996).

[134] *Klehr*, 521 U.S. at 196 (Scalia, J., concurring).

[135] *See supra* section II.C. Although the Court's approach in *Rotella* repeated that in *Klehr*, it bears mentioning that neither Justice Scalia nor Justice Thomas wrote separate opinions in *Rotella*. As noted earlier, *Rotella* was a unanimous opinion. *See id.*

[136] *Klehr*, 521 U.S. at 196-97 (Scalia, J., concurring) (quoting Abrams, *supra* note 7, at 70).

rule[137] in *Keystone Insurance Co. v. Houghton.*[138] In *Klehr* the Supreme Court struck down that rule without specifying a correct approach.[139] In response to *Klehr*, the Third Circuit adopted the "injury plus pattern" discovery rule.[140] In *Rotella*, the Court eliminated that method as well, again without specifying a proper rule.[141]

In *Forbes v. Eagleson*,[142] a recent post-*Rotella* case, the Third Circuit recounted the Supreme Court's decision in *Klehr* to "leave the [accrual] matter for another day"[143] and in *Rotella* to "again [leave] the matter unsettled . . . ."[144] The Court's failure to articulate a definite rule required the Third Circuit adopt, for the third time in twelve years, an accrual rule for civil RICO suits. In *Forbes*, the court remarked, "[t]hus, once again we must make a decision regarding when a RICO action accrues even though we are aware that the Supreme Court ultimately may accept or reject our choice."[145] The Third Circuit adopted the injury discovery rule,[146] but not without recognizing the effect of its decision on the *Forbes* plaintiffs.[147] Its adoption of the injury discovery rule midway through the litigation process, the court noted, "alter[ed] the judicial landscape unfavorably to the plaintiffs from the shape in which it existed when this case was before the district court and [it must now] consider the case under an accrual rule more adverse to plaintiffs than that the district court applied."[148]

A claim's timeliness is a basic assumption upon which a plaintiff relies when undertaking the expense and time commitment of litigation; imposing a new accrual rule on parties in the midst of litigation is akin to changing the rules in the middle of the game. For the plaintiffs in *Klehr* and *Rotella*, the Court's choice of accrual rules meant the difference between their suits going

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[137] Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130 (3d Cir. 1988).

[138] 863 F.2d 1125 (3d Cir. 1988).

[139] *Klehr*, 521 U.S. at 187.

[140] Annulli v. Panikkar, 200 F.3d 189, 192, 195 (3d. Cir. 1999).

[141] Rotella v. Wood, 528 U.S. 549, 554 (2000).

[142] 228 F.3d 471 (3d Cir. 2000).

[143] *Id.* at 483 (citing *Klehr*, 521 U.S. at 191-93).

[144] *Id.* at 484 (citing *Rotella*, 528 U.S. at 554 n.2).

[145] *Id.*

[146] *Id.* In a one sentence explanation, the court reasoned that the injury discovery rule was "in harmony with the general notion that a discovery rule applies whenever a federal statute of limitation is silent on the issue." *Id.*

[147] *Id.*

[148] *Id. Compare* Lacey, *supra* note 19, stating:

> The injury and pattern discovery rule is potentially more liberal than the injury discovery rule—in a situation where a plaintiff has discovered (or should have discovered) his injury but not the pattern of racketeering, the clock starts ticking under the injury discovery rule, but not under the injury and pattern discovery rule.

Lacey, supra note 19, at 306.

forward or being dismissed. As *Rotella* illustrates, a timely claim under the injury plus pattern discovery rule is easily time-barred under the injury discovery rule.[149] In the Third, Sixth, Eighth, Tenth and Eleventh Circuits, circuits that previously applied the injury plus pattern rule, diligent investigation by plaintiffs into the merits of their claims may now be meaningless in the face of a harsher accrual rule. This situation is a hazard of litigation in an area of evolving law like civil RICO, but it is also patently inconsistent with RICO's "private attorney general" approach. Even the most public-minded of private attorneys general may hesitate to expend time and money in litigation when the accrual rules are persistently uncertain.

Because accrual rules can "make or break" a plaintiff's claim, the ramifications of the Court's process of elimination approach are far-reaching. Justice Scalia lamented the *Klehr* approach that left "reduced but unresolved the well-known split in authority that prompted [the Court] to take this case."[150] The Court's decision in *Rotella* does just that.

V. CONCLUSION

The Court's opportunity in *Rotella* to "unravel the mess that characterizes civil RICO accrual decisions"[151] instead resulted in a continuation of the process of elimination approach that initially created the problem.[152] The *Rotella* opinion struck down the "injury plus pattern" rule as incompatible with the Clayton Act, upon which Congress based RICO, and as inconsistent with the limitations period's purpose of ensuring repose and the elimination of stale claims.[153] The Court resolved the existing circuit split by eliminating all but the injury discovery rule from use, but steadfastly refused to articulate the appropriate rule. The result of this approach is continuing, albeit lessened, uncertainty for RICO litigants and lower courts. In *H.J. Inc.*, Justice Scalia remarked that "clarity and predictability in RICO's civil applications are particularly important[]."[154] The Court's process of elimination approach, introduced in *Malley-Duff* and maintained through *Klehr* and *Rotella*,

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[149] *See supra* note 148.

[150] Klehr v. A.O. Smith Corp., 521 U.S. 179, 196 (1997) (Scalia, J., concurring).

[151] Abrams, *supra* note 7, at 70.

[152] Interestingly, some commentators assumed the Court granted certiorari in *Rotella* to definitively comment on the proper accrual rule, or even specifically to reverse the lower court. *See* Frederick B. Lacey, *Civil RICO Updated*, SE28 A.L.I.-A.B.A. 547, 556 (1999) ("[i]t seems likely that *Rotella* will be the Court's vehicle for resolving much or all of the accrual question."); Michael E. Raabe, *RICO to be Clarified and Expanded?*, 42 ORANGE COUNTY L. 34, 36 (2000) (stating "it appears clear to this author that the U.S. Supreme Court took the case to overturn the holding below").

[153] *See Rotella*, 528 U.S. at 555, 557.

[154] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 255 (1989) (Scalia, J., concurring).

frustrates these goals by failing to articulate a definite accrual rule. The Court may simply be waiting for a case with the right facts on which to establish a definite rule. As Justice Louis Brandeis noted in 1932, however, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[155] In *Rotella v. Wood*, the Court's opportunity to realize this sentiment went unfulfilled.

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[155] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

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Saenz v. Roe: The Right to Travel, Durational Residency Requirements, and a Misapplication of the Privileges or Immunities Clause

I. INTRODUCTION

The right to travel is a constitutional right without a constitutional home.[1] In the 1999 case of *Saenz v. Roe*,[2] the Supreme Court broke new ground in its efforts find a source for this ubiquitous right. In *Saenz*, the Court struck down a California welfare statute containing a durational residency requirement.[3] In reaching its holding, the Court revived the long-dormant Privileges or Immunities Clause of the Fourteenth Amendment[4] and concluded that it protects the third aspect of the right to travel, i.e., the fundamental right of newly arrived residents to be treated equally with other citizens of that state.[5]

The Privileges or Immunities Clause is something of an enigma in constitutional jurisprudence, receiving only the most limited review from the

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[1] Chief Justice Taney eloquently introduced the concept of the right to travel in *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). The Chief Justice stated:

> For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizen of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

Id. at 492. Since then, the right to travel has been the cornerstone of numerous Supreme Court decisions, but each decision has defined the right to travel differently. *Compare* Crandall v. Nevada, 73 U.S. 35 (1867) (holding that the character of our government provides citizens the right of free movement between States), *with* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that durational residency requirements discriminate against new residents and penalize the right to travel). During the last fifty years, the Court has been particularly active in using the right to travel as a protection of individual liberty, but despite searching the Constitution for the source of this right, the Court has failed to establish any meaningful foundation. *See generally* Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 AM. U. L. REV. 433 (1999) (discussing right to travel jurisprudence).

[2] 526 U.S. 489 (1999).

[3] *Id.* at 507.

[4] The Privileges or Immunities Clause should be contrasted with the Privileges and Immunities Clause. The Privileges and Immunities Clause provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1. This provision applies to a resident of a state while she is temporarily in another state. *See, e.g.*, *Saenz*, 526 U.S. at 501-02.

[5] *Id.* at 502-04.

Court.[6] Legal commentators have criticized the *Slaughter-House Cases*[7] for fostering this neglect by essentially reading the Clause out of the Constitution.[8] Consequently, the reintroduction of the Privileges or Immunities Clause in *Saenz* has been praised as portending a new era in constitutional law.[9]

The term "privileges or immunities" is familiar to constitutional scholars.[10] The phrase has traditionally been limited to fundamental rights and has never been interpreted to require equal citizenship.[11] To reach a contrary conclusion, *Saenz* depended upon dicta from the majority and dissenting opinions in the *Slaughter-House Cases*.[12] A careful reading of that opinion, however, reveals that the Court did not interpret the Privileges or Immunities Clause to require equal citizenship with respect to every public benefit; nor did the Court conflate citizenship and the right to travel.[13] Accordingly, this note argues that *Saenz* conflicts with the existing case law and original meaning of "privileges or immunities." Consequently, the rebirth of the Privileges or Immunities Clause is best viewed with a jaundiced eye.

Part II briefly discusses the ratification of the Fourteenth Amendment and the Court's decision in the *Slaughter-House Cases*. Part II concludes by examining the right to travel cases that preceded *Saenz* to provide an understanding of the issues before the Court. Part III details the facts of the *Saenz* opinion and explores the reasoning of the majority and dissenting opinions. Finally, Part IV criticizes the majority opinion for ascribing to the Privileges or Immunities Clause a meaning that is inconsistent with the language of the Clause and applicable case law.

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[6] *Saenz*, 526 U.S. at 511 (Rehnquist, C.J., dissenting); *see also* Stacey L. Winick, *A New Chapter in Constitutional Law:* Saenz v. Roe *and the Revival of the Fourteenth Amendment's Privileges or Immunities Clause*, 28 HOFSTRA L. REV. 573, 592-93 (1999).

[7] 83 U.S. (16 Wall.) 36 (1872).

[8] *See* Winick, *supra* note 6, at 593 ("Just four short years after the ratification of the Fourteenth Amendment, a sharply divided Supreme Court essentially read the promising Privileges or Immunities Clause out of the Constitution."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1415 (1992).

[9] *See, e.g.*, Winick, *supra* note 6, at 573-74 ("The Saenz opinion substantially altered the Court's constitutional philosophy; privileges and immunities are again alive, and a new era in constitutional law has begun.").

[10] The phrase "privileges or immunities" can be traced back to seventeenth century colonial America, and was a part of the Articles of Confederation. *Saenz*, 526 U.S. at 523-24 (Thomas, J., dissenting). The Framers incorporated the term in Article IV, § 2 of the Constitution, as a guarantee that citizens of one state would be welcome in another state. Corfield v. Croyell, 6 F. Cas. 546, 552 (E.D. Pa. 1823); *Saenz*, 526 U.S. at 525 (Thomas, J., dissenting).

[11] *See Corfield*, 6 F. Cas. at 551-52; *Saenz*, 526 U.S. at 527-28 (Thomas, J., dissenting).

[12] *See Saenz*, 526 U.S. at 513 (Rehnquist, C.J., dissenting).

[13] *See id.* at 513-14 (Rehnquist, C.J., dissenting).

II. BACKGROUND

A. The Privileges or Immunities Clause

In the summer of 1866, the thirty-ninth Congress took its final vote on the Fourteenth Amendment.[14] Its drafters designed the Amendment to end all class legislation, and prohibit states from enacting codes that subjected African-Americans to rules and restrictions not applicable to whites.[15] Congress hoped to undo the invidious discrimination some states practiced against African-Americans in the wake of the Civil War.[16] To accomplish that end, Congress passed the Fourteenth Amendment, and, with some cajoling, it was soon ratified.[17] Section 1 provides:

> 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.[18]

Four years after ratification, the Court handed down its first interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases*.[19] The controversy arose in 1869, when the Louisiana Legislature incorporated the Crescent City Livestock Company and granted it the exclusive privilege to erect a slaughterhouse in New Orleans, which would be open to all at set fees.[20] The Act required that butchers within a three-parish area around New Orleans use this slaughterhouse for the butchering of animals.[21] Several butcher's associations challenged the Act, arguing that it violated the Privileges or Immunities Clause, because the Act deprived them of the right to pursue their chosen calling.[22]

The Court held that the Act did not deprive the butchers of the right to pursue their trade, but rather imposed restrictions consistent with the legislature's power to regulate the slaughtering industry.[23] Because the Court concluded that the state legislature had ample authority to create the

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[14] Harrison, *supra* note 8, at 1387.
[15] *Id.* at 1402-14.
[16] *Id.*
[17] *Id.* at 1387.
[18] U.S. CONST. amend. XIV, § 1.
[19] 83 U.S. (16 Wall.) 36 (1872).
[20] *Id.* at 58.
[21] *Id.*
[22] *Id.* at 60.
[23] *Id.* at 64-66.

monopoly, the only remaining issue was whether the Fourteenth Amendment circumscribed the states' power to enact such measures.[24] The Court examined the text and history of the Privileges or Immunities Clause and reasoned that the language and context of the Amendment establish that it guarantees all citizens the fundamental rights of national citizenship.[25] Because the Court held that the right to pursue a lawful trade was a state-created right, the Privileges or Immunities Clause could not safeguard its exercise against state regulation.[26]

Legal commentators have criticized the *Slaughter-House Cases* for incorrectly interpreting the Privileges or Immunities Clause and rendering it little more than a truism.[27] Perhaps for this reason, the Privileges or Immunities Clause and the *Slaughter-House Cases* have received little attention outside academia.[28] In contrast, the courts, commentators and critics have frequently examined the constitutionally unanchored right to travel.[29]

B. The Right to Travel

1. The origin of the right to travel

The right to travel cannot be found in any clause of the Constitution.[30]

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[24] *Id.*

[25] *Id.* at 72.

[26] *Id.* at 77-79. Although acknowledging that it need not define the privileges and immunities of national citizenship, the Court provided a nonexclusive list of the fundamental rights protected by the Privileges or Immunities Clause, which the states cannot abridge. *Id.* at 79. The Court concluded that the Privileges or Immunities Clause protects the right to come to the seat of government, address the judicial tribunals, access the national seaports, peaceably assemble, and petition the courts for a writ of habeas corpus. *Id.* at 79-80. Significantly for the *Saenz* Court, Justice Miller closed the enumeration by stating, "One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State." *Id.* at 80.

[27] *See, e.g.*, Harrison, *supra* note 8, at 1415.

[28] Winick, *supra* note 6, at 593-94. The Privileges or Immunities Clause has remained something of an enigma in Constitutional jurisprudence. There are very few cases interpreting the Clause, and even fewer applying it in any substantive way. *See* Nan S. Ellis & Cheryl M. Miller, *Welfare Waiting Periods: A Public Policy Analysis of* Saenz v. Roe, 11 STAN. L. & POL'Y REV. 343, 347 (2000). Most commentators blame the *Slaughter-House Cases* for the neglect, arguing that the Court essentially read the Privileges or Immunities Clause out of the Constitution. *See, e.g.*, Winick, *supra* note 6, at 593-94.

[29] Nzelibe, *supra* note 1, at 434.

[30] *Shapiro*, 394 U.S. at 630. Article IV of the Articles of Confederation secured the right of citizens to travel from one State to another. Nzelibe, *supra* note 1, at 439 n.39. When the U.S. Constitution was adopted, a truncated version of that Article became Article IV, § 2, which is also known as the Comity Clause. Nzelibe, *supra* note 1, at 439. The Comity Clause "was

Through case law, however, the Court has established the principle that citizens have the right to pass freely throughout the Country.[31] Chief Justice Taney laid the foundation for right to travel jurisprudence in his dissenting opinion to the *Passenger Cases*.[32] The Chief Justice introduced the right to travel, without so naming it, as the answer to a hypothetical question he posed in his dissent, wherein he asked whether a state could tax citizens of another state for crossing its borders.[33] He posited such an action would be unconstitutional because:

> For all the great purposes for which the Federal Government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[34]

Nearly two decades later, the Court adopted and gave force to the Chief Justice's dicta in *Crandall v. Nevada*.[35] In *Crandall*, the Court addressed a challenge to a state statute which imposed a tax upon any person leaving the state by railroad or stagecoach.[36] The Court concluded that as a union of states, the federal government has the power to call its citizens from any point in the nation, and citizens have a concomitant right to access the federal bodies "independent of the will of any State over whose soil he may pass in the exercise of it."[37] The direct tax on interstate travel was therefore unconstitutional, the court held, because it conditioned the power of the federal government and the rights of its citizens upon the will of the state.[38] In doing so, *Crandall* firmly established that states have little authority to prevent free movement across their borders, but instead of grounding this right in the Constitution, the Court based its holding on an amorphous "notion of political unity."[39]

Subsequent decisions enshrined *Crandall*'s free movement principle, but provided little additional guidance. In *Edwards v. California*,[40] the Court

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designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948). These provisions, however, do not address the right of citizens to simply cross State boarders, without State interference.

[31] Nzelibe, *supra* note 1, at 433-34.

[32] The Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting).

[33] *Id.*

[34] *Id.*

[35] 73 U.S. 35, 49 (1867).

[36] *Id.* at 39.

[37] *Crandall*, 73 U.S. at 43-44.

[38] *Id.* at 48-49.

[39] Nzelibe, *supra* note 1, at 434.

[40] 314 U.S. 160 (1941).

addressed a state statute which provided that any person who knowingly brings an indigent nonresident into the state is guilty of a misdemeanor.[41] The Court rested its decision upon the Commerce Clause, and reasoned that "commerce" includes interstate travel and Congress has the primary authority in that regard.[42] Accordingly, the Court struck down the statute because it violated the right of free ingress and egress across state borders.[43]

The Court reached a similar conclusion in *United States v. Guest*.[44] In *Guest*, the Court assessed the validity of a federal criminal indictment against private citizens for conspiracy to deprive African-Americans of the right to use public streets and highways.[45] The Court held that the indictment could be sustained because such interference with the use of roads and highways violates the right to travel, and, under the Commerce Clause, Congress has the power to legislate to protect an individual's right of free movement against private action.[46] Although in *Guest* the Commerce Clause provided the constitutional authority for Congressional action, the Court did not settle upon the Commerce Clause as the source of the right to travel.[47] Consequently, after repeated review and thorough examination, the right to travel remained unsecured.

2. *Durational residency requirements and the right to travel*

Durational residency requirements are state statutes that impose a condition upon the receipt of a public benefit, such as welfare,[48] lower tuition[49] or public employment[50] until the citizen has maintained residency for the prescribed length of time.[51] Durational residency requirements do not place a condition

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[41] *Id.* at 165-66.

[42] *Id.* at 166-67. The Court recognized that states have the power to regulate matters of local concern, even if they affect interstate commerce. *Id.* However, it held that prohibiting the transportation of indigents is not within the police power of the states, and therefore such action is unconstitutional. *Id.* The opinion is narrowly tailored, and the Court was careful to explain that it only decided the "propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory." *Id.* at 167. "The nature and extent of its obligation to afford relief to newcomers" was not before the Court. *Id.*

[43] *Id.* at 166.

[44] 383 U.S. 745 (1966).

[45] *Id.* at 757 n.13.

[46] *Id.* at 758-60.

[47] *Id.* Like *Crandall*, *Guest* is a narrow opinion, which decided only that citizens have a right to use the public roads and highways, and private citizens cannot deny that right. *See id.*; *see also* Saenz v. Roe, 526 U.S. 489, 500 (1999).

[48] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[49] *See, e.g.*, Starns v. Malkerson, 362 F. Supp. 234 (D. Minn. 1970).

[50] *See, e.g.*, Nehring v. Ariyoshi, 443 F. Supp. 228 (D. Haw. 1977).

[51] *See, e.g.*, *Shapiro*, 394 U.S. at 622-27.

on a citizen's entry into the state, and thus do not squarely fit within *Crandall*'s holding. A Commerce Clause approach, like that applied in *Guest* and *Edwards*, is likewise inadequate because durational residency requirements by their nature do not take effect until after a citizen has finished her interstate journey.[52] Consequently, durational residency requirements compelled a new mode of analysis.

In the 1969 case of *Shapiro v. Thompson*,[53] the Court first applied the guarantee of free interstate movement to durational residency requirements.[54] *Shapiro* came before the Court as a consolidation of several cases brought by plaintiffs who had recently moved into various states and the District of Columbia. Each jurisdiction required one-year of continuous residency before becoming eligible for welfare benefits.[55] The cornerstone of the opinion is the Court's conclusion that the durational residency requirements created classes of people and as such raised an issue of equal protection of the law.[56] With a cognizable equal protection claim as a foundation, the Court used a fundamental rights analysis and expanded upon *Crandall*'s free movement principle to give the right to travel effect beyond mere interstate passage.[57] The Court held that moving from state to state is a constitutional right, and "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."[58] After examining the states' justifications, the Court held that they had "utterly failed to demonstrate a compelling interest," and therefore the residency requirements were unconstitutional.[59]

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[52] *See, e.g., id.*

[53] 394 U.S. 618 (1969).

[54] For a thorough discussion of the fundamental shift in jurisprudence that *Shapiro* brought, see generally Winick, *supra* note 6, and Laurence H. Tribe, Saenz *San Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 113-16 (1999).

[55] *Shapiro*, 394 U.S. at 622-27. The states and the District of Columbia passed the legislation pursuant to a Congressional Act, which explicitly authorized the Secretary of Health, Education, and Welfare to approve state assistance plans imposing a durational residency requirement, under the jointly funded Aid to Families with Dependent Children (AFDC) program. *Id.* at 638. Congressional authorization provides another explanation why a Commerce Clause approach would have been inadequate.

[56] *Id.* at 627. Intimating that the states enacted the residency requirements to exclude the poor, the Court decided that the provisions were well suited to that end, but found such a purpose unconstitutional because it violated the fundamental right to travel. *Id.* at 626-29.

[57] *Id.* at 630-34.

[58] *Id.* at 634.

[59] *Id.* at 638. The states justified the waiting period on various grounds, including fiscal integrity, past contributions of residents, administrative predictability, and the prevention of fraud. *Id.* at 635-38. The Court dismissed the proffered justifications, stating that even under traditional equal protection analysis the residency requirements "seem irrational and

Shapiro established that a durational residency requirement violates the Equal Protection Clause if its purpose or effect is to deter interstate travel, but like the preceding decisions, *Shapiro* did not ascribe a constitutional source for the right to travel.[60] Because of this failure, a relatively weak line of inconsistent opinions followed *Shapiro*.[61] Thus, the right to travel remained unanchored, and *Saenz* provided an opportunity to close "one of the modern constitutional sagas—a constitutional home for the so called 'right to travel.'"[62]

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unconstitutional." *Id.* at 638. In a final effort to save the measures, the states cited Congressional approval. *Id.* The Court reasoned that it was not the intent of Congress to expressly approve of such requirements, but merely to allow states to enact them without disqualification from the program. *Id.* at 638-41. Moreover, even if Congress had authorized the one-year waiting period requirement, the Court held that "Congress may not authorize the States to violate the Equal Protection Clause." *Id.* at 641. *Shapiro* appears to establish that any durational residency requirement will be subjected to strict scrutiny because it inevitably "touches on the fundamental right of interstate movement." *Id.* at 638. However, the decision is not as clear as it may seem. Significantly, the Court noted that it implied "no view of the validity of . . . residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth." *Id.* at 638 n.21.

[60] *Id.* at 630. "We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision." *Id.*

[61] Tribe, *supra* note 54, at 120. In two decisions, the Court struck down residency requirements as violations of the right to travel. *See* Dunn v. Blumstien, 405 U.S. 330 (1972), and Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). In *Dunn*, the Court expanded upon *Shapiro* and invalidated a one-year durational residency requirement for voting. *Dunn*, 405 U.S. at 359. In a sweeping statement, the Court held that "[t]he right to travel is an 'unconditional personal right,' a right whose exercise may not be conditioned." *Id.* at 341, citing *Shapiro*, 394 U.S. at 643 (Stewart, J., concurring). Two years later, the Court in *Maricopa County* used more tempered language and invalidated a state law which required that to qualify for free non-emergency medical care, an indigent person must have been a resident of the county for one year. 415 U.S. at 269. In stark contrast to those cases, the Court has found some durational residency requirements do not violate or even implicate the right to travel. *See* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd.* 401 U.S. 985 (1971), and Sosna v. Iowa, 419 U.S. 393 (1975). In *Starns*, the Court upheld a one-year durational residency requirement as a condition for in-state college tuition because the regulation was not enacted to inhibit interstate travel, and there was no evidence of any deterring effects. *See Starns*, 326 F. Supp. at 241-43; *see also* Vlandis v. Kline, 412 U.S. 441 (1973). In a further departure from *Shapiro*, the Court in *Sosna* upheld a durational residency requirement that imposed a one-year waiting period in order to qualify for a divorce. *Sosna*, 419 U.S. at 393. The Court rejected the plaintiff's appeal to apply the right to travel analysis, and held that the residency requirement did not impinge upon the right to travel because a state "may insist the one seeking to initiate a [divorce] have a modicum of attachment to the State[.]" *Id.* at 407.

[62] Nzelibe, *supra* note 1, at 433-34. As discussed, *Crandall* was based on "general notions of political unity." *Id.* at 434. *Edwards* employed a Commerce Clause Approach. *Id.* at 469 n.10. *Guest* essentially avoiding the question, states, "Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate

III. SAENZ V. ROE

A. Facts

In 1992, the California legislature passed a statute which limited a new resident's welfare entitlements to levels she would have received in her former state of residence, until she satisfied a one-year durational residency requirement.[63] On the day that the residency requirement became effective, two recent immigrants to California filed actions challenging the statute as a violation of the right to travel.[64] The district court certified a class, and finding for the plaintiffs, entered a restraining order.[65] Without deciding the merits of the case, the Ninth Circuit affirmed.[66] The Supreme Court granted certiorari,[67] and thirty years after *Shapiro*, again addressed the issue of whether states may

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travel, there is no need here to canvass those differences further. All have agreed that the right exists." United States v. Guest, 383 U.S. 745, 759 (1966). *Shapiro* relied on the Equal Protection Clause and the Due Process Clause. Nzelibe, *supra* note 1, at 469 n.5. Justice O'Connor suggested a Comity Clause approach in her concurring opinion to *Zobel v. Williams*, 457 U.S. 55, 71-81 (1982), even though *Zobel* seemed to mark a retreat from the right to travel. 457 U.S. at 61. The *Zobel* Court declined the plaintiff's request to follow *Shapiro* and stated, "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." *Id.* at 61; *see also* Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

[63] CAL. WELF. & INST. CODE § 11450.03(a) (West Supp. 1999). Pursuant to federal law, California applied for and received approval of the residency requirement from the United States Secretary of Health and Human Services. Saenz v. Roe, 526 U.S. 489, 493 (1999). California, however, did not enforce the residency requirement until Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWOA) in 1996, because a federal district court had issued a temporary restraining order pursuant to a challenge brought by three new residents in 1992. *Id.* at 494-96 (citing Green v. Anderson, 811 F. Supp. 516 (E.D. Ca. 1993)). *Green* reached the Supreme Court; however, the Court was unable to reach the merits of the case because the Secretary's approval was invalidated in a separate proceeding. *Saenz*, 526 U.S. at 495. The PRWOA authorized States receiving grants under the Temporary Assistance to Needy Families (TANF) program to apply to a resident, who had lived in the State for less than one year, the TANF rules of her former State of residence, including benefit levels. 42 U.S.C. § 604 (Supp. II 1994). Thus, the PROWA obviated the need for the Secretary's approval, and § 11450.3 became effective on April 1, 1997. *Saenz*, 526 U.S. at 495-96.

[64] Roe v. Anderson, 966 F. Supp. 977 (E.D. Ca. 1997).

[65] *Id.*

[66] Roe v. Anderson, 134 F.3d 1400, 1401 (9th Cir. 1998).

[67] *Saenz*, 526 U.S. at 498.

impose a durational residency requirements on the receipt of welfare entitlements.[68]

B. The Majority Opinion

In a seven to two decision,[69] the Court held that California's residency requirement was unconstitutional.[70] In reaching its decision, the Court concluded the right to travel is comprised of three distinct components.[71] First, the Court recognized that citizens have a right of free passage between states.[72] Second, the Court observed that the Comity Clause[73] guarantees citizens of one State the right to enter and be welcome in another State.[74] Finally, the Court reasoned that newly arrived citizens have the right to the same privileges and immunities enjoyed by other citizens of the same State.[75] The Court concluded that at issue in *Saenz* was this "third aspect of the right to travel."[76]

Relying entirely upon the *Slaughter-House Cases* the Court stated, "[I]t has always been common ground that [the Privileges or Immunities Clause] protects the third component of the right to travel."[77] Specifically, the Court quoted two passages from the opinion.[78] The Court first cited to the majority opinion in the *Slaughter-House Cases*, which concluded in dicta that the Privileges or Immunities Clause protects the right of citizens of the United States to "become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State."[79] The Court also found support for its conclusion in Justice Bradley's dissenting opinion,[80] where he remarked:

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[68] *Id.*

[69] Justice Stevens authored the majority opinion, in which Justices O'Connor, Scalia, Breyer, Ginsburg, Kennedy and Souter joined. *Id.* at 491.

[70] *Id.* at 510-11.

[71] *Id.* at 500.

[72] *Id.* The Court cited *Edwards v. California*, 314 U.S. 160 (1941), a case in which the Court had invalidated a criminal penalty on transporting indigents across State borders; however, the Court chose not to ground this facet of the right to travel in the Constitution. *Id.*

[73] U.S. CONST. art. IV, § 2, cl.1.

[74] *Saenz*, 526 U.S. at 501-02. The Court correctly held that the Comity Clause protects this facet of the right to travel, and that the protection is not absolute. *Id.*

[75] *Id.* at 502.

[76] *Id.* The Court did not explain which cases establish the third aspect of the right to travel. *Id.* The *Shapiro* line, however, is the only precedent recognizing as much. *See* Winick, *supra* note 6, at 573.

[77] *Id.* at 503.

[78] *Id.* at 503-04.

[79] *Id.* (quoting the Slaughter-House Cases, 83 U.S. 36, 80).

[80] *Id.* at 504.

> The states have not now, if they ever had, [the] power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right. He is not bound to cringe to any superior, or to pray for any act of grace, as a means of enjoying all the rights and privileges enjoyed by other citizens.[81]

Thus establishing that the Privileges or Immunities Clause protects the third aspect of the right to travel, the Court concluded that it must strictly review state action that "discriminates against some of its citizens because they have been domiciled in the State for less than a year."[82] The Court recognized that the residency requirement may only incidentally affect interstate travel, but concluded that this was irrelevant because "the right to travel embraces the citizen's right to be treated equally in her new State of residence, [and therefore] the discriminatory classification is itself a penalty."[83] The Court authoritatively dismissed California's fiscal and administrative justifications,[84] and held that neither a citizen's length of residency in the State, nor the location of her former home "bear any relationship to the State's interest in making an equitable allocation of funds to be distributed among its needy citizens."[85]

C. Dissenting Opinions

1. Chief Justice Rehnquist's Dissent

Chief Justice Rehnquist disagreed with the majority's analysis and holding. He noted that for most of our Country's history, the right to travel prohibited only actual barriers to travel.[86] Because the plaintiffs had completed their journey, and as the majority recognized, the statute posed no actual barrier, the

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[81] *Id.* at 504 (quoting the *Slaughter-House Cases*, 83 U.S. at 112-13).

[82] *Id.* at 504.

[83] *Id.* at 505.

[84] *Id.* at 506. The Court was clearly unimpressed by California's justification that the durational residency requirement would save the State 10.9 million dollars annually. *See id.* However, the Court noted that its opinion did not "rest on the weakness of the State's purported fiscal justification." *Id.*

[85] *Id.* at 507. The Court also cited *Zobel* for the proposition that the Citizenship Clause does not allow for "degrees of citizenship based on length of residence." *Id.* at 506-07 (citing Zobel v. Williams, 457 U.S. 55, 69 (1982)). The Court further held that explicit Congressional approval could not resuscitate the durational residency requirement. *Id.* The Court relied on *Shapiro* for this proposition, because in *Shapiro* the Court had plainly held that Congress may not authorize a Constitutional violation. *Id.* (citing *Shapiro*, 394 U.S. at 641).

[86] *Id.* at 512 (Rehnquist, C.J., dissenting).

Chief Justice concluded that the right to travel was not at issue.[87] In addition, he lamented that the decision called into question the historically important and constitutionally permissible need for bona fide residency requirements.[88] Finally, the Chief Justice stressed that the majority opinion failed to explain why it is permissible to discriminate against new residents who are exercising "the right to educational benefits, the right to terminate a marriage, or the right to vote in primary elections," but not for welfare benefits.[89] Because an increase in welfare recipients will negatively affect a state's budget and the means employed were reasonable, the Chief Justice would have upheld the durational residency requirement as "a permissible exercise of the State's power to 'assur[e] that services provided for its residents are enjoyed only by residents.'"[90]

2. Justice Thomas' Dissent

In a separate dissent, Justice Thomas addressed the majority's failure to consider the historical meaning and application of the term "privileges and immunities."[91] Tracing its use through American colonial and constitutional law, Justice Thomas concluded that the term was properly understood to refer to fundamental rights,[92] rather than "every public benefit established by positive law."[93] Accordingly, "the majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefit[s] appears contrary to the original understanding and is dubious at best."[94] Because the majority failed to ascribe to the Clause its historical meaning, Justice Thomas opined that "the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the predilections of those who happen at the time to be Members of this Court."[95]

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[87] *Id.* at 512.

[88] *Id.* at 516-18 (Rehnquist, C.J., dissenting).

[89] *Id.* at 518 (Rehnquist, C.J., dissenting).

[90] *Id.* at 520 (Rehnquist, C.J., dissenting) (citing Martinez v. Bynum, 461 U.S. 321, 328 (1983)).

[91] *Id.* at 521 (Thomas, J., dissenting).

[92] *See id.* at 520-27 (Thomas, J., dissenting).

[93] *Id.* at 527 (Thomas, J., dissenting).

[94] *Id.* (Thomas, J., dissenting).

[95] *Id.* at 528 (Thomas, J., dissenting) (citing Moore v. Cleveland, 431 U.S. 494, 502 (1977)).

IV. ANALYSIS

The decision invalidating California's durational residency requirement rests on the cases recognizing a "third aspect of the right to travel" and an interpretation of the Privileges or Immunities Clause.[96] The most significant contribution of the *Saenz* opinion to constitutional jurisprudence is the Court's effort to secure the right to travel to the previously moribund Privileges or Immunities Clause.[97] At first glance, the majority's interpretation of the Privileges or Immunities Clause and the *Slaughter-House Cases* law seems logical and appropriate.[98] A deeper reading, however, reveals that *Saenz* is inconsistent with the traditional meaning of "privileges and immunities" and prior case law.[99]

The Privileges or Immunities Clause protects the fundamental rights of national citizenship.[100] The right of interstate travel and the right to establish residency in any state are fundamental rights of national citizenship.[101] These rights, however, are distinct and independent;[102] one is not a component of the other.[103] Moreover, the issue of equal treatment of residents with respect to state-created entitlements is not within the purview of the Privileges or Immunities Clause.[104] In its effort to constitutionalize the right to travel, the *Saenz* Court misapplied the Privileges or Immunities Clause and potentially brought new problems to the jurisprudence.[105]

A. The Historical Meaning of "Privileges or Immunities" is Contrary to the Meaning Ascribed by the Majority in Saenz

The meaning of "privileges or immunities" was well established when the drafters of the Fourteenth Amendment gathered to undo the invidious discrimination practiced against African-Americans.[106] The Comity Clause – a part of the original Constitution – provides: "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several

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[96] *See id.* at 502-03.

[97] *See* Nzelibe, *supra* note 1, at 433-34; Winick, *supra* note 6, at 597.

[98] *See, e.g.*, Winick, *supra* note 6, at 597-98.

[99] *See Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

[100] Slaughter-House Cases, 83 U.S. 36, 97-98 (1872).

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

[102] *Saenz*, 526 U.S. at 513-14 (Rehnquist, C.J., dissenting).

[103] *Id.*

[104] *See Slaughter-House Cases*, 83 U.S. at 77-78.

[105] *See Saenz*, 526 U.S. at 526-28 (Thomas, J., dissenting).

[106] *See Saenz*, 526 U.S. at 526-27 (Thomas, J., dissenting); *Slaughter-House Cases*, 83 U.S. at 97-98 (Field, J., dissenting); *see also* Harrison, *supra* note 8, at 1416-19.

States."[107] In the 1823 case of *Corfield v. Croyell*,[108] Justice Washington authored the leading explication of the Comity Clause. In *Corfield*, the court held that the rights protected by the Comity Clause are confined to "those privileges and immunities, which are, in their nature, fundamental."[109] In defining a "fundamental privilege and immunity," the court reasoned that these rights fall under the general headings of protection by the government, the enjoyment of life and liberty, and the right to acquire property.[110] To the court, these rights were fundamental and required protection because they tended to "secure and perpetuate mutual friendship and intercourse among the people" of the Union.[111] The court held, however, that the Comity Clause does not create rights, and it neither guarantees nonresidents the right to receive all state benefits, nor requires that legislatures regulate the use and access to common property equally among residents and nonresidents.[112]

The proponents of the Fourteenth Amendment repeatedly referred to *Corfield* when explaining the text and effect of the Privileges or Immunities Clause.[113] Moreover, the cannons of statutory and constitutional interpretation provide that words and phrases, which have received judicial construction, should subsequently be understood according to that construction.[114] That is, once a phrase has been interpreted, future courts should adhere to that interpretation. These understandings should instantly narrow any query into which rights the Privileges or Immunities Clause embraces. The Clause cannot be interpreted as creating rights, but rather – like the Comity Clause – it secures fundamental rights, essential to our status as a Union.[115] Securing "privileges and immunities" is not a prohibition against all discrimination, without any consideration of the underlying privilege involved.[116] Consequently, the conclusion reached by the *Saenz* Court – that the Privileges

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[107] U.S. CONST. art. IV, §2, cl.1.

[108] 6 F.Cas. 546 (E.D. Pa. 1823).

[109] *Id.* at 551.

[110] *Id.* at 552.

[111] *Id.*

[112] *Id.*

[113] *See* Saenz v. Roe, 526 U.S. 489, 526-27 (1999) (Thomas, J., dissenting) (noting that the Congress relied on the Comity Clause in drafting the Fourteenth Amendment); the Slaughter-House Cases, 83 U.S. 36, 97-98 (1872) (Field, J., dissenting) (citing to *Corfield* to support his position); *see also* Harrison, *supra* note 8, at 1416-19 (citing examples of senators who had debated the Amendment and relied on the Comity Clause and *Corfield* to explain "privileges or immunities").

[114] ANTONIN J. SCALIA, A MATTER OF INTERPRETATION 27 (1997).

[115] *See Saenz*, 526 U.S. at 527 (Thomas, J., dissenting).

[116] *See id.* (Thomas, J., dissenting).

or Immunities Clause dictates equal treatment between new and old residents – is contrary to the historical meaning of the phrase.[117]

B. The Majority Opinion in the Slaughter-House Cases does not Support Saenz

Writing for the majority, Justice Miller began the analysis by recounting that the purpose of the Fourteenth Amendment was to secure freedom for all former slaves, and to protect their status as citizens against oppression.[118] Although acknowledging that the protections of the Fourteenth Amendment are not limited to African-Americans, the Court cautioned:

> What we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.[119]

Thus, the Court construed the entire Amendment narrowly, and recognized the context of the Amendment's proposal and ratification.

In determining the meaning of "privileges or immunities," the Court in the *Slaughter-House Cases* approvingly examined *Corfield*, and, with *Corfield* as a guide, placed the fundamental rights of national citizenship within the capable arms of the Privileges or Immunities Clause.[120] The Court held that the Privileges or Immunities Clause secures for citizens of the United States the fundamental rights inherent in national citizenship, and consequently it offered no relief for the aggrieved butchers.[121] Because a protected right was not before the Court, it declined to provide an exhaustive list of fundamental national rights.[122] Nevertheless, the Court recorded some such rights to illustrate the character of the "privileges or immunities" protected by the Clause.[123] The first privilege listed is the right to move freely throughout the Country, as described in *Crandall v. Nevada*,[124] without any embellishment or expansion.[125] The Court also included the right to peaceably assemble and the

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[117] *See id.* at 526-27 (Thomas, J., dissenting).
[118] *Slaughter-House Cases*, 83 U.S. at 71.
[119] *Id.* at 72.
[120] *See id.* at 78-79.
[121] *See id.* at 77-79.
[122] *Id.*
[123] *See id.* at 79.
[124] 73 U.S. 35 (1867).
[125] *Slaughter-House Cases*, 83 U.S. at 79.

writ of habeas corpus in its enumeration.[126] Significantly for *Saenz* and this discussion, the Court concluded that one such privilege is "that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."[127] Finally, the Court recognized that the Clause embraces the protections of the Thirteenth and Fifteenth Amendment.[128]

At first blush, the list may not seem to have any logical consistency, but the stated privileges have one important unifying characteristic: the rights enumerated by the Court serve to secure for African-Americans their new freedom against usurpation, and this is consistent with the Court's admonishment at the beginning of its analysis.[129] Moreover, far from recognizing the third component of the right to travel, the *Slaughter-House Cases* Court explicitly affirmed *Crandall*, and then merely established that a state may not create a lesser degree of citizenship, where one group is not afforded the same privileges and immunities, defined as fundamental rights of national citizenship, as another, as was the case with slavery and the Black Codes.[130] Thus, the opinion serves to protect against the creation of a second-class status imposed upon African-Americans, and grants them the liberties necessary to preserve their freedom.[131] It would be a dubious proposition to argue that limiting welfare benefits to new residents is analogous to the invidious discrimination that African-Americans once endured and the Fourteenth Amendment was designed to eradicate. The opinion, moreover, cannot mean that a state is foreclosed from determining for its citizens which positive benefits and civil rights to bestow and in what capacity, because the Court expressly denied that the Privileges or Immunities Clause divested the states of such power.[132] Therefore, the *Slaughter-House Cases* interpreted the Privileges Or Immunities Clause narrowly, and the majority opinion cannot be read as supporting the *Saenz* decision.

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[126] *Id.*

[127] *Id.* at 80.

[128] *Id.*

[129] *See id.* at 72.

[130] *Id.* at 71-72.

[131] *See id.* Thus, the *Slaughter-House Cases* were about more than the right of butchers to pursue their chosen calling. The opinion was about the scope of the Privileges or Immunities Clause and the Fourteenth Amendment in general.

[132] *Id.* at 77.

C. The Dissenting Opinions in the Slaughter-House Cases Likewise do not Support Saenz

Similarly, the *Saenz* Court misinterpreted Justice Bradley's dissent in the *Slaughter-House Cases*.[133] In his dissent, Justice Bradley addressed the issue of whether there was a fundamental right to pursue any lawful employment.[134] He concluded that there was, because a "citizen of the United States has a perfect constitutional right to go and reside in any State he chooses, and to claim citizenship therein . . . and the whole power of the nation is pledged to sustain him in that right."[135] According to Justice Bradley, the statute granting a monopoly to the slaughterhouse violated that right because those butchers who were not members of that guild were not able to pursue the same calling in the same capacity.[136]

When the quotation from Justice Bradley is read in context, it is clear that he interpreted the Privileges or Immunities Clause in a fundamentally different way from the majority in the *Slaughter-House Cases*, and the two opinions cannot be reconciled. The dissent argued that the Privileges or Immunities Clause protects fundamental state-created rights as well as national rights, which affords a protection beyond free interstate movement.[137] That is, according to the dissenting Justices, the Privileges or Immunities required whichever fundamental rights a state provides for one citizen, it must do so equally for all citizens.[138] Therefore, one cannot – as the *Saenz* Court did – conflate the majority and dissenting opinions to support an expansion of the right to travel.

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[133] *Saenz*, 526 U.S. at 503. Justice Bradley also joined Justice Field's dissenting opinion. *Slaughter-House Cases*, 83 U.S. at 111 (Field, J., dissenting). Justice Field argued that the Privileges or Immunities Clause secures for every citizen the fundamental rights belonging to all freemen, regardless of State citizenship. *Id.* at 95 (Field, J., dissenting). However, even Justice Field was quick to add that the "exercise of these rights and privileges, and the degree of enjoyment received from such exercise, are always more or less affected by the condition and the local institutions of the State, or city, or town where he resides." *Id.* (Field, J., dissenting).

[134] *Id.* at 113-14 (Bradley, J., dissenting).

[135] *Id.* at 112-13 (Bradley, J., dissenting).

[136] *Id.* at 113-14 (Bradley, J., dissenting).

[137] *See id.* at 101 (Field, J., dissenting), 113 (Bradley, J., dissenting).

[138] *See id.* at 96-101.

V. CONCLUSION

The *Slaughter-House Cases* and the few subsequent decisions reveal the meaning of the Privileges or Immunities Clause and its effect upon the right to travel.[139] The Clause did not add a new dimension to the right to travel, but merely offers protection for all existing fundamental rights of national citizenship, including the right to move freely between states and to the right to establish residency in any state of the Union.[140] The Privileges or Immunities Clause does not create new rights, and the Court in the *Slaughter-House Cases* adamantly rejected any construction that would have divested states of the power to define and enforce the rights and benefits of state citizenship.[141] Nevertheless, the *Saenz* Court ascribed a different meaning to the Clause, holding that it protects the right of new residents to be treated equally with other residents of the State. Because this is inconsistent with the apparent meaning of "privileges and immunities" and precedent, its revival may—as Justice Thomas fears—in fact portend a new era of creating rights based upon the personal beliefs of the Justices who sit in judgment.[142]

Calvert Chipchase[143]

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[139] *See* Williams v. Fears, 179 U.S. 270 (1900) and Twinning v. New Jersey, 211 U.S. 78 (1908). In *Williams*, the Court recognized that the Fourteenth Amendment protects free movement between States, and held that a tax upon any person who hired laborers for work outside the State was constitutional because it only "incidentally and remotely" affect the right to travel. 179 U.S. at 272-76. In *Twinning*, the Court stated that the Privileges or Immunities Clause protects rights, which "arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution .... [Among those rights is] the right to pass freely from state to state." 211 U.S. at 97. These cases echo the holding in the *Slaughter-House Cases*.

[140] *See Slaughter-House Cases*, 83 U.S. at 77-80.

[141] *See id.*

[142] *See Saenz*, 526 U.S. at 528 (Thomas, J., dissenting).

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United States v. Montero-Camargo Elimination of the Race Factor Develops Piecemeal: The Ninth Circuit Approach

I. INTRODUCTION

Only days after the Court of Appeals for the Ninth Circuit announced its first decision in *United States v. Montero-Camargo*,[1] the case made news.[2] The court had held that race was a relevant factor in determining the reasonableness of an investigatory stop. The two to one panel decision, however, was yoked with animadversion, and on August 25, 1999, the court amended its opinion, replacing the factor it labeled "ethnicity" with the more specific description of "Mexicali license plates and Hispanic appearance."[3] The change was not enough to convince the circuit of the panel's prudence, and an order for an *en banc* rehearing of *Montero-Camargo* was granted on October 25, 1999.[4] The case is the newest addition to the cases examining the reasonable suspicion calculus in an investigatory or *Terry*[5] stop.[6] More significantly, *Montero-Camargo* represents a novel addition to the growing body of cases addressing whether alleged *Terry* stops are pretexts for stops based in whole or in part on race and not reasonable suspicion.[7]

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[1] 177 F.3d 1113 (9th Cir. 1999), *aff'd en banc on other grounds*, 208 F.3d 1122, *cert. denied* 2000 WL 979662 (U.S. Oct. 2, 2000).

[2] *See Court Upholds Ethnicity Factor in Traffic Stops by Border Patrol*, SAN FRANCISCO ASSOCIATED PRESS, http://www.americanpatrol.com/ENFORCEMENT/ethnicstopsokcourt051599.html (May 15, 1999); *If You're Ethnically Brown, You Can be Arrested!*, SAN DIEGO LA PRENSA, *at* http://www.ncmonline.com/commentary/1999-06-04/etharrest.html (May 28, 1999).

[3] United States v. Montero-Camargo, 183 F.3d 1172 (9th Cir. 1999) (*amending* prior decision reported at 177 F.3d 1113 (9th Cir. 1999)).

[4] United States v. Montero-Camargo, 192 F.3d 946 (9th Cir. 1999).

[5] Terry v. Ohio, 392 U.S. 1 (1968).

[6] A *Terry* stop is the ability of "police [to] stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." United States v. Sokolow, 490 U.S. 1, 7 (1989)(citing Terry v. Ohio, 392 U.S. 1 (1968)).

[7] For law review articles taking the position that frisks, stops, or arrests are frequently predicated on race, *see, e.g.*, Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425 (1997) (discussing race as the "real purpose" behind ostensible stops of motorists for minor traffic violations); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677-87 (1994) (arguing that demography propagates racial profiling and that a return to the "probable cause" standard is warranted); David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 4-23 (1994) (asserting that the logical and legal underpinnings of *Terry* have been

Overruling the panel's endorsement of the race factor, the court sitting *en banc* deviated from the law on which it had relied for twenty-five years.[8] The *Montero-Camargo* court analyzed the changes in demographic statistics, and concluded that the probative value of race is no longer significant in investigatory stops.[9] Notwithstanding a timbre of disdain for racial profiling, the practical significance of the Ninth Circuit's decision in *Montero-Camargo* is almost wholly circumscribed by the Supreme Court in *Whren v. United States*.[10] In *Whren*, the Court essentially refused to eradicate the potential for pretext by allowing even the most minor of civil traffic violations to serve as the purported basis for an investigatory stop.[11] Thus, the facial removal of the race factor from the reasonable suspicion calculus has limited application.

This note argues that despite *Montero-Camargo*'s elimination of racial considerations in certain prescribed *Terry* contexts, pretextual stops and stops based on racial profiling will continue. Part II introduces a brief summary of the reasonable suspicion standard and is followed in Part III by an analysis of the *Montero-Camargo* case itself. Part IV.A explores two prior Ninth Circuit cases which may have had an impact on the *Montero-Camargo* decision, and Part IV.B uses "practical application" as a medium to address the breadth of the court's holding.

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largely forgotten, and that such deviation has come at the expense of minorities); Erika L. Johnson, *"A Menace to Society:" The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 657-64 (1995) (examining the prevalence and effect of racial profiling on black males); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 161-90 (1994) (analyzing how the social position of police officers lends itself to the unfettered use of racial profiling); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 311-23 (addressing the Supreme Court's historical nescience to the racial element of traffic stops); *Developments in the Law - Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1494-1520 (1988) (addressing the day-to-day infusion of racial bias in law enforcement and examining how such bias concomitantly undermines social notions of equality).

[8] *See* United States v. Montero-Camargo, 208 F.3d 1122, 1132, 1135 (9th Cir. 2000).

[9] *Id.* at 1130-35.

[10] 517 U.S. 806 (1996).

[11] *Id.* at 810. Petitioners argued that the Court should adopt a higher standard for stops based on routine civil traffic violations and posited that such a stop should turn on "whether a police officer, acting reasonably, would have made the stop for the reasons given." *Id.* According to the petitioners, to hold otherwise would allow for unfettered stops based on race, with such stops disguised in the pretext of minor of traffic violations. *Id.*

II. BACKGROUND

The landmark U.S. Supreme Court decision in *Terry v. Ohio* allowed police, for the first time, to stop a person based on less than probable cause.[12] The general proscription of the Fourth Amendment[13] against unreasonable searches and seizures was thereafter redefined to accommodate the competing interests of law enforcement and the need to use searches that would have previously been defined as unreasonable. "The exception to the probable-cause requirement for limited seizures of the person recognized in *Terry* and its progeny" rests on this balance.[14] The *Terry* stop was originally conceived to allow a police officer to conduct a limited pat-down for weapons if the officer has reason to believe that the person may be armed and dangerous.[15] However, the Court has found the *Terry* stop to be an effective way to allow police to actually detain and search persons who are merely suspected of criminal activity, unencumbered by the requirement of probable cause.[16] The expansion of *Terry* from its arguably limited conception appears to have fallen disproportionately on minorities.

A. The "Reasonable Suspicion" Standard

Terry established that investigatory stops based on less than probable cause are not necessarily "unreasonable" within the meaning of the Fourth Amendment.[17] Cases found to be improper "seizures" within the *Terry* stop context turn on whether the stop "was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[18] This justification need not rise to probable cause sufficient to effect an arrest, but rather, need only be based on reasonable suspicion of criminal activity based on "specific and articulable facts . . . [and] rational inferences from those facts."[19] *Terry* represents the creation of the

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[12] Terry v. Ohio, 392 U.S. 1, 22 (1968).

[13] Unreasonable searches and seizures are prohibited by the Fourth Amendment of the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[14] United States v. Place, 462 U.S. 696, 703 (1983).

[15] *Terry*, 392 U.S. at 23-24.

[16] *See Place*, 462 U.S. at 716-17 (Brennan, J., concurring).

[17] *Terry*, 392 U.S. at 30-31.

[18] *Id.* at 20.

[19] *Id.* at 21.

reasonable suspicion standard and the beginning of an expansion of that standard. The courts, thereafter, have construed *Terry* to apply in a variety of contexts over the last thirty years.[20] In particular, the *Terry* doctrine has been found applicable in automobile contexts, and has been applied in this context by the U.S. Supreme Court as early as 1978.[21]

Interestingly, the *Terry* opinion, itself, foreshadowed the particularly modern racial problem encountered in *Montero-Camargo*. In *Terry*, as in most cases examining possible Fourth Amendment violations, the Court had to decide whether to exclude evidence obtained as part of search and seizure. The police officer in *Terry* uncovered a concealed handgun in both Terry's overcoat and that of codefendant Richard Chilton.[22]

In deciding whether to exclude the handguns pursuant to the exclusionary rule,[23] or to adopt a new standard by which the evidence would remain admissible, the Court found itself making brief inquiry into the arguments supporting application of the exclusionary rule. [24] The defendant argued that if the Court failed to condemn the police conduct in question and employ the exclusionary rule, the Court would be placing its imprimatur on improper encounters initiated by police.[25] Chief Justice Warren, in his discussion of the exclusionary rule, concluded in dicta that "[t]he wholesale harassment by certain elements of the police community, of which minority groups,

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[20] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340-43 (1985) (expanding law enforcement officers' ability to make a *Terry* stop when around or near a school); Michigan v. Summers, 452 U.S. 692, 702-06 (1981) (limiting authority of law enforcement officers to detain persons associated with a premises in the process of executing a search warrant); Florida v. Royer, 460 U.S. 491, 497-01 (1983) (establishing lower threshold of privacy from searches and seizures in airports and other public forums); United States v. Brignoni-Ponce, 422 U.S. 873, 878-83 (1975) (permitting brief stops of vehicles near international borders to question the occupants); Adams v. Williams, 407 U.S. 143, 147 (1972) (allowing an aggressive *Terry* stop based on an unverified tip from a previous informant).

[21] Stephen A. Saltzburg, Terry v. Ohio: *A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 951 (1998).

[22] Terry v. Ohio, 392 U.S. 1, 7 (1968).

[23] BLACK'S LAW DICTIONARY 564 (6th ed. 1990). The exclusionary rule is defined as:

> [C]ommand[ing] that where evidence has been obtained in violation of the search and seizure protections guaranteed by the U.S. Constitution, the illegally obtained evidence cannot be used at the trial of the defendant. Under this rule evidence which is obtained by an unreasonable search and seizure is excluded from admissibility under the Fourth Amendment, and this rule has been held to be applicable to the States.

Id.

[24] *Terry*, 392 U.S. at 12-15.

[25] *Id.* at 13-14. Writing for the majority, Chief Justice Warren revealed that the Court was cognizant of the fact that police harassment without an investigative purpose is more often occasioned upon minorities. *Id.*

particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."[26]

It was, therefore, at least contemplated by the Court that minorities experienced disproportionate police inquiry and intrusion. The opinion did not, however, address the more systemic problem of inappropriate police conduct towards minorities, and only admonished that, "[n]othing we say today is to be taken as indicating approval of police conduct [that is] outside the legitimate investigative sphere."[27] In reality, however, the Court made a deliberate choice not to address the racial underpinnings of the *Terry* case itself.[28] John Terry was African-American, but the Court did not seize on the fact that his race was one of the factors which had aroused the police officer's suspicion in the first place.[29] In failing to consider the racial dimension of the case, the *Terry* doctrine enunciated by the Court would prove only to exacerbate the use of race in the reasonable suspicion calculus, and thus, give rise to modern notions of racial-profiling.[30]

III. UNITED STATES V. MONTERO-CAMARGO

A. Factual Background

On October 15, 1996, a blue Chevrolet Blazer, driven by Lorenzo Sanchez-Guillen, and a red Nissan sedan, driven by German Espinoza Montero-Camargo, were traveling northbound on Highway 86 approximately fifty miles from the California-Mexico border.[31] Nearing an area where a large sign indicated that a police checkpoint was open, the two cars made a U-turn onto the shoulder of the southbound lanes before arriving at the checkpoint.[32] A separate northbound driver observed the cars make the U-turn and informed the border patrol agents at the Highway 86 checkpoint.[33] Agents Brian Johnson and Carl Fisher proceeded southbound from the checkpoint, in

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[26] *Terry*, 392 U.S. at 14-15 (footnote omitted) (emphasis added).

[27] *Id.* at 15.

[28] *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 967-68 (1999) (discussing the Court's choice to use a lexicon devoid of racial terminology, in spite of the fact that witness testimony made specific references to race).

[29] *See id.*

[30] *See id.* at 972-74. (Thompson notes that the *Terry* decision "established a pattern" of handling the potential racial motivations of police officers. The Court's preference to avoid the underlying racial issue ended in *Whren v. United States*, 517 U.S. 806 (1996), when the Court squarely addressed the question.).

[31] United States v. Montero-Camargo, 177 F.3d 1113, 1116-17 (9th Cir. 1999).

[32] United States v. Montero-Camargo, 208 F.3d 1122, 1127 (9th Cir. 2000).

[33] *Id.*

separate marked patrol cars, to investigate.[34] The agents observed the blue Blazer and red Nissan, both bearing Mexicali license plates, pull from the shoulder onto the roadway and drive south.[35] Agent Johnson followed the blue Blazer, driven by Sanchez-Guillen, and noticed that the driver and his passenger, Sylvia Renteria-Wolff,[36] both appeared to be Hispanic.[37] Johnson then pulled over the blue Blazer and inquired about the citizenship of the occupants,[38] at which point Sanchez-Guillen and Renteria-Wolff provided their I-586 cards.[39] Agent Johnson arrested both occupants in the blue Blazer for violating the terms of their entry into the United States[40] and instructed them to drive north to the Highway 86 checkpoint for processing.[41]

While Agent Johnson followed the blue Blazer back to the checkpoint, Agent Fisher continued southbound in pursuit of the accelerating red Nissan.[42] After catching up to the red Nissan, Fisher noticed that the driver was Hispanic.[43] He continued to follow the car for approximately four miles before pulling over Montero-Camargo.[44] Agent Fisher with the assistance of Agent Johnson, who had returned from the checkpoint, searched the trunk of the red Nissan and found two large bags of marijuana.[45] Upon returning to the checkpoint, the agents searched the blue Blazer and found a loaded .32 caliber pistol in the glove compartment.[46] Agent Fisher then searched Sanchez-Guillen and Renteria-Wolff and recovered a .32 caliber ammunition clip in Renteria-Wolff's purse.[47]

Montero-Camargo, Sanchez-Guillen, and Renteria-Wolff were charged with conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. §§ 846 and 841(a)(1).[48] Sanchez-Guillen was also charged with being

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[34] *Id.*

[35] *Id.*

[36] *Id.* at 1127. Renteria-Wolff did not appeal her subsequent conviction for violations of 18 U.S.C. § 922(g)(5) and 924(a)(2) and she was not a party to the appeal in *Montero-Camargo*. *Id.* at 1128 n.7.

[37] United States v. Montero-Camargo, 177 F.3d 1113, 1117 (9th Cir. 1999).

[38] *Id.* at 1122.

[39] *Id.* at 1117. I-586 cards are border-crossing cards issued to individuals who live in border towns along the Mexican/U.S. border, which allow Mexican nationals to travel up to twenty-five miles inside the United States for a period of up to seventy-two hours. *Id.* at 1122.

[40] It is unclear how many miles, in excess of the allowable twenty-five, Sanchez-Guillen and Renteria-Wolff had traveled in violation of their I-586 cards.

[41] *Montero-Camargo*, 208 F.3d at 1127.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1127-28.

[45] *Id.* at 1128.

[46] *Id.*

[47] United States v. Montero-Camargo, 177 F.3d 1113, 1117 (9th Cir. 1999).

[48] *Id.*

an illegal alien in possession of ammunition in violation of 18 U.S.C. § 922(g)(5) and § 924(a)(2) and aiding and abetting the carrying of a firearm during the commission of a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1) and (2).[49] The appellants moved to suppress the evidence based on the fact that the agents did not have reasonable suspicion to stop the vehicles driven by Montero-Camargo and Sanchez-Guillen.[50] The district court denied the appellants' respective motions and Montero-Camargo appealed.[51]

On appeal to the Court of Appeals for the Ninth Circuit, Montero-Camargo contended that the district court had erred, *inter alia*, in: 1) denying appellants' motion to suppress based on a lack of reasonable suspicion by the border patrol agents involved; 2) denying appellants motion to suppress based on a lack of probable cause by the border patrol agent to search the blue Blazer; 3) refusal to dismiss the case for violations of the Speedy Trial Act; 4) refusing to instruct the jury that actual knowledge of an alien's illegal status is a prima facie element of the ammunition possession charge; 5) denying appellants' motion to suppress statements made by Sanchez-Guillen after Agent Johnson had inspected his and Renteria-Wolff's I-586 cards; 6) improper admission of evidence in violation of Federal Rules of Evidence 803(1) and 803(6); and 7) denying appellants' for downward departure based on aberrant behavior.[52] Judge Damrell, writing for the majority,[53] affirmed the district court opinion in all respects.[54] An *en banc* rehearing was granted solely to consider the question of whether the investigatory stop of Montero-Camargo and Sanchez-Guillen was supported by reasonable suspicion.[55]

B. The Majority Opinion

Judge Reinhardt, writing for the *en banc* majority, examined the factors upon which the district court and the Ninth Circuit had relied in denying defendants' motion to suppress.[56] Judge Reinhardt summarized the factors enumerated by the previous Ninth Circuit opinion as "apparent avoidance of a checkpoint, tandem driving, Mexicali license plates, the Hispanic appearance of the vehicles' occupants, the behavior of Renteria-Wolff,[57] the agent's prior

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[49] *Id.*

[50] *Id.* at 1118.

[51] *See id.*

[52] *See id.* at 1118-25.

[53] *See id.* at 1116. Judge Damrell was joined by Judge O'Scannlain. Judge Kozinski dissented.

[54] *See id.* at 1118-26.

[55] United States v. Montero-Camargo, 208 F.3d 1122, 1126 (9th Cir. 2000).

[56] *Id.* at 1131-39.

[57] *Id.* at 1135-37. The Ninth Circuit specifically disagreed that Renteria-Wolff's behavior of "picking up a newspaper after glancing at the patrol car in the rear-view-mirror-was a

experience during stops after similar turnarounds, and the pattern of criminal activity at the remote spot where the cars stopped."[58] On this record, the *en banc* panel rejected the use of Hispanic appearance or ethnicity as a relevant factor "where particularized suspicion or individualized suspicion is required."[59] The court specifically overruled a line of its cases holding that race or ethnicity was, indeed, a relevant factor, and included two examples of such cases.[60] The *Montero-Camargo* case, again, made news for its seemingly novel approach.[61]

In analyzing the reasonable suspicion question, the Ninth Circuit first cited the U.S. Supreme Court's decision affirming the circuit's decision in *United States v. Brignoni-Ponce* for the proposition that ethnicity could not be the dispositive factor upon which an investigatory stop is justified.[62] Secondly, the court relied on its own decision in *United States v. Rodriguez* to highlight the circuit's rejection of profiles that are "likely to sweep many ordinary citizens into a generality of suspicious appearance . . . "[63] Although in *Brignoni-Ponce* the Court suggested, in dicta, that it was still appropriate to utilize ethnicity or race as one of several factors in the reasonable suspicion calculus, the Ninth Circuit in *Montero-Camargo* declined to further endorse this approach. The *Montero-Camargo* decision turned primarily on the dramatic changes in the racial and ethnic composition of the United States.[64] The court found there

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relevant factor in the reasonable suspicion analysis." *Id.* at 1135-36. Acknowledging that the Supreme Court has in the past found evasive behavior to be a pertinent factor in determining reasonable suspicion, the court concluded that Renteria-Wolff's behavior was "not the sort evasive conduct that the Supreme Court has held is properly part of the reasonable suspicion calculus." *Id.* at 1137 (interpreting Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000)).

[58] *Id.* at 1128-29.

[59] *Id.* at 1135.

[60] *Id.* at 1134. The court singled out *United States v. Rodriguez-Sanchez*, 23 F.3d 1488 (9th Cir. 1994) (*overruling of a particular proposition by* Montero-Camargo, 208 F.3d 1122 (2000)), and *United States v. Franco-Muñoz*, 952 F.2d 1055 (9th Cir. 1991) (*overruling of a particular proposition by* United States v. Montero-Camargo, 208 F.3d 1122 (2000)).

[61] *See* U.S. v. Montero-Camargo*: 9th Circuit Rules Hispanic Appearance Not Proper Factor For Finding "Reasonable Suspicion" To Justify Stop*, Immigrants' Rights Update, Vol. 14, No. 4, http://www.nilc.org/immlawpolicy/arrestdet/ad023.htm (July 26, 2000).

[62] United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2000) (citing United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975)).

[63] *Id.* at 1129 (citing United States v. Rodriguez, 976 F.2d 592, 595-96 (9th Cir. 1992)).

[64] *Id.* at 1132-35. In *United States v. Brignoni-Ponce*, the Court appeared to endorse the use of race as one of several factors for a police officer to consider when initiating a stop. One year after *Brignoni-Ponce*, the Court held that it was, indeed, "constitutional to refer motorists selectively" at a fixed checkpoint, on the basis of factors that "would not sustain a roving-patrol stop . . . even if it assumed that such referrals are made largely on the basis of apparent Mexican ancestry." United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976). Avoiding the application of *Martinez-Fuerte* and the dicta in *Brignoni-Ponce*, the Ninth Circuit healthily addressed the significance of the demographic changes, particularly in regard to the Hispanic

was little probative value in a person's race in an increasingly diverse society.[65]

The Ninth Circuit's departure from the operative rule that race is a legitimate factor to be considered by police officers when such consideration is only one of two or more factors[66] has its basis in the court's seeming aversion to racial profiling[67] trends. The court markedly stated:

> Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. Such stops also send a clear message that those who are not white enjoy a lesser degree of constitutional protection - that they are in effect assumed to be potential criminals first and individuals second. It would be an anomalous result to hold that race may be considered when it harms people, but not when it helps them.[68]

The court adopted the doctrine promulgated by the U.S. Supreme Court in affirmative action contexts. Seizing upon the "stigmatic harm" language of the Court's decision in *City of Richmond v. J.A. Croson Co.*,[69] Judge Reinhardt intimated that any use of race or ethnicity as a factor to justify an investigatory stop would be an unconstitutional racial classification.[70] Short of actually applying the strict scrutiny standard, the court in *Montero-Camargo* found that the stigmatic harm attendant to a police stop far outweighs the stigma that may

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population, over the last twenty-five years. The circuit concluded that the demographic information upon which the Court had previously relied was outdated due in part to the exponential increase in Hispanic population since the writing of those opinions. The modern conversion of minorities to majorities, in some cases, allowed the Ninth Circuit to distinguish between race as a potentially legitimate "suspicious" factor in the days of *Brignoni-Ponce* and *Martinez-Fuerte* to a "benign" factor in the era of *Montero-Camargo*. *Montero-Camargo*, 208 F.3d at 1135. The circuit did not limit this application to geographic areas where prior minorities have become majorities, but rather, approached the issue as a national blurring of racial statistics. *Id.* at 1135.

[65] *Id.*

[66] It is unclear whether a multiplicity of factors is required or whether race and one other factor would be sufficient to remain within the confines of *Brignoni-Ponce*.

[67] Racial profiling is defined as "an informally compiled abstract of characteristics thought typical of persons [who commit certain offenses]." David A. Harris, *Driving While Black: Racial Profiling On Our Nation's Highways*, American Civil Liberties Union Special Report, *at* http:// www.aclu.org/profiling/report/ (June, 1992). *See* analysis *infra* section IV.A.

[68] *Montero-Camargo*, 208 F.3d at 1135.

[69] 488 U.S. 469 (1989).

[70] *See id.* at 493. Writing for the majority, Justice O'Connor struck down a Richmond, Virginia affirmative action plan, stating that, "[c]lassifications based on race carry the danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* (citations omitted).

accompany an overbroad affirmative action plan.[71] Under this reasoning, the court declined to answer a broad Constitutional question, but found that a race classification could not be a factor in the individualized reasonable suspicion determination,[72] required by the *Terry* exception to the Fourth Amendment's general requirement of probable cause to justify a search or seizure.[73]

The *en banc* panel also disagreed with the original panel's use of Renteria-Wolff's behavior as an appropriate factor upon which Agent Johnson could rely.[74] The court found that Renteria-Wolff's glance at the following patrol car and picking up of a newspaper thereafter was not suspicious.[75] The court refused to conclude that "such actions [were] the sort of evasive conduct that the Supreme Court has held is properly part of the reasonable suspicion calculus" in *United States v. Wardlow*.[76] However, unlike race, the court allowed the use of furtive behavior, and noted that what constitutes furtive behavior would be factually dependent and turn on the circumstances of a particular case.[77] The court considered this holding to be consistent with its prior decisions.[78]

Judge Reinhardt also examined the Supreme Court's opinion in *Wardlow* as it related to the U-turn made by Sanchez-Guillen and Montero-Camargo on Highway 86. Although the Ninth Circuit had previously frowned upon use of a turnaround as the dispositive factor creating reasonable suspicion,[79] the court was compelled to reconcile its position with what appeared to be an overruling

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[71] *Montero-Camargo*, 208 F.3d at 1135.

[72] *Id.*

[73] *See* United States v. Sokolow, 490 U.S. 1, 7 (1989). In this context, the Fourth Amendment requires "at least a minimal level of objective justification for making the stop." *Id.*

[74] *See supra* note 57 and accompanying text.

[75] *Montero-Camargo*, 208 F.3d at 1136.

[76] *Id.* (citing Illinois v. Wardlow, 528 U.S. 119 (2000)). The court stated:

> We recognize that in its recent decision in *Wardlow*, the Supreme Court noted that evasive behavior may be a 'pertinent factor in determining reasonable suspicion.' However, nothing in *Wardlow* - or the three Supreme Court cases it cites to illustrate that proposition - runs contrary to our conclusion that Renteria-Wolff's conduct provides no basis for reasonable suspicion.

Id.

[77] *Id.* The court examined conduct, such as eye contact, in light of the circumstances of each case. Especially in the case of conduct that may be viewed subjectively, evaluation of the totality of the circumstances is particularly appropriate. *Id.*

[78] *Id.*; *See* Gonzalez-Rivera v. INS, 22 F.3d 1441, 1446 (9th Cir. 1994) (court stated that "[u]nder Ninth Circuit law, a driver's *failure* to look at the Border Patrol cannot weigh in the balance of whether there existed reasonable suspicion for a stop."). *Id.* (emphasis added). In *Montero-Camargo*, the court held that "glancing" at the patrol car could not similarly be weighed in determining reasonable suspicion. *Montero-Camargo*, 208 F.3d at 1136.

[79] *See infra* notes 89, 92 and accompanying text.

by the Supreme Court in *Wardlow*.[80] The court went to great lengths to distinguish its holding, and concluded that a "suspicious" turnaround, similar to that in *Wardlow*, was salient to the reasonable suspicion analysis when combined with other factors. The majority of the *en banc* panel agreed that the U-turn in *Montero-Camargo* was an appropriate factor to consider when combined with the other non-race factors enumerated by the district court.[81]

In affirming the first two to one panel decision in *Montero-Camargo*, the Ninth Circuit examined three other factors which it considered sufficient to justify the investigatory stop, in spite of the prior inappropriate considerations of race and alleged furtive behavior.[82] The court majority characterized the locale of the Highway 86 checkpoint as a "high crime" area, a factor which, although not dispositive, could be considered by the officers in justifying their stop of Sanchez-Guillen and Montero-Camargo.[83] In doing so, the court relied on *Wardlow* and the uniqueness of the Highway 86 area.[84]

In closing, the majority felt that Mexicali license plates and "tandem driving" in a border-crossing area should be given weight in the reasonable suspicion analysis. Thus, while soundly rejecting the use of race, ethnicity, and Renteria-Wolff's furtive behavior, the majority, nevertheless, affirmed the appellants' convictions based on the U-turn, Mexicali license plates, and

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[80] *See Montero-Camargo*, 208 F.3d at 1137. *Wardlow* involved headlong flight, apparently resulting from the suspect's sighting of police officers. The court felt that *Wardlow* could be distinguished from its prior holding in *United States v. Ogilvie*, where the circuit had held that a turnaround could not be the dispositive factor for reasonable suspicion or probable cause purposes. In *Ogilvie*, the suspect made a legal turnaround which could be described as wholly innocuous conduct, in the absence of other factors which might have otherwise rendered the turnaround suspicious. Notwithstanding the majority's application of *Ogilvie*, it found that because the turnaround was properly combined with other factors, it could be considered in the reasonable suspicion calculus in *Montero-Camargo*. The concurrence in *Montero-Camargo* disagreed with such a characterization, and further argued that *Ogilvie* should be overruled in favor of a *Wardlow* type analysis. *Id.* at 1141-42, 1137-38, n.29 (citing United States v. Ogilvie, 527 F.2d 330, 332 (9th Cir. 1975)). *See infra* section III.C.

[81] *Montero-Camargo*, 208 F.3d at 1138.

[82] *Id.* at 1129. The *en banc* majority stated that, "[a]lthough we reach the same result as both the district judge and the panel majority [in the first hearing], we do so on the basis of a more selective set of factors." *Id.*

[83] *See id.* at 1138-39.

[84] *Id.* The court described the Highway 86 area in question as isolated and unpopulated desert. The desolate character of the area allowed the court to make negative inferences regarding the defendants' presence and actions; *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000). The majority in *Wardlow* harkens back to *Terry*, affirming that when a stop occurs in a high crime area, it is a relevant contextual consideration in the *Terry* analysis. Further, the Court in *Wardlow* noted that "officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Id.* (quoting Adams v. Williams, 407 U.S. 143, 144 (1972)).

"tandem-driving."[85] The court concluded that these factors,[86] while not overwhelming, were sufficient to justify the agents' reasonable suspicion for the stop.[87]

C. The Concurring Opinion

The concurring opinion, written by Judge Kozinski[88] does not address the majority's elimination of the race factor from the reasonable suspicion calculus. Judge Kozinski, rather, urged the court to overrule its prior decision in *United States v. Ogilvie*.[89] He described the majority's attempt to distinguish *Ogilvie* from *Montero-Camargo* as unconvincing: "Turning in one's tracks just before reaching a law enforcement checkpoint is precisely the kind of behavior that properly gives rise to reasonable suspicion."[90] Kozinski railed against the court's application of the totality of the circumstances approach, stating that the turnaround in *Montero-Camargo* should have been considered a factor sufficient, in itself, to justify the investigatory stop.[91] The majority, he contended, differentiated between the types of evasion used in *Ogilvie* and *Montero-Camargo* only to superficially distinguish the court's prior holding in *Ogilvie*.[92]

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[85] *Id.* at 1139-40.

[86] *See id.* at 1130. None of the factors upon which the court relied dispositively established reasonable suspicion. The court cited and implicitly relied on an aspect of the *Brignoni-Ponce* decision stating that "sometimes conduct that may be entirely innocuous when viewed in isolation may properly be considered in arriving at a determination that reasonable suspicion exists." *Id.*

[87] *Id.* at 1139-40.

[88] *Id.* (Kozinski, J., concurring). Judge Kozinski was joined by JJ., T.G. Nelson, Kleinfeld, and Silverman.

[89] *Id.* at 1140; *See* United States v. Ogilvie, 527 F.2d 330, 332 (9th Cir. 1975). The court held that the driver in *Ogilvie* made a legal turnaround using an exit ramp, and that although it may have been in avoidance of a police barricade, was not sufficient, in and of itself, to establish reasonable suspicion. *Id.*

[90] *Montero-Camargo*, 208 F.3d at 1140 (Kozinski, J., concurring).

[91] *Id.* at 1141-42 (Kozinski, J., concurring).

[92] *Id.* at 1141 (Kozinski, J., concurring). The disparity between the Reinhardt and Kozinski opinions mirrors the majority and dissent in *Wardlow*. The dissent in *Wardlow*, authored by Justice Stevens, reflects what he considered to be a wise refusal to adopt a *per se* rule endorsing "flight" as a dispositive factor in the reasonable suspicion calculus. Illinois v. Wardlow, 528 U.S. 119, 126 (2000). Judge Kozinski's concurrence in *Montero-Camargo* more closely reflects the Court's majority opinion in *Wardlow*, in which the Court stated, "Headlong flight – wherever it occurs - is the consummate act of evasion: it is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Id.* The majority in *Montero-Camargo* distinguished the *Ogilvie* and *Wardlow* holdings on the basis of whether the suspects' flight was "headlong" or benign, so as to avoid overruling *Ogilvie* and apply *Wardlow* to *Montero-Camargo*. *Montero-Camargo*, 208 F.3d at 1138 n.29.

After addressing *Ogilvie* at length, the concurring opinion briefly reviewed the "high crime area" factor considered by the agents in *Montero-Camargo*.[93] Judge Kozinski, again, criticized the court for so quickly defining the Highway 86 area as high crime, having relied only on the fact that the police agents in question had testified on their successful stop to arrest ratio.[94] Judge Kozinski felt such a liberal application of the "high crime area" factor was an invitation to trouble, allowing police officers to "turn any area into a high crime area based on their unadorned personal experiences."[95] Here, the concurrence argued that if there was enough traffic on Highway 86 to make the government's checkpoint worthwhile, the proffered stop to arrest ratio was comparatively small.[96]

IV. ANALYSIS

A. Arriving at Montero-Camargo

Montero-Camargo appears to be the expected response to a number of cases the Ninth Circuit found particularly troubling. In both 1996[97] and 1999,[98] Judge Reinhardt authored what appeared to be scathing reviews of police action that fell within the gamut of "racial profiling." Cited in *Montero-Camargo*, *Washington v. Lambert*[99] brought the circuit's attention to the seriousness of racial profiling in 1996.

In *Washington v. Lambert*, the circuit addressed the situation of when "an intrusive law enforcement stop and seizure of innocent persons [is made] on the basis of suspicions rooted principally in the race of the suspects."[100] Santa Monica police officer Skystone Lambert encountered George Washington and Darryl Hicks in a fast-food restaurant and believed them to be suspects in a string of robberies.[101] Although, neither Washington nor Hicks accurately fit

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[93] *Id.*

[94] *Id.* at 1141-42.

[95] *Id.* at 1143.

[96] *See id.* Based on an agent's testimony, Judge Kozinski estimated that there was about one arrest every four months in the Highway 86 area. *See id.*

[97] *See* Washington v. Lambert, 98 F.3d 1181 (9th Cir. 1996).

[98] *See* Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000). *Price* was argued about six months prior to arguments before the *en banc* panel in *Montero-Camargo*. Judgment in *Price* was, thereafter, rendered in January 2000 and followed by judgment in *Montero-Camargo* exactly three months later.

[99] *See generally Washington*, 98 F.3d at 1187-90 (condemning acts of police that exceed what is permissible under *Terry*).

[100] *Id.* at 1182 (internal quotation marks omitted).

[101] *Id.* at 1183.

the description of the suspects,[102] Lambert believed that they had exhibited both nervous and casual behavior as he had observed them in the restaurant.[103] Washington and Hicks were both African-American males. Officer Lambert followed the men he considered to be suspects from the restaurant to the parking garage of a hotel.[104] As Washington and Hicks began exiting their car, three or four squad cars, approximately six officers, and a K-9 officer with a police dog also entered the parking garage.[105] The officers, at Lambert's order, shone spotlights on the men, pointed their guns, handcuffed, searched, and subjected them to various other humiliations attendant to such a stop.[106] Washington, in actuality, was a picture editor with Sports Illustrated magazine and Hicks a senior program analyst with the Bank of New York.[107] The two had been visiting Los Angeles from New York and had stopped at the fast-food restaurant to pick up food and take it to their hotel.[108]

Washington and Hicks filed suit under 42 U.S.C. § 1983, for violation of their Fourth Amendment rights.[109] Although Officer Lambert claimed that he had made a valid *Terry* stop and that the doctrine of qualified immunity barred the suit against him,[110] the district court directed a verdict in the plaintiff's favor on all claims.[111] Judge Reinhardt, writing for the Ninth Circuit, affirmed

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[102] *See id.* at 1183. The two suspects were described as being African-American males, one, tall (6'0 to 6'2) and thin (150-170 pounds), and the other was described as being short (5'5 to 5'7) and heavier (170-190 pounds). The suspects were also known to drive expensive get-away cars, as well as a stolen, white Oldsmobile Cutlass. Contrarily, George Washington was 6'4 and 235 pounds, and Hicks was 5'7 ½" and 135-140 lbs. Washington and Hicks were driving a rented Plymouth Dynasty. *Id.* at 1183-84.

[103] *Id.* at 1191-92.

[104] *Id.* at 1184.

[105] *Id.* It is unclear whether the entirety of the police contingency arrived concurrently or at what point the full extent of the force appeared. It is undisputed that at least two squad cars followed Washington and Hicks into the garage. *Id.*

[106] *Id.* at 1183.

[107] *Id.*

[108] *Id.*

[109] Civil Action for Deprivation of Rights, 42 U.S.C. §1983 provides in pertinent part:

> [e]very person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

42 U.S.C. § 1983 (1994).

[110] *See generally* Act-Up!/Portland v. Bagley, 1995 U.S. App. LEXIS 15810, at *12-13 (9th Cir, June 22, 1995). The Ninth Circuit held that police officers were not entitled to qualified immunity for unreasonable strip searches in violation of the Fourth Amendment. *Id.*

[111] *Washington*, 98 F.3d at 1183.

the district court's decision.[112] The court cited numerous cases, law review articles, and statistics that described the pervasiveness of racial profiling.[113] Reinhardt concluded that, at most, Washington and Hicks were two African-Americans, one of whom was short and the other tall.[114] Short of directly stating that the plaintiffs were the victims of racial profiling, the court found that a reasonable juror "would be compelled to find on these facts that the stop was an arrest[,]" outside the penumbra of a valid *Terry* stop.[115]

Judge Kozinski, who later authored the *en banc* concurring opinion in the *Montero-Camargo* case, also wrote a concurring opinion in *Washington*.[116] In *Washington*, Judge Kozinski expressed distaste for the majority's "sociological disquisition on the racial prejudices of police officers."[117] He continued to note that the facts were shown to be amply egregious and that resort to bolstering caselaw was not necessary. The opinions of both Judge Kozinski and Reinhardt would prove to be classic foreshadowing of the *Montero-Camargo* opinions. To the dismay of Judge Kozinski, the "disquisition" would continue unfettered.

Montero-Camargo could be said to be a predictable fallout of *Washington v. Lambert* wherein the court described "articulable suspicion"[118] as subjective and tenuous in nature.[119] In *Montero-Camargo*, the Ninth Circuit used the reasonable suspicion calculus as a medium to address the disparity between

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[112] *Id.*

[113] *Id.* at 1187-88.

[114] *Id.* at 1192.

[115] *Id.*

[116] *Id.* at 1194 (Kozinski, J., concurring).

[117] *Id.* (Kozinski, J., concurring).

[118] *Id.* at 1193. "Articulable suspicion" is synonymous with "reasonable suspicion" which is based upon "reasonable and articulable facts, which taken together with rational inferences from those facts, reasonably warrant intrusion." BLACK'S *supra* note 23, at 1266.

[119] *See Washington*, 98 F.3d at 1193. The court was not alone in its description, as the *Terry* doctrine has been heartily described as overly subjective. In his concurrence in *Brignoni-Ponce*, Justice Douglas agreed that the use of Mexican ancestry to justify a *Terry* stop was unconstitutional and stated that:

> I dissented from the adoption of the suspicion test in *Terry*, believing it an unjustified weakening of the Fourth Amendment's protection of citizens from arbitrary interference by the police. I remarked then:
>
> The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has to commit a particular crime.

United States v. Brignoni-Ponce, 422 U.S. 873, 888 (1975) (citing Terry v. Ohio, 392 U.S. 1, 38 (1968)).

race and the legal basis for an investigatory stop.[120] Because the determination of when a police officer may have articulable suspicion, probable cause, or nothing at all[121] is a subjective calculation, such calculus inherently provides the invitation for racial factors. As in *Washington*, the court dismantled the facially invalid factors upon which officer Lambert allegedly relied, and the court was left only with the height and race factors.[122] Although race may have appeared to be facially legitimate, inasmuch as it correlated with the profile of the robbery suspects,[123] race as a general factor was far too sweeping.[124] Without more, race could not be combined with other generalized factors, such as height, to satisfy the reasonable suspicion calculus. The question, however, remained as to whether race was *ever* an appropriate factor.

Six months before the *en banc* rehearing of *Montero-Camargo*, the circuit was presented with another troubling case involving racial profiling. In *Price v. Kramer*,[125] Judge Reinhardt again opined that the police conduct in question was couched in racial animus.[126] In *Price*, on May 27, 1994, three high school boys were driving home after seeing a movie together.[127] Two of the boys were African-American and the third a Caucasian.[128] The two African-Americans were sitting in the front seat of their car, while the Caucasian was sleeping in the rear seat.[129] While driving through a predominantly white suburb of Los Angeles, a police patrol car began to follow them. After following the boys on the roadway, into a gas station, and back on the roadway, Officers D'Anjou and Kramer pulled the car over.[130] In a succession of police wrongdoing, the officers pointed their guns at the two African-American boys' heads, grabbed and yanked their testicles, and verbally and

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[120] United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000).

[121] *See Washington*, 98 F.3d at 1190. "Washington and Hicks did nothing prior to or during their confrontation with the police to justify Lambert's use of a complete battery of intrusive and threatening procedures in the context of a *Terry* stop." *Id.*

[122] *Id.* at 1192.

[123] *Montero-Camargo*, 208 F.3d at 1134 n.22. Although this exception would appear to have supported the stop in *Washington*, the court further expanded that:

> Even in such circumstances, however, persons of a particular racial or ethnic group may *not* be stopped and questioned because of such appearance, unless there are other individualized or particularized factors which, together with the racial or ethnic appearance identified, rise to the level of reasonable suspicion or probable cause.

Id. (emphasis added).

[124] *Washington*, 98 F.3d at 1191.

[125] 200 F.3d 1237 (9th Cir. 2000).

[126] *Id.* at 1248, 1250-51.

[127] *Id.* at 1241.

[128] *Id.*

[129] *Id.* at 1241.

[130] *Id.* at 1241-42.

physically subjugated them.[131] The officers treated the Caucasian boy in a dissimilar manner, merely inquiring if he knew the African-Americans.[132] After realizing that the boys had not engaged in any criminal activity, the officers cited the African-American driver for an "inoperative turn signal" and the Caucasian passenger for a seat belt violation.[133] The boys returned to their respective homes after the one-hour ordeal.[134] The three families thereafter acted immediately, the court noting that "[o]ne plaintiff's father was an Assistant City Attorney for the City of Los Angeles, another's mother was a lawyer at one of Los Angeles's oldest and largest law firms, and the parent of the third had been a Probation Officer for over ten years."[135] The district court, in a jury trial, awarded the plaintiffs $245,000 and the officers appealed.[136]

Citing *Washington v. Lambert*,[137] the Ninth Circuit brought attention to the fact that *Price* was not an isolated occurrence.[138] In determining whether reasonable suspicion existed to justify the officers' stop, the court quickly dismissed the factors upon which the police had relied, concluding that no justification existed to support the officers' actions.[139] Echoing the overbroad use of race in *Montero-Camargo* and *Washington*, Judge Reinhardt found the basis of the officers' reasonable suspicion in *Price* was, likewise, overbroad.[140] Additionally, because the disparity in the treatment of the African-American boys and the Caucasian boy was so great,[141] the court found that the officers' conduct was likely a product of racial animus.

Importantly, unlike *Washington* and *Montero-Camargo*, neither race nor ethnicity was one of the stated factors upon which the police relied in *Price*.[142] If race was a consideration in *Price*, it was deducible from common sense and

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[131] *Price*, 200 F.3d at 1242.

[132] *Id.*

[133] *Id.* at 1242-43.

[134] *Id.*

[135] *Id.* at 1243.

[136] *Id.*

[137] *Id.*, 200 F.3d at 1256.

[138] *Id.*

[139] *See id.* at 1246-48. The appellants in *Price* claimed that they had pulled the boys over for: 1) passing several gas stations before choosing to stop at the particular one they choose; 2) traveling in a "high crime" area known for gang activity; 3) driving a car registered to a woman not residing in the suburb of their travel; 4) traveling below the speed limit; and 5) driving a car with a broken taillight or turn signal. *Id.* The court concluded that the jury was reasonable in finding that none of the aforementioned factors was credible or were, in most cases, factually untrue. *Id.* at 1248.

[140] *Id.* at 1247-48. "These are the kinds of purely innocent acts which, if made the basis for reasonable suspicion, would leave most any group of youths vulnerable to being stopped at the whim of the police." *Id.* at 1247; *But see supra* notes 56, 76, 80.

[141] *Id.* at 1251.

[142] *See supra* note 122 and accompanying text.

not the officers' testimony as to why they stopped the boys' car.[143] The question therefore remains whether the holding of *Montero-Camargo*, restricting the use of race as a factor in the reasonable suspicion calculus, would change the conduct of the police in *Price*. The likely answer is that when police officers covertly, rather than expressly, consider race in a *Terry* context, the rule in *Montero-Camargo* cannot change the result. In cases such as *Price*, the courts must resort to a close examination of the facts to determine when seemingly legitimate police activity is subterfuge for racism.[144]

Reinhardt cites both *Washington* and *Price* in his *Montero-Camargo* opinion,[145] but these cases do not alone support the holding of the *en banc* majority. The reality of racial profiling by police and the manifestation thereof in cases facing the circuit are *singuli in solidum tenentur*. Particularly in California, where both Judges Reinhardt and Kozinski reside, racial profiling has had far-reaching ramifications. In late 1999, California Governor Grey Davis vetoed a bill aimed at ending racial profiling,[146] although the bill had passed in Assembly by a wide margin.[147] The history of racial profiling in California is a sordid one[148] and has led to the filing of a class action lawsuit against the California Highway Patrol.[149]

Outside California, racial profiling has also garnered widespread attention. Although this casenote does not endeavor to address the phenomenon of racial profiling,[150] profiling was well within the consciousness of the *en banc* jurists when they decided *Montero-Camargo*. In particular, less than one month after the two to one panel decision in *Montero-Camargo*, President Clinton issued

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[143] *Price*, 200 F.3d at 1251. The relevance of racial bias was appropriate to show that "the officers' actions were racially motivated [and] could explain why they stopped the boys' vehicle without probable cause or reasonable suspicion and also why they used excessive force without cause." *Id.*

[144] *See infra* section IV.B.1.

[145] United States v. Montero-Camargo, 208 F.3d 1122, 1135 (9th Cir. 2000).

[146] *See* Rebecca Carroll, *California Governor Vetoes Racial Profiling Bill*, Africana.com, 1999, *at* http://www.africana.com/index_19991008.htm (last visited Sept. 7, 2000).

[147] *See* Ben Stocking & Anne Martinez, *Davis likely to decide racial profiling bill*, San Jose Mercury News, http://www1.mercurycenter.com/local/center/dwb091099.htm (Sept. 10, 1999).

[148] *See, e.g.*, *"Driving While Black" Is Not a Crime . . . So Why Are Incidents Like These Occurring Across the Country?*, American Civil Liberties Union Freedom Network, *at* http://www.aclu.org/profiling/tales/ (last visited Mar. 12, 2001); *See* Harris, *Driving While Black: Racial Profiling On Our Nation's Highways supra* note 67, at 9-10; Greg Lefevre, *'Driving While Black'—racial profiling under study*, CNN.com, *at* http://www.cnn.com/US/9906/02/racial.profiling/ (June 2, 1999).

[149] *See* Rodriguez v. California Highway Patrol, 89 F.Supp.2d 1131 (9th Cir. 2000); ACLU-NC Press Release, *ACLU Files Racial Profiling Lawsuit Against the California Highway Patrol*,http://www.aclunc.org/pressrel/990603-profiling.html (June 03, 1999).

[150] The subject of racial profiling has been healthily addressed by numerous scholars. *See* Thompson, *supra* note 28, at 957 n.1.

an executive order requiring federal law enforcement to collect race and gender statistics on the people whom they stop and question.[151] Also on a federal level, the 106th U.S. Congress passed the Traffic Stops Statistics Act of 1999, requiring the U.S. Attorney General to compile nationwide statistics relating to traffic stops,[152] assumedly to provide a model for states to follow in enacting their own initiatives. The federal action, however, has *not* resulted in analogous state legislation.[153]

The Supreme Court has not remained silent on the issue of racial profiling and in fact, has been considered by some commentators to have fostered the environment in which racial profiling flourishes.[154] In *Whren v. United States*,[155] the Supreme Court resolved a split in the circuits by addressing the constitutionality of pretexts in traffic stops.[156] Justice Scalia delivered the unanimous opinion for the Court, holding that "the Fourth Amendment is not violated when a minor traffic violation is a pretext rather than the actual motivation for a stop by law enforcement."[157] The Ninth and Eleventh Circuits, in contrast, had previously ruled that "a traffic stop was sufficient to constitute probable cause *only* when a reasonable officer would have made the stop."[158] The appellants in *Whren* urged the Court to adopt the standard of the Ninth and Eleventh Circuits, but the Court specifically disavowed the use of the "reasonable officer" test, because such a test would be reserved for violations beyond mere traffic infractions.[159] On balance, the Court felt that "probable cause to believe the law has been broken 'outbalances'"[160] the privacy interests of the citizenry to be free from police intrusion.[161] Justice

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[151] *See* Kevin Galvin, *Clinton executive order targets racial profiling*, The Detroit News, http://www.detroitnews.com/1999/nation/9906/09/06100011.htm (June 9, 1999).

[152] H.R. 1443, 106th Cong. (1999) (enacted).

[153] *See* Carroll, *supra* note 146. (At the time of the printing of this article, only North Carolina had enacted a statute designed to compile statistics to determine the seriousness of the problem.).

[154] *See generally* Kenneth Meeks, DRIVING WHILE BLACK 141 (2000) (referring to the Court's decision in *United States v. Whren*, 517 U.S. 806 (1996)).

[155] 517 U.S. 806 (1996).

[156] David A. Harris, *"Driving While Black" and all Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 548 n.27 (1997); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 310-11 & n.178 (1999).

[157] Rodriguez v. California Highway Patrol, 89 F. Supp. 2d 1131, 1139 (9th Cir. 2000) (interpreting the holding of the Supreme Court in *Whren*).

[158] *See* Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, *supra* note 156, at 310 n.178 (emphasis added).

[159] *Whren*, 517 U.S. at 816-17.

[160] *Id.* at 818.

[161] *Id.* Amici curiae from eleven states, including California, urged the court to affirm in this regard. *Id.* at 807. Interestingly, three years after the state of New Jersey filed an amicus brief

Scalia directed plaintiffs with claims of selective enforcement of the law based on race to seek redress under the Equal Protection Clause and not the Fourth Amendment.[162] Opinions are divided as to whether a claim could survive the equal protection analysis.[163]

B. A Piecemeal Approach in Montero-Camargo

The question remains how disallowing the use of race as a factor in the reasonable suspicion calculus will affect practical law enforcement. In deciding *Montero-Camargo*, the court relied heavily on its prior decision in *United States v. Brignoni-Ponce*.[164] The Supreme Court affirmed the Ninth Circuit's result in that case, stating that "the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished a reasonable grounds to believe that the three occupants were aliens."[165] However, twenty-five years later, *Brignoni-Ponce* lends both the impetus and the justification for the Ninth Circuit's novel holding in *Montero-Camargo*. After dismissing race as an insufficient factor upon which to wholly base an investigatory stop, the *Brignoni-Ponce* Court went on to say that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance [one] relevant factor."[166] The Court later affirmed its position in this regard in *United States v. Martinez-Fuerte*.[167] Judge Reinhardt, in his opinion, considered the Court's endorsement of the race factor in *Brignoni-*

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in the *Whren* case, the U.S. Justice Department prepared to sue the New Jersey State Police for discrimination against minority motorists. *See* Thomas Zolper, *U.S. ready to sue N.J. over racial profiling, at* http://www.bergen.com/news/civiltz199904304.htm (Apr. 30, 1999).

[162] *Whren*, 517 U.S. at 813.

[163] *See* Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, *supra* note 28, at 961 & n.17. Thompson states that:

> It is virtually impossible to prove an Equal Protection Clause violation in these types of cases. Demonstrating that the police stop black motorists in situations where they do not stop white motorists likely would require proof of police conduct over time. In addition, a plaintiff would have to overcome a heavy evidentiary burden in order to surmount discovery limitations.

Id.

[164] 499 F.2d 1109 (9th Cir. 1974).

[165] *Brignoni-Ponce*, 422 U.S. at 885-86.

[166] *Id.* at 886-87.

[167] *See supra* note 64.

Ponce to be dicta,[168] and the circuit would no longer follow the twenty-five years of established jurisprudence.[169]

The Ninth Circuit's majority opinion does not absolutely remove the race factor from all cases involving an investigatory stop. In fact, the court in *Montero-Camargo*, carves out a major exception, allowing race to be validly considered when "the suspected perpetrator of a specific offense has been identified as having such an appearance."[170] The majority, again,[171] entertains the government's claim, "that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut."[172] The circuit allowed such considerations when a suspect has been identified as having such an appearance.[173] Noting that the lower courts have favored a general race factor rather than consider particularized factors,[174] the court left open the question of how to bisect a particularized characteristic from the non-particularized.[175] Thus, it remains unresolved whether haircut or mode of dress may serve as a proxy for alienage.

1. Practical application

The holding in *Montero-Camargo* will not have an effect on the end result in most cases. The rule and exception in *Montero-Camargo* must be applied hypothetically to determine whether the rule would have affected the results

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[168] *See* United States v. Montero-Camargo, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000). Judge Reinhardt noted that notwithstanding the fact that the circuit gives appropriate deference to the dicta of the Supreme Court, the dicta is not binding. *Id.*

[169] *Id.* at 1135.

[170] *Id.* at 1134 n.22.

[171] *Id.* at 1134 n.21. The circuit had been presented with the same contention in *Brignoni-Ponce* twenty-five years earlier. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885 (1975).

[172] *Montero-Camargo*, 208 F.3d at 1134 n.21.

[173] *Id.* at 1134 n.22.

[174] *Id.* at 1134 n.21. The court stated that, characteristic appearances "have been largely ignored by lower courts, in favor of a broader reading of Mexican or Hispanic appearance." *Id.* The court continued, "we do not reject the use of factors such as dress or haircut when they are relevant." *Id.*

[175] *Id.* at 1134. *But see generally* Washington v. Lambert, 98 F.3d 1181, 1190-91 (9th Cir. 1996). The Ninth Circuit held that race must be combined with other descriptive factors to support a reasonable suspicion determination. In *Washington*, race and approximate height alone were not sufficient to support the investigatory stop. *Id.* Thus the court has preemptively narrowed the exception outlined in *Montero-Camargo*. By analogy to *Washington*, it appears unclear whether "race and haircut" or "race and dress" will be sufficient to establish reasonable suspicion. In particular, when the suspects are alien nationals of Mexico, would a particularly Mexican mode of dress be within the exception of *Montero-Camargo*, but above the threshold established by *Washington*?

in particular cases. To begin, it is useful to examine the cases that the *Montero-Camargo* opinion specifically overruled,[176] namely *United States v. Franco-Munoz*[177] and *United States v. Rodriguez-Sanchez*.[178] In *Franco-Munoz*, the court examined the reasonable suspicion calculus, based on seven factors, including: 1) the area was one in which illegal aliens were often transported; 2) failure by Franco-Munoz to acknowledge the border agents' presence; 3) Franco-Munoz's car was a rental car; 4) the investigatory stop occurred during a patrolmen shift change; 5) the driver looked at the patrol car in his rear and side-view mirrors several times; 6) the vehicle appeared to be sluggish or "heavily-laden"; and 7) Franco-Munoz appeared to be Hispanic.[179] Applying *Montero-Camargo*, the police in Franco-Munoz's case would have been prohibited from considering his Hispanic appearance, as well as the acknowledgement or non-acknowledgement of the border agents, inasmuch as they are analogous to Renteria-Wolff's behavior in the *Montero-Camargo* case.[180] Thus, the reasonable suspicion by the agent in *Franco-Munoz* could only be based on time, area, and characteristics of the automobile. Based on precedent, it appears that these factors would still be sufficient to have allowed the agent in *Franco-Munoz* to stop the vehicle.[181]

In *United States v. Garcia-Camacho*, the government argued that the factors in the case were similar to those in *Franco-Munoz*, in which the court did

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[176] *Montero-Camargo*, 208 F.3d at 1134 n.22. The court stated that "To the extent that our prior cases have approved the use of Hispanic appearance as a factor where there was no particularized, individual suspicion, they are overruled. Such cases include, but are not limited to: *United States v. Rodriguez-Sanchez*; *United States v. Franco-Munoz*." *Id.* (citations omitted).

[177] 952 F.2d 1055 (9th Cir. 1991).

[178] 23 F.3d 1488 (9th Cir. 1994).

[179] *Franco-Munoz*, 952 F.2d at 1057.

[180] *See supra* notes 57, 75, 76 and accompanying text.

[181] Factors such as time, area, and characteristics of the automobile may each be sufficient in and of themselves to provide reasonable suspicion for the police to pull over an automobile. In *Montero-Camargo*, Judge Reinhardt revisited the Court's opinion in *Brignoni-Ponce* to illustrate the sufficiency or insufficiency of particular factors. He stated:

> In *Brignoni-Ponce*, the Court listed factors which officers might permissibly take into account in deciding whether reasonable suspicion exists to stop a car. Those factors include: (1) the characteristics of the area in which they encounter a vehicle; (2) the vehicle's proximity to the border; (3) patterns of traffic on the particular road and information about previous illegal border crossings in the area; (4) whether a certain kind of car is frequently used to transport contraband or concealed aliens; (5) the driver's "erratic behavior or obvious attempts to evade officers;" and (6) a heavily loaded car or an unusual number of passengers . . . "subsequent interpretations of these factors have created a highly inconsistent body of law," and we have given them varying weight in varying contexts.

Montero-Camargo, 208 F.3d at 1130 (citations omitted).

affirm a conviction of the appellant.[182] Judge Tang, writing for the panel, held that the border patrol agent lacked probable cause[183] and distinguished the case based on the above factors in *Franco-Munoz*.[184] These time, area, and automobile characteristics are the exact factors which withstood the application of the rule in *Montero-Camargo*. Although Judge Tang continued to give weight to the appellant's glances in the rear and side-view mirrors,[185] without the race and furtive behavior factors in *Franco-Munoz*, it appears that the conviction would stand by analogy to *Garcia-Camacho*. Therefore, the outcome in *Franco-Munoz* would probably not have been affected after removing the race factor in accordance with *Montero-Camargo*.

In a similar vein, the Ninth Circuit considered the race factor in *Rodriquez-Sanchez*.[186] The border agent in *Rodriquez-Sanchez* based his reasonable suspicion on the fact that: 1) Rodriquez-Sanchez abruptly exited the highway in an erratic manner; 2) location of the observance by the officer took place in an area "notorious for alien smugglers"; 3) lack of acknowledgement between Rodriquez-Sanchez and the border agents; 4) the type of car involved was one favored by alien smugglers; and 5) Rodriquez-Sanchez was Hispanic.[187] Again removing the third and fifth factors as demanded by the holding in *Montero-Camargo*, the court is left with factors that would also appear to withstand the reasonable suspicion analysis as promulgated by the Ninth Circuit.[188] In particular, the facts in *Rodriquez-Sanchez* bear a striking resemblance to the remaining factors in *Montero-Camargo* after the race and behaviorism factors were removed. On the basis of the evasive movement and location of the incident, the outcome for Mr. Rodriquez-Sanchez would likely remain unaffected by the seemingly novel approach in *Montero-Camargo*.

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[182] United States v. Garcia-Camacho, 53 F.3d 244, 248 (9th Cir. 1995). The government argued that "the instant case is indistinguishable from *Franco-Munoz*." *Id.*

[183] *Id.* at 249.

[184] *Id.* at 248-49. In distinguishing the factors presented, the court stated that *Garcia-Camacho* differed from *Franco-Munoz* because: 1) ". . . the defendants here were not driving a rental car;" 2) "[T]here is no evidence that the agents were in the process of a shift change;" 3) "[T]here is no evidence that the defendants looked several times at the patrol car in their rear-view mirror and side view mirror;" and 4) "[T]he vehicle in *Franco-Munoz* was a car, which appeared heavily ladened even though it had only one passenger in it." *Id.* at 249.

[185] *See supra* notes 57, 75, 76 and accompanying text.

[186] 23 F.3d 1488 (9th Cir. 1994).

[187] *Id.* at 1493.

[188] *See* United States v. Hernandez-Alvarado, 891 F.2d 1414, 1416 (9th Cir. 1989) (citing United States v. Cortez, 449 U.S. 411, 416-18 (1981)). Reasonable suspicion must consist of "specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained in engaged in criminal activity." *Id.* (citations omitted).

2. The breadth of the holding of Montero-Camargo

It should come as no surprise that the results in both *Franco-Munoz* and *Rodriquez-Sanchez* would not change after applying *Montero-Camargo*, as the removal of the race factor from *Montero-Camargo* itself, did not change the circuit's affirmance of the appellant's conviction.[189] This may lead one to wonder whether consideration of the race factor is merely perfunctory when combined with other factors. The problem herein lies when a police officer or agent uses the race of the suspect in the practical application of reasonable suspicion, but does not record such usage.[190] The rule in *Montero-Camargo* cannot defeat that of the Supreme Court's holding in *Whren*. In *Whren* the Court refused to address the potential of police officers using a minor traffic violation as the basis of a *Terry* stop, when in actuality, the stop may be based "on decidedly impermissible factors, such as the race of the car's occupants."[191] Possibly inconsistent with its holding in *Montero-Camargo*, the Ninth Circuit has also subscribed to the view that minor traffic violation may serve as a basis for a stop, notwithstanding the potential for pretext. The year after *Montero-Camargo* the circuit held in *United States v. Ettress*[192] that a minor traffic violation was a proper basis for an investigatory stop, in spite of Ettress' claims that the stop was unconstitutional for lack of probable cause.[193]

Disallowing a police officer to consider race or ethnicity does not solve the problem upon which racial profiling is partially based: picking the suspect and then searching the law books to find an offense.[194] Because racial profiling involves a basic "untruth,"[195] race can be added or subtracted from the equation without an effect on the outcome of an investigatory stop, albeit the

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[189] *See* United States v. Montero-Camargo, 208 F.3d 1122, 1140 (9th Cir. 2000).

[190] *See supra* notes 113 & 132 and accompanying text. The problem hearkens back to that encountered in *Price*, wherein every conceivable violation was disingenuously presented as a pretext for the actual basis of the stop, which the court concluded was racial animus. Price v. Kramer, 200 F.3d 1237, 1246-48 (9th Cir. 2000).

[191] Whren v. United States, 517 U.S. 806, 810 (1996).

[192] 2000 U.S. App. LEXIS 20211 (9th Cir. Aug. 10, 2000).

[193] *See id.* at *2-3. A broken taillight violation served as the basis for the police stop.

[194] Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, *supra* note 156, at 303. Harris notes that:

> [w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not the question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him . . .

Id.

[195] *Id.* at 299. Harris describes the pretextual traffic stop as an "untruth" because of the high odds that the violation is not the "real reason" the officer had stopped the particular driver. *Id.*

likely impetus for the stop.[196] Although we may be quick to applaud the Ninth Circuit in *Montero-Camargo*, the general effect of the decision is probably negligible.

The limited impact of *Montero-Camargo's* holding is further limited by its own exception. In *Choi v. Gaston*,[197] a case decided by the Ninth Circuit four months after the *en banc* rehearing of *Montero-Camargo*, the exception was applied. The panel reversed the district court's grant of summary judgment in favor of defendants,[198] holding that there was sufficient evidence to create a jury question as to whether the police had both reasonable suspicion or probable cause to stop Choi.[199] Choi was mistaken for a suspect in a police murder investigation, and pursuant to such misidentification, was held at gunpoint, handcuffed, verbally abused, and taken into custody.[200] The suspect had been described as a male Vietnamese by the name of Phu Nguyen, who was "5'10", Black [hair], Brown [eyes], eighteen years old, wearing a white T-shirt and black pants."[201] The officers encountered Choi about one-fifth of a mile from the crime scene and believed he fit the description of the suspect, although Choi, by contrast, is Korean, thirty-two years old, 5'7", 145 pounds, and was wearing a striped white shirt and blue jeans.[202] In his concurring opinion, Judge Noonan stated that there "was sufficient evidence to go to the jury on whether the Anaheim police had enough to justify a *Terry* stop and on whether they had conducted a *Terry* stop."[203] The facts of the case lend support to the theory posited by Judge Noonan, that the police had performed a stop and effective arrest based on a racial stereotype.[204] Judge Noonan concluded by stating that "we . . . expect more of police moving in a community of many ethnicities."[205]

The real life result in *Choi* could not have been avoided by the application of the court's reasoning in *Montero-Camargo*.[206] *Choi* more closely resembles

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[196] *Id.*

[197] 220 F.3d 1010 (9th Cir. 2000).

[198] Choi v. Gaston, 220 F.3d 1010, 1013 (9th Cir. 2000). Defendants included Randall Gaston, Anaheim Chief of Police, the City of Anaheim, the California Highway Patrol, and fifteen other police officers in their official capacity.

[199] *Id.* at 1012.

[200] *Id.* at 1014.

[201] *Id.* at 1013 (bracketed portions from the original).

[202] *Id.* at 1014.

[203] *Id.* at 1015-16.

[204] *Choi*, 220 F.3d at 1016.

[205] *Id.*; *See* ACLU Newswire, *Federal Appeals Court Orders Trial on Racial Profiling Charge by Korean Man in Anaheim*, http://www.aclu.org/news/2000/w080900a.html (Aug. 9, 2000).

[206] The application of *Montero-Camargo* may be unremarkable, as the *Choi* case was decided four months after the Ninth Circuit's *en banc* opinion. Assumedly, the district court

the facts of *Washington*, where police were looking for suspects identified by a particular description. In both cases, the police did not accurately match the profile with the apprehended plaintiffs.[207] The stop of Yong Ho Choi falls expectedly within the exception outlined in *Montero-Camargo*, permitting police to consider race when tied to other descriptive characteristics.[208] *Montero-Camargo* continues to permit police officers to use the race factor in the reasonable suspicion calculation when race is combined with one or more "particularized" factors, the quantum of which need only be modest.[209] In light of the fact that the police considered Choi's race in addition to his height, clothing, age, and location, Choi would find no solace in the rule of *Montero-Camargo*. Although the circuit appeared to be enthusiastic about ending improper race considerations, *Choi* and *Washington* appear to support the conclusion that *Montero-Camargo* will not have an effect on the phenomenon of racial profiling when such profiling is linked to any type of suspect description.

In the only reported case in which a criminal defendant has asserted a defense based on *Montero-Camargo*, the U.S. District Court for the Southern District of New York denied the defendant's motion to suppress evidence.[210] In *United States v. Bridges*, the court stated:

> It is understandable that Bridges and McKenzie believed, at the time of the October 15 stop, that they had been stopped solely because they are young African-American men. The men had no way of knowing that law enforcement had conducted an investigation for more than a week and had been surveilling them for more than six hours prior to the stop. But surely at the second stop, they should have realized that Agent Smith was "on to them" and that the stop had nothing to do with race, and everything to do with PCP. It is clear that law

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or circuit panel would have applied the rule in *Montero-Camargo* had it been appropriate. For scholarly purposes, *Choi* reveals the limitations of the *Montero-Camargo* opinion.

[207] *See Choi*, 220 F.3d at 1012. The court described the disparity that:

> [w]hen the officers first apprehended Choi they were presented with the following facts: (1) Choi was next to a man who was seen running from the direction of the CHP vehicle the suspect stole from his victim; (2) Choi's clothing was similar to the suspect's, although not identical; (3) Choi was shorter and significantly older than the suspect; (4) Choi was Korean while the suspect was Vietnamese. When defendants took Choi into "custody," only minutes later, they removed Choi's wallet and discovered that his name did not match the suspect's.

[208] *See supra* note 170 and accompanying text.

[209] *See* United States v. Montero-Camargo, 208 F.3d 1122, 1134 nn.21-22. Judge Reinhardt used "haircut" and "mode of dress" as examples of other descriptions which might be considered in conjunction with race to establish the propriety of an investigatory stop. *Id.* Such a reference could be read as indicating that the quantum of the additional characteristic need only be modest.

[210] *See* United States v. Bridges, 2000 U.S. Dist. LEXIS 11737, *1 (S.D.N.Y. Aug. 15, 2000).

> enforcement did not believe the defendant fit a "racial profile" but rather a drug-trafficking profile.[211]

In the majority of cases, where the police have not done any prior investigation, would Bridges and McKenzie have been wrong? If the court were to have applied *Whren* to "furnish the minimal level of objective justification needed for a detention or seizure,"[212] the court could have, likewise, made quick mince-meat of the *Montero-Camargo* defense. The decision in *Montero-Camargo* appears to be couched in the Ninth Circuit's disdain for racial profiling,[213] and although the exclusion of race considerations in certain circumstances may have a timbre of judicial activism, the reach of such a holding may be severely limited. Assertions that an officer has relied on race in her determination to effect an investigatory stop are rare. Race, more probably, will be the subtext of many factors, for which racial animus can only be uncovered after voiding the credibility of (almost all) the factors purported to have been relied upon.[214]

IV. CONCLUSION

Montero-Camargo may be novel in two respects: first, for effectively abandoning the race factor in certain types of *Terry* stops, and second, for highlighting the fact that no amount of law-making can defeat social truths.[215] In light of *Whren*, scholars have resorted to flimsy claims under the Equal Protection Clause[216] or sought remedies by legislative intervention and

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[211] *Id.* at *17.

[212] Florida v. Bostick, 501 U.S. 429, 437 (1991).

[213] *See Montero-Camargo*, 208 F.3d at 1135-39 & n.n.24, 31. (citing Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L.REV. 956, nn.1-3 (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 554-71 (1997); Davis, *Race, Cops, and Traffic Stops*, *supra* 7, at 431-32 nn.41-51; Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, *supra* note 156, at 265; Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, *supra* note 156, at 559-71; David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, *supra* note 7, at 677.

[214] *See generally* Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000) (the court spent a large part of its analysis sifting through pretextual reasons why the officers had pulled over the plaintiff's car).

[215] *See generally* Martin Schram, *Racial profiling is unacceptable- and we all do it*, Scripps Howard News Service, http://www.naplesnews.com/today/editorial/d10545a.htm (June 10, 1999) (arguing that "racial profiling" is part of a natural assumptive aspect of human interactions, notwithstanding the fact that such assumptions may be unfounded).

[216] *See supra* note 163 and accompanying text.

policymaking.[217] The federal initiatives to keep statistics on traffic stops should provide some insight as to how to address the problem. The *Whren* decision in 1996 preceded the national interest in racial profiling and as a result, may have been out of touch with the reality and prevalence of the problem. Nevertheless, the Supreme Court has not spoken solely to this effect in *Whren*, but has steadfastly increased police discretion over vehicles and drivers for the last twenty years.[218] In lieu of abandoning or altering *Terry*, the courts have apparently decided either that bad faith stops can never be eliminated or that the disproportionate impact on minorities is an acceptable tradeoff. Thus, the likely answer will come through legislative action.

Although it remains to be seen whether disallowing police to consider the race factor will result in significant change, it is likely that *Montero-Camargo* represents the case when judicial good intentions fall, sadly, to waste. In the courtroom before *Montero-Camargo*, the officer might have felt free to explain that he or she had pulled over the particular driver in question because of a traffic violation, some suspicious behavior, and the driver's race. In the same courtroom after the decision in *Montero-Camargo*, the officer's response will be that he or she pulled over the driver because of a traffic violation and some suspicious behavior. Race will remain the subtext for the stop of the driver and the result will be the same.

Ian H. Hlawati[219]

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[217] *See* Thompson, *supra* note 28, at 960-61 (exploring disparate reactions in the wake of *Whren*).

[218] Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters* *supra* note 156, at 312.

[219] J.D. Candidate, May 2002, William S. Richardson School of Law, University of Hawai'i. Special thanks for the thoughtful comments of Professor Virginia E. Hench, Professor Hazel G. Beh, Professor Mark J. Bennet, and the 2000 University of Hawai'i Law Review Editorial Board.

Implementing *Olmstead v. L.C.*: Defining "Effectively Working" Plans for "Reasonably Paced" Wait Lists for Medicaid Home and Community-Based Services Waiver Programs

I. INTRODUCTION

More than 3.8 million non-institutionalized Americans have been diagnosed with mental retardation, developmental disabilities ("MR/DD"),[1] or both.[2] The

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[1] The term "mentally retarded," for the purposes of Medicaid eligibility, means persons who "have an IQ of 59 or less, or persons who have an IQ of 60-69 who have physical and mental impairments that impose significant work-related limitations." STEVEN LUTZKY ET AL., REVIEW OF THE MEDICAID 1915(C) HOME AND COMMUNITY BASED SERVICES WAIVER PROGRAM LITERATURE AND PROGRAM DATA: FINAL REPORT 15 (June 15, 2000) [hereinafter HCBS WAIVER PROGRAM REP. 2000], http://www.hcfa.gov/medicaid/hcbsprog.pdf (last modified Aug. 3, 2000).

The term "developmentally disabled" refers to persons who have a developmental disability, defined by federal law as:

> [A] severe, chronic disability . . . that—
> (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
> (B) is manifested before the individual attains age 22;
> (C) is likely to continue indefinitely;
> (D) results in substantial functional limitations in three or more of the following areas of major life activity—
> (i) self-care;
> (ii) receptive and expressive language;
> (iii) learning;
> (iv) mobility;
> (v) self-direction;
> (vi) capacity for independent living; and
> (vii) economic self-sufficiency; and
> (E) reflects the individual's need for a combination . . . of special . . . services, supports, or other assistance that is of lifelong or extended duration and is individually planned and coordinated . . . .

Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1994, Pub. L. No. 103-230, 108 Stat. 284 (1994) (definition codified as amended at 42 U.S.C.A. § 15002 (West 2000)); *see also* Res. & Training Ctr. on Cmty. Living, Univ. of Minn., *Prevalence of Mental Retardation and/or Developmental Disabilities: Analysis of the 1994/1995 NHIS-D*, 2 MR/DD DATA BRIEF 5 (Apr. 2000), *available at* http://rtc.umn.edu/nhis/pubs.html.

[2] *Id.* Put another way, this means that there are 14.9 non-institutionalized individuals with MR/DD for every 1,000 people in the United States. *Id.* The total number of people with MR/DD in the United States, in all settings, is estimated at 4,132,878 or 15.8 individuals for

concept of providing "community-based services,"[3] care and treatment that helps these individuals live in their communities, as opposed to living in institutions, is not new. States began experimenting with community care as early as the 1950s.[4] By the 1970s, communities across the nation embarked upon ambitious "deinstitutionalization" programs aimed at "eliminat[ing] the

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every 1,000 people in the United States. *Id.* at 8. The total was calculated by adding the number of individuals with MR/DD in "institutional" settings (i.e., nursing homes, psychiatric facilities, or other institutional settings with four or more residents), as reported by state agencies, to the total number of non-institutionalized individuals. *Id.*

The *Prevalence* report "uses the National Health Interview Survey's Disability Supplement (NHIS-D) to estimate the prevalence of mental retardation and/or developmental disabilities among the non-institutionalized population of the United States." *Id.* at 1. "Prevalence refers to the proportion of persons in a population who have a particular condition, illness, or status." *Id.*

> Because definitions of mental retardation and developmental disabilities presume the need for assistance, prevalence estimates help identify the number of people who may be expected to need assistance . . . [and] assist in identifying the status, needs, and challenges of such groups. Prevalence estimates provide an important statistical context to efforts within a society to plan and provide for groups of interest.

Id. at 2.

[3] "Community-based services" are defined as "long-term support services for people who need help with activities of daily living outside of large state institutions or nursing homes and in their own homes and communities." DEWAYNE DAVIS ET AL., NAT'L CONF. OF STATE LEGISLATURES, DEINSTITUTIONALIZATION OF PERSONS WITH DEVELOPMENTAL DISABILITIES: A TECHNICAL ASSISTANCE REPORT FOR LEGISLATORS (2000) [hereinafter NCSL REPORT], http://www.ncsl.org/programs/health/Forum/pub6683.htm (last visited Sept. 19, 2000). Community-based care emphasizes "quality of life issues: presence in the community; health and safety; personal growth and opportunity; and self-determination." *Id.*

> Community-based services include the following types of services, provided in community settings:
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> - *Residential services and supported living facilities*, including community-based residential placements in supervised apartments or group homes with case manager visits.
> - *Personal assistance services* (PAS), including a range of human and mechanical assistance for those people of any age who require help with routine [activities of daily living] and health maintenance.
> - *Care planning and case management*, including a comprehensive assessment by a case manager and people with disabilities of their individual needs and the network of aid agencies and programs appropriate for providing care.
> - *Day programs*, including placement in activity centers, habilitation and adult skills programs.
> - *Vocational services*, including supported employment programs, vocational evaluations, job training and placement, and work adjustment programs.
> - *Other quality of life services*, such as recreation and leisure activities, transportation and early intervention programs.

Id. (emphasis added); *see also* HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 16-17.

[4] NCSL REPORT, *supra* note 3.

unnecessary institutionalization of people with developmental disabilities who are capable of living in their own communities."[5]

Today, the Medicaid Home and Community-Based Services ("HCBS") Waiver program[6] is the primary funding stream to develop community-based services for the MR/DD population.[7] The HCBS Waiver program is an essential part of states' efforts to redesign and expand community-based services offered to individuals with disabilities.[8] Every state has at least one HCBS Waiver program[9] and nationwide there are currently 240 HCBS Waiver programs in effect, providing services to 559,903 people at a cost of $7.827

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[5] *Id.* "Deinstitutionalization involves not only the discharge of patients from large residential facilities, but also the reduction in admissions into residential facilities" and the movement toward smaller residential settings, such as ICF-MR facilities. *Id.* at 6-8. An intermediate care facility for the mentally retarded and developmentally disabled ("ICF-MR/DD") is defined by the Medicaid Act as:

> [A]n institution . . . for the mentally retarded or persons with related conditions, if—
> (1) the primary purpose of such institution . . . is to provide health or rehabilitative services for mentally retarded individuals and the institution meets such standards as may be prescribed by the Secretary;
> (2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this subchapter is receiving active treatment under such a program . . . .

42 U.S.C. § 1396d(d) (1994), *cited in* Cramer v. Chiles, 33 F. Supp. 2d 1342, 1347 (S.D. Fla. 1999).

[6] The Medicaid Home and Community-Based Services ("HCBS") Waiver program was established by Congress as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2176, 95 Stat. 357 (1981) (codified as amended at 42 U.S.C. § 1396n(c) (1994)). *See* HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 2. States may obtain a waiver of certain federal requirements (relating to statewideness, comparability of services, and income and resource rules for the medically needy) and may elect to cover a broad variety of services not usually covered by the general Medicaid program. HEALTH CARE FIN. ADMIN., HOME AND COMMUNITY-BASED SERVICES 1915(C) WAIVERS [hereinafter HCBS WAIVER FACT SHEET], *at* http://www.hcfa.gov/medicaid/hpg4.htm (last modified Feb. 6, 2001). The HCFA was renamed centers for Medicare and Medicaid Services on June 14, 2001, after this article went to press.

[7] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 7-8. This trend is consistent with the states' gradual move toward deinstitutionalization over the past forty years. NCSL REPORT, *supra* note 3.

While the HCBS Waiver program has increased by leaps and bounds, however, demand for ICF-MR/DDs has steadily declined, with the number of individuals residing in public institutions dropping by twenty-eight percent between 1993 and 1998. *Id.* By 1998, eight states (Alaska, Hawai'i, Maine, New Hampshire, New Mexico, Rhode Island, Vermont, and West Virginia) and the District of Columbia had closed all their MR/DD public institutions. *Id.*

[8] *Id.*

[9] HCBS WAIVER FACT SHEET, *supra* note 6. Arizona is a technical exception, because it provides community-based services under a Section 1115 Waiver. *Id.*

billion in 1997 alone.[10] Despite an average thirty-five percent increase in federal funding each year from 1993 to 1998,[11] however, states are finding that the number of individuals seeking community-based services exceeds their ability to provide such services.[12] As a result, states utilize wait lists; an estimated 63,735[13] to 83,101[14] individuals are wait-listed for HCBS Waiver services nationwide. Whether wait lists violate the rights of these individuals under the Medicaid Act and the Americans with Disabilities Act ("ADA") remains unclear.

In 1999, in a landmark decision in *Olmstead v. L.C.*,[15] the U.S. Supreme Court suggested that states maintaining wait lists for such services would not be violating the ADA if they could demonstrate that individuals are moved off the wait list into community placements at a "reasonable pace" in accordance with an "effectively working" state plan.[16] The Court, however, did not elaborate what constituted a reasonable pace or an effectively working plan.

As the lower courts consider how to comply with the *Olmstead* decision, an important, yet unresolved issue will be determining the exact scope of states' obligations to provide community-based services under the Medicaid Act and the ADA. For example, can a state refuse to provide community-based services to an individual with disabilities once the approved HCBS Waiver "population limits" have been reached?[17] What are the characteristics of an "effectively working" plan and a wait list that is moving at a "reasonable pace"? Litigation over these terms continues today, forming a body of federal caselaw. This paper examines these decisions and sets forth the emerging standard to which states administering HCBS wait lists will be held in light of the federal rights of MR/DD individuals.

Part II of this paper will provide an overview of the Medicaid Home and Community-Based Services Waiver program and the ADA. Part III will

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[10] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 11 (reflecting 1997 figures). The number of individuals with MR/DD served under HCBS Waivers grew at an annual rate of nearly thirty percent between 1992 and 1997. *Id.* at 7.

[11] DAVID BRADDOCK ET AL., UNIV. OF ILL. AT CHI., THE STATE OF THE STATES IN DEVELOPMENTAL DISABILITIES: 2000 STUDY SUMMARY 18 (2000) [hereinafter STATE OF THE STATES 2000], *available at* http://www.uic.edu/depts/idhd/StateoftheStates.

[12] *Id.* at 42; NCSL REPORT, *supra* note 3.

[13] NCSL REPORT, *supra* note 3, tbl.5 (1998 data).

[14] STATE OF THE STATES 2000, *supra* note 11, at 42 (1997 data).

[15] 527 U.S. 581 (1999).

[16] *Id.* at 605-06.

[17] A related issue, beyond the scope of this article, is the potential impact of the Supreme Court decision in *Bd. of Trustees of Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001) (5-4 decision). A sharply divided Court, in a narrowly drawn opinion, invalidated a portion of the ADA, holding that "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I," the employment provisions of the ADA. *Id.* at 967-68 & n.9; *see also* STATE OF THE STATES 2000, *supra* note 11, at 39.

review the Supreme Court's recent decision in *Olmstead v. L.C.*[18] and its progeny. Part IV will analyze the impact of *Olmstead* on the use of wait lists for HCBS Waiver programs and will survey the criteria by which to evaluate whether a state has an "effectively working" plan that ensures that wait-listed individuals receive needed community-based services at a "reasonable pace."

II. BACKGROUND

Determining the legality and propriety of population limits and wait lists requires interpreting two federal statutes, the Medicaid Act[19] and the Americans with Disabilities Act.[20] Part A of this section will provide an overview of the Medicaid Home and Community-Based Services Waiver program established by the Medicaid Act. Part B will highlight the relevant provisions of the Americans with Disabilities Act.

A. The Medicaid Home and Community-Based Services Waiver

The Medicaid program is a joint federal-state entitlement program enacted by Congress in 1965 to provide medical assistance to eligible needy persons.[21] In 1981, Congressional concern over rising Medicaid costs led to the enactment of the Medicaid Home and Community-Based Services ("HCBS") Waiver, also known as a Section 1915(c) (of the Social Security Act) Waiver.[22] The HCBS Waiver was intended to contain "long-term care costs . . . [by] provid[ing] services to some individuals in less expensive settings, such as at home or in the community, rather than in an institution."[23]

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[18] *Olmstead*, 527 U.S. at 587.

[19] 42 U.S.C. §§ 1396–1396v (1994); *see infra* note 21.

[20] 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 225, 611 (1994); *see infra* note 45.

[21] HEALTH CARE FIN. ADMIN., MEDICAID: A BRIEF SUMMARY [hereinafter MEDICAID OVERVIEW], *at* http://www.hcfa.gov/pubforms/actuary/ormedmed/default4.htm (last modified Sept. 7, 2000). Congress enacted the Medicaid program as Title XIX of the Social Security Act of 1965, 42 U.S.C. §§ 1396 – 1396v (1994) [hereinafter Medicaid Act]. *Id.* Each participating state operates and administers its own Medicaid program and, within the general guidelines set by Congress, determines how its Medicaid program will operate and what services such program will provide. *Id.* Program administration and costs are shared by the state and federal governments. *Id.*; 42 U.S.C. § 1396. The program is administered at the federal level by the Health Care Financing Administration ("HCFA") for the Secretary of the U.S. Department of Health and Human Services.

[22] *See supra* note 6 and accompanying text.

[23] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 2. The difference in cost between institutional and community-based services can be substantial. The average cost to provide HCBS was $14,902/recipient, or $84/day; by contrast, the average cost to provide services in an ICF-MR (institution) was $94,348/recipient, or $258/day, in 1998. NCSL REPORT, *supra* note 3. These figures are misleading, however, because HCBS recipients "typically have some

The HCBS Waiver program makes federal funds available to states to provide services in the home or community. The program is very attractive to states because the federal government contributes between fifty to eighty-three percent of the total program cost.[24] States have used federal HCBS Waiver funds to match state funds, pooling resources to make more services available and to replace state-funded community-based services.[25]

While the HCBS Waiver program has provided a significant financial impetus to states to develop community-based services, program cost remains a major issue.[26] Congressional concerns about skyrocketing medical assistance costs are implicit in the structure and administration of the waiver program. Thus, the federal government conditions federal funding on participating states' compliance with several program requirements, which are focused largely on cost containment.[27] Eligibility is limited to certain defined categories (i.e., individuals with mental retardation/developmental disabilities ("MR/DD"), aged and disabled, fragile children), and individuals must have a disability severe enough that, but for the waiver, they would "require the level of care provided in a hospital or a nursing facility or intermediate care facility."[28]

In addition, because federal law limits the amount of funds expended on the HCBS Waiver program, states must demonstrate that the program is "cost neutral," that is, the average per-person cost for services under the waiver must be equal to or less than the average cost for institutionalized services.[29] States must also submit, for federal approval, the number of individuals it proposes to provide with community-based services through the waiver program:

> The State must indicate the number of unduplicated beneficiaries to which it intends to provide waiver services in each year of its program. *This number will constitute a limit on the size of the waiver program* unless the State requests and

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of their care funded from the regular Medicaid program." HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 7-8.

[24] MEDICAID OVERVIEW, *supra* note 21.

[25] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 7-8, 31.

[26] *Id.* at 2, 7-8.

[27] *Id.* at 29-30.

[28] 42 U.S.C. § 1396n(c)(1) (1994).

[29] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 2. The Medicaid Act provides that:

> [T]he average per capita expenditure estimated by the State in any fiscal year for medical assistance provided with respect to such individuals [may] not exceed 100 percent of the average per capita expenditure that the State reasonably estimates would have been made in that fiscal year . . . if the waiver had not been granted . . . .

42 U.S.C. § 1396n(c)(2)(D). The cost neutrality requirement is the single most important provision with which the states must comply. *See* HCBS WAIVER FACT SHEET, *supra* note 6; HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 2.

> the Secretary approves a greater number of waiver participants in a waiver amendment.[30]

This number is a federally-approved population limit that acts as a cap on the size of a state's HCBS Waiver program; individuals outside these limits are placed on a wait list for services.[31] As individuals receiving HCBS services die or become ineligible for services, the state may fill the vacancies created, as long as the total number of individuals served remains within the federally-approved population limit.[32] The Health Care Financing Administration ("HCFA") must approve the maximum enrollment and cost-neutral proposed budget before a state's HCBS Waiver application is approved.[33] States, in turn, have attempted to contain costs by imposing limitations on eligibility and limiting state funding for HCBS Waiver programs.[34]

The HCBS Waiver program is intended to give states the flexibility to develop and implement "creative alternatives" to institutionalized care (i.e., in hospitals, nursing facilities, or intermediate care facilities) for individuals with disabilities.[35] Within guidelines established by HCFA, states may elect to provide a broad array of services, such as case management, homemaker/home health aide services, and personal care services.[36] Once an individual is determined to be eligible, the HCBS Waiver program provides an individual support plan and those services needed to enable that individual to live in a home or home-like setting.[37]

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[30] 42 C.F.R. § 441.303(f)(6) (2001) (emphasis added). States must, at a minimum, agree to provide services under the HCBS Waiver program to 200 individuals each year. 42 U.S.C. § 1396n(c)(10).

[31] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 30.

[32] 42 U.S.C. § 1396n(c)(9).

[33] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 30.

[34] *See id.*; *see also* discussion *infra* section IV.B.

[35] HCBS WAIVER FACT SHEET, *supra* note 6.

[36] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 16. The HCBS Waiver program is unique in that it offers "non-medical services such as homemaker services and habilitation [services,]" as well as medical services not usually covered by the general Medicaid program. *Id.*; 42 U.S.C. § 1396n(c)(4)(B). These include:

> [C]ase management services, homemaker/home health aide services and personal care services, adult day health services, habilitation services, [and] respite care, . . . and for day treatment or other partial hospitalization services, psychosocial rehabilitation services, and clinic services . . . for individuals with chronic mental illness.

42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180 (2001).

Other related services, such as "non-medical transportation, in-home support services, special communication services, minor home modifications, and adult day care" may be provided by the state, subject to federal government approval. HCBS WAIVER FACT SHEET, *supra* note 6; *see also* 42 U.S.C. § 1396n(c)(4)(B); 42 C.F.R. § 440.180.

[37] Cramer v. Chiles, 33 F. Supp. 2d 1342, 1348 (S.D. Fla. 1999).

Importantly, when a state elects to provide HCBS, "that service becomes part of the state Medicaid plan and is subject to the requirements of federal law."[38] The state must administer its Medicaid program in accordance with the various provisions of the Medicaid Act, including the "reasonable promptness" provision, which directs states to accept all applications and provide medical assistance to eligible individuals with reasonable promptness.[39] This statutory provision is implemented by two regulations. The first requires the state to determine a disabled applicant's eligibility for medical assistance within ninety days.[40] The second directs the state to "[f]urnish Medicaid promptly to recipients without any delay caused by the agency's administrative procedures[.]"[41]

In addition, the state must provide assurances that there are adequate safeguards in place to protect the health and welfare of the individuals served through the HCBS Waiver program.[42] Because the objective of the program is to provide cost efficient, community-based alternatives to institutional care, the state must assure that recipients are informed of the "feasible alternatives" available and offered a choice between receiving institutionalized care in a hospital, nursing home, or intermediate care facility, or home and community-based services.[43] The regulations implementing this "free choice" provision require the state to ensure that the recipient is offered a choice of institutional and home and community-based services options as available.[44]

Thus, although a goal of the HCBS Waiver program is to provide individuals with individualized services that allow them to live at home, the program as implemented has been driven more by cost concerns than by the

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[38] Doe v. Chiles, 136 F.3d 709, 714 (11th Cir. 1998) (quoting Tallahassee Mem'l Reg'l Med. Ctr. v. Cook, 109 F.3d 693, 698 (11th Cir. 1997)). States are allowed to waive certain statutory requirements (relating to statewideness, comparability of services, and community income and resource rules for the medically needy) under the HCBS Waiver program, but must comply with the other provisions of the Medicaid Act. 42 U.S.C. § 1396n(c)(4); HCBS WAIVER FACT SHEET, *supra* note 6.

[39] 42 U.S.C. § 1396a(a)(8) (1994) (codifying the "reasonable promptness" provision).

[40] 42 C.F.R. § 435.911(a) (2001).

[41] 42 C.F.R. § 435.930(a), (b) (2001).

[42] 42 U.S.C. § 1396n(c)(2); 42 C.F.R. § 441.302 (2001). The state must provide assurances that: 1) "necessary safeguards have been taken to protect the health and welfare of the recipients" and to assure financial accountability for funds expended; 2) the State will evaluate an individual's need for institutional services and inform those deemed likely to require an institutional level of care of the alternatives available under the waiver; 3) there are adequate standards for provider participation, licensing and certification; 4) the state will annually spend less per capita under the waiver than without the waiver; and 5) the state will annually provide information to the Health Care Financing Administration on the impact of the HCBS Waiver program. 42 C.F.R. § 441.302.

[43] 42 U.S.C. § 1396n(c)(2)(C) (codifying the "free choice" provision).

[44] 42 C.F.R. § 441.302(d); *see also* 42 U.S.C. § 1396n(c)(2)(C).

individual's special needs. Thus, under the Medicaid Act, states are allowed to limit enrollment and maintain wait lists for HCBS Waiver services. This raises a related issue of whether such actions comport with other federal disability-related laws, such as the Americans with Disabilities Act.

B. The Americans with Disabilities Act

Population limits and wait lists for HCBS Waiver services have also been attacked as violating the Americans with Disabilities Act of 1990 ("ADA").[45] The ADA, hailed as the "emancipation proclamation" for individuals with disabilities,[46] is a comprehensive, far-reaching piece of legislation that for the past decade has stood as our nation's strongest statement on civil rights for individuals with disabilities.[47] The ADA aims to provide a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"[48] that has helped focus national attention on the rights of people with disabilities.[49] The culmination of nearly twenty years of federal legislative effort,[50] the ADA established "clear, strong, consistent, enforceable standards" to address the issue of disability discrimination at the national level.[51]

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[45] Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213, 47 U.S.C. §§ 225, 611 (1994)) [hereinafter ADA].

[46] 136 CONG. REC. S9,689 (daily ed. July 13, 1990) (statement of Sen. Harkin).

[47] *Id.*; *see also* Olmstead v. L.C., 527 U.S. 581, 589 n.1 (1999).

[48] 42 U.S.C. § 12101(b)(1) (1994).

[49] *See generally*, Leslie Francis & Anita Silvers, *Disability Rights Today: How Far Have We Come?*, 27 HUM. RTS. 3 (2000); Mary Johnson, *The ADA at 10: A Retrospective View*, NEW MOBILITY, June 2000, at 18.

[50] In 1973, Congress passed the Vocational Rehabilitation Bill, which included a civil rights provision, now known as § 504. Rehabilitation Act of 1973, tit. V, § 504, 29 U.S.C. § 794 (1994) [hereinafter § 504]. Section 504 makes it unlawful for the federal government and any program or activity that receives federal funds to discriminate against an otherwise qualified individual on the basis of disability. *Id.* "Although § 504 has been called the 'cornerstone of the civil rights movement of the mobility-impaired,' its shortcomings and deficiencies quickly became apparent." Helen L. v. DiDario, 46 F.3d 325, 331 (3d Cir. 1995) (citations omitted). The ADA evolved out of a desire to extend § 504 protections beyond the federal government and federally funded programs to address the pervasive discrimination against individuals with disabilities in all sectors of the community. *See id.* at 331; *see also*, Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.—C.L. L. REV. 413, 431 (1991).

[51] 42 U.S.C. § 12101(b)(2). The ADA provides individuals with disabilities with civil rights protections similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion, and guarantees equal opportunity for the disabled in the areas of public accommodations, employment, transportation, state and local government services, and telecommunications. EQUAL EMP. OPPORTUNITY COMM'N & U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: QUESTIONS AND ANSWERS, at i (1997).

In passing the ADA, Congress for the first time recognized that the isolation and segregation of individuals with disabilities is a "serious and pervasive" form of discrimination, finding that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . exclusionary qualification standards and criteria, [and] segregation[.]"[52] Congress concluded that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency."[53]
The ADA required that state and local governments make public programs and services accessible to "qualified individuals with disabilities" by January 26, 1992.[54] This meant that state and local governments were required to:

> Administer services, programs, and activities in the *most integrated setting* appropriate to the needs of qualified individuals with disabilities.[55]

Specifically, state and local governments were required to:

> make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity.[56]

Thus, the ADA, by virtue of its comprehensive scope and breadth of coverage, has provided important protections for individuals with disabilities in many areas. Not the least of these protections has been the ADA's integration mandate, which aimed to end discrimination, in the form of segregation, by ensuring that individuals with disabilities have the opportunity to live and participate in their communities to the fullest extent possible.[57] In recent years, courts have begun to define the ADA's integration mandate and

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[52] 42 U.S.C. § 12101(a)(2), (5) (2001).

[53] 42 U.S.C. § 12101(a)(8).

[54] 42 U.S.C. § 12131 (1994). The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). A "qualified" individual with a disability is one "who, with or without reasonable [accommodation], . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

[55] 28 C.F.R. § 35.130(d) (2001) ("integration regulation") (emphasis added). The "most integrated setting appropriate" for individuals with disabilities is "a setting that enables [the individual] to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. A, at 489 (2001).

[56] 28 C.F.R. § 35.130(b)(7) (2001) ("fundamental alteration" defense) (emphasis added).

[57] *See supra* note 55.

the fundamental alteration defense in the context of cases involving, among other things, the Medicaid HCBS Waiver Program.

III. FEDERAL CASES

A. Olmstead v. L.C.: Affirming the ADA's Community Integration Mandate

Nearly a decade after the enactment of the Americans with Disabilities Act ("ADA"), the U.S. Supreme Court, in the landmark decision *Olmstead v. L.C.*,[58] held that Title II, the public services portion of the ADA, may require states to provide services to persons with mental disabilities in community settings, rather than in institutions.[59] L.C. and E.W., the plaintiffs in *Olmstead* were diagnosed with mental retardation and mental illness and were voluntarily admitted and confined to the psychiatric unit at the Georgia Regional Hospital.[60] When their conditions stabilized, their treating physicians recommended their release to community-based treatment programs.[61] Despite this recommendation, however, L.C. remained institutionalized for thirty-three months, and E.W. for about one year, before being offered community-based services by the State.[62] They filed suit, claiming that the State's delay in providing them with community-based services after their treating physicians had recommended community treatment violated the ADA.[63]

A clear majority of the U.S. Supreme Court agreed, holding that the "unjustified isolation" of individuals with disabilities "is properly regarded as discrimination based on disability,"[64] because such segregation perpetuates negative stereotypes and severely restricts and infringes upon the everyday life activities of individuals with disabilities.[65] Therefore, the Court held, states must place individuals with mental disabilities in community settings, rather than in institutions, when:

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[58] 527 U.S. 581 (1999).

[59] *Id.* at 587. Justice Ginsburg joined by Justices Stevens, O'Connor, Souter, and Breyer, delivered the opinion of the Court as to parts I, II, and III-A. *Id.* Justice Stevens also wrote separately, concurring in part and in the judgment. *Id.* at 607. Justice Kennedy concurred in the judgment. *Id.* at 608. A plurality composed of Justices Ginsburg, O'Connor, Souter, and Breyer joined in part III-B, suggesting a fundamental alteration defense that might be asserted by states in wait list cases. *Id.* at 605. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined. *Id.* at 615.

[60] *Id.* at 593.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 594.

[64] *Id.* at 597.

[65] *Id.* at 600-01.

> the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.[66]

A four-justice plurality[67] went one step further, recognizing that a state's obligation to provide care and treatment for individuals with disabilities would be limited to some extent by its available resources and obligation to "maintain a range of facilities and to administer services with an even hand."[68] Under the ADA, states need not make any modifications that would fundamentally alter the nature of the program or service provided.[69] The plurality suggested that a state could affirmatively raise a fundamental alteration defense against an ADA claim by showing that "immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."[70] Specifically, the Court suggested that a state would satisfy the fundamental alteration defense and, therefore, would be in compliance with the ADA if it had:

> a comprehensive, *effectively working* plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a *reasonable pace* not controlled by the State's endeavors to keep its institutions fully populated.[71]

The Court did not define the terms "effectively working" and "reasonable pace," nor did it address the issue of wait lists directly. Moreover, because only a non-binding plurality of four Justices joined this portion of the opinion, it is still unsettled whether a state may use federally-approved Medicaid HCBS

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[66] *Id.* at 587.

[67] Referring to Justices Ginsburg, O'Connor, Souter, and Breyer; *see supra* note 59.

[68] *Id.* at 605. The plurality emphasized that factors other than the relative cost of community-based and institutional services must be considered, including "costs the State cannot avoid," such as the increased overall expenses resulting from the need to continue operating partially-full state institutions, while funding community-based services. *Id.* at 604.

[69] 28 C.F.R. § 35.130(b)(7) (2001); *Olmstead*, 527 U.S. at 603-04.

[70] *Olmstead*, 527 U.S. at 604.

[71] *Id.* at 605-06 (emphasis added). The plurality, in its only comment on the wait list issue, apparently agreed with the defendants that, "by asking [a] person to wait a short time until a community bed is available, Georgia does not exclude . . . [nor] discriminate against [that person] by reason of disability," and that "[i]t is reasonable for the State to ask someone to wait until a community placement is available." *Id.* at 606 (citing Tr. of Oral Arg. at 5, 25). Thus, an individual would not be entitled to jump to the top of the wait list simply because he filed suit. *Id.*

Waiver population limits as the basis for denying publicly-funded community-based services to qualified individuals with disabilities.

What is apparent, however, is the Court's deference to state program funding decisions. Justices Ginsburg, O'Connor, Souter, and Breyer agreed that such budgetary concerns were strictly within the state's purview.[72] Justice Kennedy, in an opinion concurring in the judgment, emphasized that a state was entitled to "wide discretion" in the allocation of health care resources.[73] Justice Thomas, in a dissenting opinion joined by Chief Justice Rehnquist and Justice Scalia, declared that "constitutional principles of federalism" require the federal courts to defer to states in the provision of public benefits.[74] Thus, it appears that a majority of the Justices would agree that the federal courts should defer to states in fiscal matters relating to the provision of public benefits to the disabled.

Olmstead is considered a landmark decision for its reaffirmation of the ADA's integration mandate. Lower courts have begun to address the application of the fundamental alteration defense, and concomitant deference accorded to state funding decisions, which was suggested by the four-Justice plurality.[75] Because the *Olmstead* Court left undefined key terms (like "effectively working" and "reasonable pace"), lower courts have attempted to address these ambiguities in the context of Medicaid HCBS Waiver cases.

B. Post-Olmstead Federal Cases and the Wait List Issue

No court has yet conclusively addressed the issue of whether a state may deny services to individuals with disabilities once the federally-mandated population limits for HCBS Waiver programs have been reached.[76] There are,

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[72] *Id.* at 605-06.

[73] *Id.* at 615 (Kennedy, J., concurring).

[74] *Id.* at 624 (citing Alexander v. Choate, 469 U.S. 287, 307 (1985)) (Thomas, J., dissenting). "[T]he appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities." *Id.* at 625.

[75] *See* discussion *infra* section IV.B.

[76] These cases were the only published opinions discovered through a computer-aided (Westlaw) search on October 18, 2000, and updated through February 20, 2001. There are a few cases that have been cited by courts because they interpret various provisions of the Medicaid Act; these cases, however, are inapposite because they do not specifically address wait lists for Medicaid HCBS Waiver services. *See, e.g.*, Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998) (holding that the State must provide services in an intermediate care facility for the mentally retarded ("ICF-MR") within ninety days of eligibility determination; note that the ICF-MR program, unlike the HCBS Waiver program, does not have population limits); Cramer v. Chiles, 33 F. Supp. 2d 1342 (S.D. Fla. 1999) (holding that under the ADA, Florida cannot deny Medicaid-eligible individuals a choice between institutional and home-based services); Benjamin H. v. Ohl, Civ. No. 3:99-0338 (S.D. W. Va. July 15, 1999) (memorandum opinion

however, a handful of reported decisions with precedential value that will inform the discussion.

1. Helen L. v. DiDario: Lack of funding is no defense

In *Helen L. v. DiDario*,[77] one of the first cases to address the ADA's integration mandate in the context of public services, the Third Circuit affirmed that the "unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination" under the Americans with Disabilities Act ("ADA").[78] Plaintiff Idell S. was a nursing home resident, paralyzed from the waist down, who needed assistance with daily living activities such as "bathing, laundry, shopping, getting in and out of bed, and house cleaning."[79] Although she was evaluated and determined eligible for Pennsylvania's community-based care program, she was placed on a wait list for services due to a lack of available state funding for the program.[80] The plaintiff, who had to remain in the nursing home in order to receive needed services, claimed that the State's failure to provide her with attendant care services in the "most integrated setting appropriate" to her needs violated Title II, the public services portion of the ADA.[81]

The Third Circuit agreed, holding that the State's failure to provide a paralyzed woman with state-funded, community-based services for which she qualified and which would enable her to live at home with her family, rather than in a nursing home, violated the ADA.[82] In so doing, the court emphasized that the "unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning" of the ADA and distinguished those incidents of discrimination resulting from the disparate treatment of disabled and non-disabled individuals.[83] Recognizing the nation's commitment to the civil rights of individuals with disabilities, evident in the ADA's comprehensive societal goals and concomitant regulatory reach, the court held that an individual who brought a case under the ADA need not establish disparate treatment or discriminatory intent to maintain an ADA claim against a state or local

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and order directing the state to develop a plan to eliminate wait lists and provide ICF-MR services within a reasonable time).

[77] 46 F.3d 325 (3d Cir. 1995).

[78] *Id.* at 335.

[79] *Id.* at 328.

[80] *Id.* at 328-29.

[81] *Id.* at 327-28.

[82] *Id.* at 327, 336-37.

[83] *Id.* at 333-35.

government.[84] Thus, an individual could bring a claim for disability discrimination under the ADA on the basis of unnecessary segregation in public services even where there was no "intentional or overt 'discrimination.'"[85]

Lastly, the court held that it was reasonable in this case for the state to modify its programs by providing more spaces in its attendant care program.[86] The court rejected the State's argument that providing public services in the most integrated setting appropriate to the plaintiff's needs would fundamentally alter the nature of its programs.[87] "The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services" under the ADA.[88] Similarly, a lack of funding or other funding constraints would not excuse a state from compliance with the requirements of the ADA.[89] Moreover, providing plaintiff with the individualized services requested would not fundamentally alter the program, since the State could provide those services through an existing program.[90] In short, the court concluded, "since [Massachusetts] has chosen to provide services to [plaintiff] under the ADA, it must do so in a manner which comports with the requirements of the statute."[91]

Although *Helen L.* did not directly address wait lists, it was one of the earliest cases to consider whether a state may assert a fundamental alteration defense to an ADA claim based on budgetary or administrative constraints, such as a lack of state funding.[92] The *Helen L.* court, applying the ADA to a state-funded community-based services program similar to the Medicaid HCBS Waiver program, established that a lack of state funding, without more, is not a fundamental alteration under the ADA.[93]

2. *Makin v. Hawai'i: Population "cap" limits eligibility for HCBS Waiver*

In *Makin v. Hawai'i*,[94] disabled individuals at risk of institutionalization challenged lengthy wait lists for the Medicaid HCBS Waiver program administered by the State of Hawai'i. Four named plaintiffs represented a

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[84] *Id.*
[85] *Id.*
[86] *Id.* at 337-39.
[87] *Id.*
[88] *Id.* at 338 (citation omitted).
[89] *Id.* at 337-38.
[90] *Id.*
[91] *Id.* at 339.
[92] *Id.* at 337.
[93] *See supra* notes 86-89 and accompanying text.
[94] 114 F. Supp. 2d 1017 (D. Haw. 1999).

certified class of over 800 Medicaid-eligible individuals with mental retardation living at home who had been placed on a wait list for HCBS services by the state, allegedly because of inadequate state funding.[95] Over 750 of the class members had been waiting for HCBS waiver services for at least ninety days, and some had been wait-listed for more than two years.[96]

The district court, ruling on cross-motions for summary judgment, first addressed the effect of federally-mandated population limits on a state's obligation to provide community-based services under the HCBS Waiver program.[97] The court noted that when a state accepts federal funds, it must comply with statutory requirements.[98] The federal statute and regulations establishing the Medicaid HCBS Waiver program provide for limits on program enrollment.[99] Therefore, the court held, the federally-approved "population limits" for the State's HCBS Waiver program were, in effect, an additional eligibility requirement:

> [W]hile the Medicaid Act requires a state to offer feasible alternatives available under the waiver to all eligible individuals, the [HCBS] program is not "available" under the statute when the slots available under the "population limit" have been filled. Thus, the State of Hawai'i is in compliance with the Medicaid statute even if there are over 750 "eligible" individuals on the [HCBS waiver] wait list so long as there is other appropriate treatment available to them under the Medicaid program.[100]

Therefore, the court concluded, the State need not provide HCBS services to listed individuals on the wait list until vacant slots become available under the HCBS Waiver program.[101]

The court also found that the State must comply with Title II of the Americans with Disabilities Act ("ADA"), which prohibits unnecessary

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[95] *Id.* at 1020.

[96] *Id.* at 1023. The State was federally authorized to serve 976 individuals through its HCBS Waiver program in fiscal year 1998-1999. *Id.* at 1022. At the beginning of the fiscal year, 971 individuals were receiving waiver services. *Id.* Although some people dropped out of the program during the year, the State failed to fill those slots; at the end of the fiscal year, only 949 individuals were receiving services. *Id.* at 1022-23 & n.6. The State claimed that a lack of state funding, coupled with strong demand for HCBS services, made it necessary to maintain a wait list. *Id.* Yet, the State's HCBS program ended the fiscal year with $417,776 budgeted but not spent (of an annual budget totalling about $10.9 million), which was returned to the general fund, despite the fact that more than 800 people were still waiting for services. *Id.* at 1023 nn.8 & 9, 1031.

[97] *See id.* at 1025.

[98] *Id.* at 1027.

[99] *Id.*

[100] *Id.* at 1028.

[101] *Id.*

segregation in the provision of public services.[102] The court found that the State's Medicaid statute, with its population limits and resulting wait lists, failed to offer HCBS services in the most integrated setting appropriate to individualized needs, potentially forcing individuals with disabilities into institutions to receive needed services, in violation of the ADA's integration mandate.[103] The court concluded:

> [I]f a state is found to have discriminated against disabled individuals through the administration of a program, it must modify the program to remedy the situation unless it can prove that any modification would fundamentally alter the program.[104]

In analyzing whether a proposed modification would fundamentally alter an existing program, the court would consider whether the modification was "prudent in light of the State's other undertakings," and would require only "feasible modifications" that would not cause other programs to suffer unjustly.[105] Importantly, the court found that potential funding problems, without more, did not constitute a fundamental alteration.[106] Rather, the court found that specific evidence of a comprehensive, effectively working plan to move the wait list at a reasonable pace was required to satisfy the fundamental alteration defense suggested by the *Olmstead* Court.[107]

> [T]he State has provided no evidence of any such [comprehensive] plan. The only evidence of any effort to decrease the wait list is the increase in "slots" over the next few years. That single piece of evidence, though, does not show that the State is complying with the ADA by acting responsibly.[108]

A settlement agreement was reached by the parties in April 2000, and the case was dismissed upon court approval of the settlement.[109] Under the terms of the settlement agreement, the State agreed to expand the HCBS Waiver

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[102] *Id.* at 1032-34; *see also* 42 U.S.C. § 12132 (1994); 28 C.F.R. § 35.130(d) (2001).

[103] *Makin*, 114 F. Supp. 2d at 1034 (internal quotation marks omitted). The court carefully did not rule that Plaintiffs were "not qualified" under the ADA, merely because the population limits had already been reached, explaining that, "[I]f that were the case, the State would have the unfettered ability to discriminate against individuals through poorly administrated programs." *Id.* at 1033 & n.21.

[104] *Id.* at 1034.

[105] *Id.* at 1034-35. The court did not, however, reach that analysis at this early stage of the litigation. *Id.* at 1035.

[106] *Id.* at 1034. In fact, there was evidence suggesting that the State had not filled the vacant slots that were made available when individuals left the HCBS Waiver program and allowed $417,776 to lapse without an explanation. *See supra* note 96.

[107] *See Makin*, 114 F. Supp. 2d at 1035.

[108] *Id.*

[109] Makin v. Hawai'i, Civ. No. 98-00997 DAE, slip op. at 2 (D. Haw. Aug. 15, 2000) (order approving settlement agreement).

program to provide services to at least 700 of the wait-listed individuals within the next three years.[110] Further, the State pledged to use its best efforts to secure state funding and federal approval for the expansion.[111] Lastly, the State agreed to develop a comprehensive plan to ensure that the wait list will continue to move at a reasonable pace after June 30, 2003, and to involve individuals with disabilities and other interested groups in the planning process.[112]

Makin was one of the first decisions to specifically address the propriety of state-maintained wait lists in light of federally-mandated population limits for Medicaid HCBS Waiver programs. The court found that population limits were simply another eligibility requirement for HCBS Waiver programs, but that wait lists may violate the ADA, if individuals are forced into institutional settings while waiting for HCBS services.[113] Importantly, according to the district court, states seeking to successfully assert an *Olmstead* defense must present specific evidence of a state plan that is effectively working to move the wait list at a reasonable pace.[114] Thus, after *Makin*, it is clear that a state must do more than show an annual increase in the population limits submitted for federal approval; rather, it must present specific evidence to show that its plan is effectively working to move wait-listed individuals into HCBS Waiver services at a reasonable pace.[115]

3. Boulet v. Cellucci: Finding an entitlement to HCBS within ninety days

In *Boulet v. Cellucci*,[116] Medicaid-eligible individuals living at home alleged that the State of Massachusetts' failure to provide them with HCBS Waiver services in a group home setting[117] violated the reasonable promptness provision of the Medicaid Act.[118] The plaintiffs, who were unable to care for

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[110] *Id.* at 3. This represents most, but not all, of the 949 person certified class of individuals with mental retardation and/or developmental disabilities living at home or in home-like settings who were wait-listed for the HCBS Waiver program. *Id.* at 2-3, 10.

[111] *Id.* at 3-4.

[112] *Id.* at 5.

[113] *Makin*, 114 F. Supp. 2d at 1028-34.

[114] *Id.* at 1035.

[115] *Id.*

[116] 107 F. Supp. 2d 61 (D. Mass. 2000).

[117] "Settings" are the locations where services under the HCBS Waiver program are delivered; residential settings include group homes, foster care, and supported living placements. STATE OF THE STATES 2000, *supra* note 11, at 1. The recent trend has been toward providing services in smaller residential settings, primarily group homes (where up to six individuals live together in a home-like setting) and supported living placements. *Id.* at 1, 4; NCSL REPORT, *supra* note 3.

[118] *Boulet*, 107 F. Supp. 2d at 63-64, 66-67.

themselves, had requested twenty-four-hour residential services in a group home setting.[119] Since there were no openings in a group home setting, plaintiffs had been placed on a wait list for the State's HCBS Waiver program.[120] In the interim, plaintiffs were living at home and were receiving some services through the general Medicaid program.[121] Each of the plaintiffs had been wait-listed for at least three years, and two had been waiting for more than ten years.[122]

The district court first explained that "[b]ecause Massachusetts has chosen to implement a waiver plan, the waiver statute provides eligible individuals in Massachusetts with an entitlement to waiver services and affords them the full protection of the Medicaid Act with regard to those services."[123] The court then considered the effect of the federally-mandated population limits on the State's administration of the waiver program. The *Boulet* court, like the court in *Makin*, held that the "cap" on waiver services was, in effect, an additional eligibility requirement, explaining that:

> As a practical matter, . . . once a state chooses to implement a waiver program and chooses the eligibility requirements, a cap is simply another eligibility requirement for that program. . . . Individuals who apply after the cap has been reached are not eligible, or alternatively, the waiver services are not "feasible" for them until the cap has risen to include them.[124]

Eligible individuals within the population limits were therefore entitled to receive services under the state's HCBS Waiver program.[125]

Since the wait-listed plaintiffs were already receiving some Medicaid services, the court considered them within the population limits, and, therefore, entitled to waiver services.[126] Because the plaintiffs were within the population limits, the court found that "the waiting list violates the 'reasonable promptness' requirement if settings are available for the services plaintiffs request."[127] The court explained that the State had not fulfilled its obligations under the Medicaid Act because it had not provided the plaintiffs with the individualized HCBS services requested within a reasonable time.[128] Further, "inadequate funding does not excuse failure to comply with the reasonable

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[119] *Id.* at 63.
[120] *Id.*
[121] *Id.* at 63, 67-68.
[122] *Id.* at 67.
[123] *Id.* at 77.
[124] *Id.* at 79.
[125] *Id.*
[126] *Id.* at 77.
[127] *Id.* at 78.
[128] *Id.* at 79.

promptness [r]equirement."[129] The court therefore held that the plaintiffs were entitled to receive services under the HCBS Waiver program with reasonable promptness, and ordered the State to provide appropriate community-based services to qualified wait-listed individuals within ninety days after their placement on the wait list.[130]

The *Boulet* court established that "the waiver statute provides eligible individuals . . . with an entitlement to waiver services"[131] that must be provided with reasonable promptness.[132] In this case, since the plaintiffs were within population limits and, therefore, were eligible for services through the HCBS Waiver program, the Medicaid Act, including the reasonable promptness provision, applied to those services.

4. Lewis v. New Mexico Department of Health: "The right to integrated placements is limited"

In *Lewis v. New Mexico Department of Health*,[133] Medicaid-eligible individuals challenged the State's underfunding of its Medicaid HCBS Waiver program, which resulted in wait lists for services.[134] Plaintiffs, individuals with developmental disabilities or mental retardation who were institutionalized, had been waiting for HCBS services for as many as seven years.[135] Specifically, plaintiffs alleged that the head of the State Department of Health had failed to request sufficient funds for waiver services and had moved some institutionalized individuals to the waiver program and used the resulting cost savings for the State's general fund.[136] Furthermore, the plaintiffs alleged, the Governor had vetoed additional funding for the waiver program, even though he knew that several hundred people were on the wait list for such services.[137]

Ruling on a motion to dismiss, the district court first considered whether the Medicaid Act created an enforceable right to receive medical assistance, including waiver services, using the three-step analysis articulated by the Supreme Court in *Blessing v. Firestone*.[138] The court first determined that

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[129] *Id.* at 79-80.
[130] *Id.* at 82.
[131] *Id.* at 77.
[132] *Id.* at 79-80.
[133] 94 F. Supp. 2d 1217 (D.N.M. 2000).
[134] *Id.* at 1222.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.* at 1233, 1236 (citing Blessing v. Firestone, 520 U.S. 329, 340-41 (1997)). The *Blessing* Court utilized a three-step analysis to determine whether a statute created a federal right enforceable under § 1983, 42 U.S.C. § 1983 (1994), which provides a cause of action for

"Congress intended the 'reasonable promptness' requirement to apply to waiver services."[139] Second, the court found that the "reasonable promptness" requirement was judicially enforceable.[140] Lastly, the court found that the statutory language at issue "unambiguously imposes a binding obligation on the [State]."[141] Therefore, the court held, since the State of New Mexico had opted to provide services under a Medicaid HCBS Waiver program, it had to comply with the requirements of the Medicaid Act, including the reasonable promptness provision.[142] Thus, the plaintiffs had an enforceable federal right to receive medical assistance, including waiver services.[143]

The court next considered whether the State's failure to provide waiver services violated the integration mandate of the ADA.[144] Following *Olmstead v. L.C.*,[145] the court found that "unjustified isolation of persons with disabilities is a form of disability discrimination prohibited by the ADA."[146] Nonetheless, the court held that:

"the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States." *Lewis*, 94 F. Supp. 2d at 1233 (citing Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 (1990)).

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Blessing, 520 U.S. at 340-41, *quoted in Lewis*, 94 F. Supp. 2d at 1233.

[139] *Lewis*, 94 F. Supp. 2d at 1234. The State asserted that the reasonable promptness provision did not apply to waiver services because "the Medicaid Act contemplates that waiver services will be limited to a certain number of individuals." *Id.* The court, however, rejected that argument:

> [T]hat the [Medicaid] Act envisions a floor for waiver services—requiring that a state waiver program not be limited to a number less than 200, and that the State applies for a waiver for a certain number of individuals does not prevent the State from applying for a waiver to serve enough persons such that it can provide waiver services to all eligible applicants with "reasonable promptness."

Id.

[140] *Id.* at 1234-35.

[141] *Id.* at 1236.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 1237.

[145] 527 U.S. 581 (1999).

[146] *Lewis*, 94 F. Supp. 2d at 1288.

> states are not required to provide community-based services to all those who request them regardless of the cost. . . . [T]he right to integrated placements is a limited one . . . .[147]

In determining whether the State could assert a fundamental alteration defense, the court would conduct a cost analysis, balancing the individual's right to integrated placements against the State's available resources and obligations to provide other programs and services for the public to determine the appropriate remedy in each case.[148]

5. Prado-Steiman v. Bush: State will increase funding to move wait list

In *Prado-Steiman v. Bush*,[149] six named plaintiffs challenged the Medicaid HCBS Waiver program administered by the State of Florida, claiming that state officials "routinely deny or provide without reasonable promptness"[150] the requested HCBS services based on funding concerns, rather than medical necessity.[151] As a result, plaintiffs claimed, individuals with disabilities were forced into institutions in order to receive the Medicaid services they required.[152] Plaintiffs sought to represent a class of potentially 20,000 individuals with disabilities who were or would be eligible for services under the HCBS Waiver program.[153]

The parties settled on June 30, 2000.[154] The settlement agreement outlines how Florida will spend "additional appropriations approved by lawmakers the past two years for treatment of the developmentally disabled."[155] Under the terms of the settlement agreement, the State will make major systemic reforms, including:

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[147] *Id.* at 1239.

[148] *Id.* The court did not reach this analysis at this early stage in the litigation, but would presumably undertake to do so during a trial on the merits. *Id.* at 1238-39.

[149] 221 F.3d 1266 (11th Cir. 1999).

[150] *Id.* at 1269.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 1269-71; *see also* Drew Douglas, *Florida: Appellate Court Vacates Certification of Developmentally Disabled Plaintiff Class*, 9 Health L. Rep. (BNA) 1332 (Aug. 24, 2000) (discussing class certification and proposed settlement agreement).

[154] Peter Nimkoff, *Lawsuit Settlement Strengthens HCBS Waiver*, THE ADVOCATE (The Advoc. Ctr. for Pers. with Disabilities, Inc., Tallahassee, Fla.), Sept. 2000, at 1. In July 2000, the district court approved the settlement. NAT'L ASS'N OF PROT. & ADVOC. SYS., FLORIDA SETTLEMENT APPROVES FAR REACHING CHANGES TO WAIVER SYSTEM (REQUIRES MEDICAID WAIVER SERVICES WITHIN 90 DAYS, SUBJECT TO FUNDING AVAILABILITY), *at* http://www.protectionandadvocacy.com/floridasettlement.html (last modified Sept. 19, 2000).

[155] Douglas, *supra* note 153.

- *New Appropriations*: For the fiscal year 2000-2001, the legislature has appropriated an additional $131 million to continue services initiated in this fiscal year (1999-2000) and to provide services to the remaining individuals on the waiting lists in existence as of July 1, 1999.
- *Reduction of Waiting Lists*: As of May 4, 2000, [Florida] had [moved] 6,034 [wait-listed] individuals to the Waiver and had arranged for services to fulfill additional or unmet needs for 8,946 persons already enrolled on the Waiver.
- *Reasonable Promptness*: The [State] will make reasonable efforts to provide [medically necessary] Waiver services . . . within 90 days of the date of an individual's enrollment on the Waiver.[156]

The *Prado-Steiman* settlement agreement is noteworthy, both for its comprehensiveness and for the sizeable additional funding commitment made by the state of Florida. The settlement agreement not only provides for additional funding to move individuals off the wait list, but also calls for major systemic reforms, including improvements in provider recruitment and training, development of group homes in order to offer a "meaningful choice" of alternative residential placements, implementation of a client-based quality assurance system, and the establishment of statewide policies for administration of the HCBS Waiver program that will be publicized in a "Waiver Handbook."[157] After implementation of these systemic reforms and the remainder of the settlement agreement, Florida should have a model waiver program.

IV. ANALYSIS

Despite the strong commitment of policymakers to protect the rights of individuals with disabilities and the passage of the Americans with Disabilities Act, there has been less enthusiasm for increased funding for programs such as the Medicaid Home and Community-Based Services ("HCBS") Waiver program.[158] Concern over program costs is clearly the motivation for the cost neutrality and maximum program enrollment requirements mandated by federal law.[159] Cost concerns are also apparent in the states' administration of their HCBS Waiver programs.[160] In response to budget and administrative

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[156] Nimkoff, *supra* note 154, at 12.

[157] *Id.*

[158] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 2-3, 29-31.

[159] *Id.* at 2-3, 29-30.

[160] *Id.* at 14-16, 29-31. Most states limit eligibility by degree of impairment or financial need, or both. *Id.* at 14-15, 30. Financial eligibility requirements are generally similar or identical to the requirements of the Federal Supplemental Security Income ("SSI") program, administered by the Social Security Administration, which provides cash assistance to

constraints, states have limited the number of individuals served and/or the types of services provided through HCBS Waiver programs based largely on cost concerns, rather than the individual's medical needs as determined by a physician.[161] Some states have attempted to contain costs by reducing state funding for the program, decreasing the number of federally-approved slots in its waiver program, and failing to fill vacancies in the program from the wait list.[162] Wait lists for community-based services exist when the number of individuals seeking community-based services exceeds the state's ability (or desire) to provide such services.[163] Given current demographic trends, wait lists for community-based services will remain a reality for the foreseeable future.[164] States will likely face increasing pressure to provide community-based services as the population ages.[165] Individuals with disabilities may be especially vulnerable as scarce resources are reallocated among competing interests. As a result, individuals with disabilities may be forced to remain in inappropriate institutional settings or may be pushed prematurely into community-based settings or forced to live at home without the necessary services and supports.

The scope of a state's obligation to provide individualized, community-based services to disabled individuals under the Medicaid HCBS Waiver program is still relatively uncharted. The Supreme Court's recent decision in

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individuals with disabilities who meet low income standards. *See id.* at 15-16.

[161] *Id.* at 29-31. States have implemented a variety of cost containment strategies, including: setting a "cap," or a maximum dollar amount that can be spent for medical assistance per person, or on the average spending per person; limiting the hours of service provided per recipient; and establishing maximum hourly/daily provider payment rates. *Id.* at 30.

[162] Some commentators believe that "[s]tates have caused waiting lists . . . to grow by decreasing the number of slots allocated to their waiver programs and by keeping allocated slots unfilled." Jane Perkins & Randolph T. Boyle, *Addressing Long Wait Lists for Home and Community-Based Services Through Medicaid and the ADA*, 45 ST. LOUIS L.J. 117, 119 (2001); *see also* HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 20-31.

[163] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 20-31; *see also* NCSL REPORT, *supra* note 3; STATE OF THE STATES 2000, *supra* note 11, at 42-43.

[164] Several demographic trends will likely impact the delivery of community-based services in the near future. Recent advances in health care and technology have significantly extended the life expectancy of individuals with disabilities. "The mean age at death for persons with mental retardation was 66 years in 1993 – up from 19 years in the 1930's and 59 years in the 1970's." STATE OF THE STATES 2000, *supra* note 11, at 41. In addition, advances in early intervention, education, and vocational training have enabled many of these individuals to live independently (with appropriate supports), work, and maintain social relationships. *Id.*

[165] The majority (59%) of individuals with MR/DD in the United States lived with family caregivers in 1998. *Id.* at 39-40. As these caregivers age beyond their capability to care for the disabled family member, they will have to seek placement in the community or in an institutional setting. *Id.* at 40. These trends will likely result in a significantly greater demand for community-based services, putting even more pressure on HCBS Waiver programs in the foreseeable future.

Olmstead v. L.C.[166] requires states to offer public services "'in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'"[167] Clearly apparent in the few decisions discussed in Section III[168] is the tension between policymakers' commitment, expressed in the ADA, to protecting the rights of individuals with disabilities, including their right to receive public services "in a setting that enables [them] to interact with nondisabled persons to the fullest extent possible,"[169] and the political reality of allocating limited resources among many competing needs. In several cases, settlements have been reached, precluding judicial pronouncements on the issue of whether wait lists violate federal law.

A. Wait Lists Under the Medicaid Act

It is well-settled that a state's general Medicaid program must comply with the requirements of the Medicaid Act, including the reasonable promptness and free choice provisions.[170] Courts, however, will likely be reluctant to interpret these requirements as applying to all individuals applying for services under the HCBS Waiver program.[171] The few courts that have addressed this issue have consistently held that federally-mandated population limits for HCBS Waiver programs are, in effect, an additional eligibility requirement.[172] Under this view, an individual cannot be eligible for and, therefore, is not entitled to services under the HCBS Waiver program if the population limits have been reached.[173] In such cases, states may utilize a wait list for

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[166] 527 U.S. 581 (1999).

[167] *Id.* at 602-03 (quoting the language of 28 C.F.R. § 35.130(d) (2001)).

[168] *See* discussion *supra* section III.B.

[169] *See* 28 C.F.R. pt. 35, app. A, at 489 (2001).

[170] 42 U.S.C. §§ 1396a(a)(8) (reasonable promptness), 1396n(c)(2)(C) (free choice) (1994).

[171] The HCBS Waiver program differs from the general Medicaid or Intermediate Care Facility for the Mentally Retarded and Developmentally Disabled ("ICF-MR/DD") programs, in that only the waiver specifies a "cap" on the number of individuals to be served which serves as a limitation on program enrollment. *See* 42 C.F.R. § 441.303(f)(6) (2001); Makin v. Hawai'i, 114 F. Supp. 2d 1017, 1027-28 (D. Haw. 1999). The Medicaid Act requires that states specify an upper limit on the number of individuals to be served annually under an approved HCBS Waiver program, subject to a statutory minimum of 200 individuals. *See supra* notes 30-33 and accompanying text.

[172] Boulet v. Cellucci, 107 F. Supp. 2d 61, 77 (D. Mass. 2000) ("The cap on waiver services is simply a constraint on eligibility."); *Makin*, 114 F. Supp. 2d at 1027 ("The statute and regulations provide for limits on [HCBS Waiver program] services . . . .").

[173] *Makin*, 114 F. Supp. 2d at 1030-31 ("[N]o law or statutory language provides Plaintiffs with any entitlement to [HCBS Waiver program] services once the 'population limits' are filled . . . ."); *Boulet*, 107 F. Supp. 2d at 77 ("Individuals who apply after the cap has been reached are not eligible, or alternatively, the waiver services are not 'feasible' for them until the cap has risen to include them.").

individuals who, but for the population limits, would be eligible for waiver services.[174] Since there are no vacant slots in the waiver program, wait-listed individuals cannot receive HCBS services, and therefore, the Medicaid Act would not apply to them.[175] Thus, a state's failure to offer or provide HCBS Waiver program services to a wait-listed individual would not violate either the free choice or reasonable promptness provisions of the Medicaid Act.[176] Therefore, once approved population limits have been reached, a state may deny an individual's application for services under the HCBS Waiver program and place that person on a wait list for such services.[177]

Importantly, courts have found that if the population limits have not been reached (i.e., the program is "available"), then the Medicaid Act "create[s] an entitlement to [HCBS] [W]aiver programs once states choose to implement them."[178] States administering a waiver program are subject to all the provisions of the Medicaid Act, including the reasonable promptness and free choice provisions.[179] Moreover, courts have consistently held that administrative and budgetary constraints "'do not excuse noncompliance'" with the Medicaid Act.[180] As a district court explained:

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[174] *E.g.*, *Makin*, 114 F. Supp. 2d at 1022 (noting that the wait list "is comprised of people who meet the [HCBS Waiver program] requirements, but for whom a space in the program is not available"); *see also supra* notes 30-33, 171-173 and accompanying text.

[175] *E.g.*, *Makin*, 114 F. Supp. 2d at 1030-32 (holding that wait lists do not violate either the free choice or reasonable promptness provisions of Medicaid Act).

[176] *E.g.*, *id.* at 1032 (Freedom of choice provision "requires the State to give the Plaintiffs a choice . . . from among the 'available' services. Unfortunately, when the spaces are filled in the [HCBS Waiver] program, it is no longer 'available' . . . ."). "[S]ince no law or statutory language provides Plaintiffs with any entitlement to these services once the 'population limits' are filled, [the State has] not violated the 'reasonable promptness' provision by maintaining wait lists." *Id.* at 1030-31.

[177] *See supra* notes 30-33, 171-76 and accompanying text.

[178] *Boulet*, 107 F. Supp. 2d at 77.

[179] Lewis v. N.M. Dep't of Health, 94 F. Supp. 2d 1217, 1236 (D.N.M. 2000) ("[N]ow that State of New Mexico has opted to provide waiver services it must comply with the requirements of the Medicaid Act . . . ."). Courts have found that HCBS Waiver services are subject to all Medicaid requirements, including the "reasonable promptness" provision. *Boulet*, 107 F. Supp. 2d at 78 (citing McMillan v. McCrimon, 807 F. Supp. 475, 481-82 (C.D. Ill. 1992)) ("'The fact that the [waiver program] is an optional service does not exempt it from the requirements of section 1396a(a)(8).'"); *cf.* Cramer v. Chiles, 33 F. Supp. 2d 1342, 1351 (S.D. Fla. 1999) ("The freedom of choice provision creates binding obligations on any state that elects to provide supports and services in homes pursuant to the Home and Community-Based Waiver.").

[180] Doe v. Chiles, 136 F.3d 709, 722 (11th Cir. 1998) (citing Alabama Nursing Home Ass'n v. Harris, 617 F.2d 388, 396 (5th Cir. 1980)); Helen L. v. DiDario, 46 F.3d 325, 338 (3d Cir. 1995) (quoting H.R. REP. NO. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 473 ("The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services" under the ADA.).

> Budgetary constraints are no defense for the failure to provide Medicaid entitlements. . . . The reason is simple. States could easily renege on their part of the Medicaid bargain by simply failing to appropriate sufficient funds.[181]

Thus, if population limits have not been reached, states must offer eligible individuals a choice of services (including home and community-based services) available under the waiver and must provide requested services with reasonable promptness, which courts have interpreted to be within ninety days.[182]

In determining the scope of a state's obligations under the Medicaid HCBS Waiver program, courts have generally deferred to the state's discretionary power to allocate health care resources and to balance available resources against their obligations to "maintain a range of facilities and to administer services with an even hand."[183] Although states have great flexibility, they do not have absolute discretion in their administration of the HCBS Waiver program.[184] Nonetheless, federal courts have been reluctant to order states to increase funding for HCBS services, reasoning that "the right to integrated placements is a limited one."[185]

B. Wait Lists and the Americans with Disabilities Act

Although the Medicaid Act would likely be inapplicable, the ADA may protect the rights of individuals while they are on a wait list for HCBS services. Wait lists of several years' duration deny disabled individuals a choice between institutional and community-based care and may compel unnecessary institutionalization, in violation of the integration mandate of the ADA.[186] Thus, an individual who is forced to move or remain in an institution while waiting for services under a state's HCBS Waiver program may claim

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[181] Perkins & Boyle, *supra* note 162, at 143 (quoting Benjamin H. v. Ohl, Civ. No. 3:99-0338, slip op. at 25-26 (S.D. W. Va. July 15, 1999)).

[182] *See, e.g., Boulet*, 107 F. Supp. 2d at 82 (holding that the State must provide waiver services "within 90 days if the applicant is eligible, the services are feasible, and settings are available for the delivery of those services").

[183] Olmstead v. L.C., 527 U.S. 581, 603-06 (1999) (discussing fundamental alteration defense); *see also id.* at 624-25 (Thomas, J., dissenting) ("In keeping with our traditional deference in this area, the appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities.").

[184] *See* Perkins & Boyle, *supra* note 162, at 119.

[185] Lewis v. N.M. Dep't of Health, 94 F. Supp. 2d 1217, 1239 (D.N.M. 2000); *see also Olmstead*, 527 U.S. at 603 ("The State's responsibility, once it provides community-based treament to qualified persons with disabilities, is not boundless.").

[186] Cramer v. Chiles, 33 F. Supp. 2d 1342, 1353 (S.D. Fla. 1999) ("Underfunding of the Home and Community-Based Waiver program compels institutionalization, thus negating meaningful choice.").

that the state's failure to offer services in the most integrated setting appropriate to his needs (i.e., community-based services) violates the ADA's integration mandate.[187]

Nonetheless, states are not required to provide services to all who request them regardless of cost.[188] A state can resist proposed modifications that would fundamentally alter the nature of the program at issue.[189] Thus, a state could defend against a wait list claim under the ADA by asserting that it would be a fundamental alteration of the waiver program to provide services to everyone who applied regardless of cost.[190] The *Olmstead* Court, interpreting the fundamental alteration defense, attempted to balance an individual's right, under the ADA, to receive necessary services in the most integrated setting appropriate to their needs, against the state's obligation to fairly and efficiently provide for the "care and treatment of a large and diverse population" of individuals with disabilities statewide.[191] After *Olmstead*, courts addressing the wait list issue must undertake a cost analysis to determine whether a modification of the program is "prudent in light of the State's other undertakings."[192] Courts must consider, "in view of the resources available to the State, not only the cost of providing community-based care . . . but also the range of services the State provides . . . and [its] obligation to mete out those services equitably."[193] Four Justices in *Olmstead* suggested that a state that had a comprehensive and "effectively working" plan to move individuals off the wait list at a "reasonable pace" would be deemed to be in compliance with the ADA.[194] Because the Court did not define the terms "effectively working"

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[187] 28 C.F.R. § 35.130(d) (2001); Makin v. Hawai'i, 114 F. Supp. 2d 1017, 1034 (D. Haw. 1999) ("[T]he Hawai'i statute could potentially force Plaintiffs into institutions in violation of the ADA's non-discrimination policy since the State's Medicaid statute fails to offer all qualified disabled people services in the 'most integrated setting possible.'").

[188] *Olmstead*, 527 U.S. at 603 ("The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless."); *id.* at 612 (Kennedy, J., concurring) ("No State has unlimited resources and each must make hard decisions on how much to allocate to treatment of diseases and disabilities.").

[189] 28 C.F.R. § 35.130(b)(7) (2001).

[190] *See, e.g.*, *Makin*, 114 F. Supp. 2d at 1034 (State argues that providing all eligible individuals with HCBS services would fundamentally alter the waiver program because it would decrease state funding for other treatment settings, such as intermediate care facilities). In such cases, the court would undertake a cost analysis. *Id.*; *see also Olmstead*, 527 U.S. at 603-06 (plurality opinion).

[191] *Olmstead*, 527 U.S. at 604. The Court asserted that individuals would not be moved up to the top of the wait list because they filed suit. *Id.* at 606.

[192] *Makin*, 114 F. Supp. 2d at 1034-35; *see also* Lewis v. N.M. Dep't of Health, 94 F. Supp. 2d 1217, 1239 (D.N.M. 2000).

[193] *Olmstead*, 527 U.S. at 597.

[194] *Id.* at 605-06. The Court did not, however, define "effectively working" and "reasonable pace." *See id.*

or "reasonable pace," it is still unclear whether lengthy wait lists would violate the ADA.

C. Defining an "Effectively Working" Plan and a "Reasonably Paced" Wait List

A number of groups have been involved in efforts to define the parameters of an effectively working plan to move the wait list at a reasonable pace. The Health Care Financing Administration, the federal agency that administers the Medicaid program, has issued initial technical assistance recommendations, which define key principles intended to assist states in developing comprehensive, effectively working *Olmstead* plans.[195] Advocacy groups have also developed and disseminated their own recommendations, which they believe should be included in a comprehensive, effectively working plan. The National Association of Protection and Advocacy Systems released a template of elements to consider in developing an *Olmstead* plan.[196] A substantial

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[195] Letter from Timothy M. Westmoreland & Thomas Perez, Health Care Fin. Admin., to State Medicaid Directors (Jan. 14, 2000) [hereinafter Westmoreland Letter], *available at* http://www.hcfa.gov/medicaid/smd1140a.htm (visited Nov. 4, 2000), http://www.protectionandadvocacy.com/olmsteadsmdletter.htm (pdf format). The principles identified in the letter include:

- Develop and implement a comprehensive, effectively working plan (or plans) for providing services to eligible individuals with disabilities in more integrated, community-based settings.
- Provide an opportunity for interested persons, including individuals with disabilities and their representatives, to be integral participants in plan development and follow-up.
- Take steps to prevent or correct current and future unjustified institutionalization of individuals with disabilities.
- Ensure the availability of community-integrated services.
- Afford individuals with disabilities and their families the opportunity to make informed choices regarding how their needs can best be met in community or institutional settings.
- Take steps to ensure that quality assurance, quality improvement, and sound management support implementation of the plan.

Id. at 6-10.

[196] NAT'L ASS'N OF PROT. & ADVOC. SYS., TEMPLATE OF KEY ELEMENTS WHICH MUST BE CONSIDERED WHEN DEVELOPING A COMPREHENSIVE, EFFECTIVELY WORKING STATE PLAN FOR MOVING PEOPLE OUT OF INSTITUTIONS AND INTO APPROPRIATE COMMUNITY SETTINGS (Oct. 12, 1999) [hereinafter NAPAS REPORT], http://www.protectionandadvocacy.com/temploct12.htm. The eight elements are: 1) participation of key stakeholders in the development of the plan; 2) needs assessment; 3) development of new community services and support infrastructure; 4) transition services to prepare individuals for a change in placement; 5) data collection which is individualized and tied to individual program plan; 6) outcomes measurement and target dates; 7) monitoring and quality assurance; and 8) resource development. *Id.*

report prepared by the Bazelon Center for Mental Health Law contains specific suggestions in four broad areas.[197] Taken together, these provide some guidance in defining an "effectively working" plan and a "reasonably paced" wait list under *Olmstead*.

First, courts have consistently held that a lack of funding, without more, does not constitute a fundamental alteration of the waiver program.[198] Thus, a state may not evade its obligation to provide for the care and treatment of individuals with disabilities by laying the blame on inadequate legislative appropriations[199] or administrative convenience.[200] Rather, a state must seek to maximize its available resources by "aggressively seeking additional funds—from the legislature, by restructuring its Medicaid program[,] or through similar strategies."[201] This means that, at a minimum, a state must show, not only annual increases in HCBS Waiver program population limits, but also that it was using its best efforts to obtain the necessary approvals and funding to support this expansion from both the federal government and state legislature.[202]

Second, courts have held, in all cases, that waiting periods of several years are outside of the "zone of reasonableness."[203] The U.S. Supreme Court has clearly articulated that, "[w]hile there may be a range of reasonable [time periods for provision of assistance], there certainly are some [time periods] outside that range that no State could ever find to be reasonable . . . under the [Medicaid] Act."[204] It is then axiomatic that states that maintain wait lists for Medicaid must actively manage that process to ensure that individuals are

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[197] *Under Court Order: The Supreme Court Ruling in* Olmstead v. L.C.*: What the Community Integration Mandate Means for People with Mental Illness*, BAZELON CTR. FOR MENTAL HEALTH LAW (Oct. 1999) [hereinafter BAZELON REPORT], http://www.bazelon.org/undctord.pdf. The report provides recommendations in four broad areas: 1) state obligations; 2) affected populations; 3) plan development; and 4) financing community treatment. *Id.*

[198] *E.g.*, Helen L. v. DiDario, 46 F.3d 325, 338 (3d Cir. 1995) (holding that States "cannot rely upon a funding mechanism of the General Assembly to justify administering [a community-based services] program in a manner that discriminates and then argue that [they] cannot comply with the ADA without fundamentally altering [the] program").

[199] *Id.* at 338-39.

[200] *Id.* at 338 ("The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services . . . .").

[201] BAZELON REPORT, *supra* note 197, at 3-4; *see also* HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 31.

[202] *See* Makin v. Hawai'i No. CV 98-0097 DAE, slip op. at 3-4 (D. Haw. Aug. 15, 2000) (order approving class action settlement).

[203] Boulet v. Cellucci, 107 F. Supp. 2d 61, 72 (D. Mass. 2000).

[204] Wilder v. Va. Hosp. Ass'n, 496 U.S. 509, 519-20 (1990), *cited in* Doe v. Chiles, 136 F.3d 709, 717 (11th Cir. 1998).

provided with needed services within a reasonable period of time.[205] States must demonstrate a good faith effort to annually serve the maximum number of individuals allowable under the HCBS Waiver, rather than leaving slots unfilled for budgetary reasons.[206] Further, a state may not offer "some other services or some other choice" to eligible individuals, but must offer the services identified by the individual (and, presumably, his treating physician) as meeting his special needs.[207] States can also access and pool funds from other sources, such as Supplemental Security Income ("SSI"), which can be used to provide individualized services or to develop community-based alternatives to institutional care.[208] In addition, improved case management and evaluation can help a state actively manage its wait list by ensuring that the services provided remain necessary, and that billed services were actually provided.[209] By streamlining program administration, evaluating results, and improving case management and tracking, states will be better able to control costs and provide services to more people more efficiently.[210] This, in turn, will help reduce the number of people on the wait list.

Third, the *Olmstead* Court specifically suggested that states may be able to demonstrate compliance with the ADA by developing a comprehensive plan to ensure that community-based services are delivered to qualified individuals without delay.[211] Perhaps the most critical component in determining the ultimate success of any such plan will be the early and meaningful involvement of key stakeholders in the planning process.[212] A state may, as part of its state plan, develop objective, quantifiable standards to define a "reasonable pace" of placements into community-based settings for specific

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[205] *See, e.g.*, Makin v. Hawai'i, 114 F. Supp. 2d 1017, 1035 (D. Haw. 1999) (state must show more than just an increase in the number of slots to demonstrate "responsible development" of the HCBS Waiver program and compliance with the ADA); *cf. Boulet*, 107 F. Supp. 2d at 77-78 ("That the statute creates eligibility requirements and limitations for the waiver services does not remove any obligation from states implementing the waiver program they have themselves fashioned.").

[206] *See Makin*, 114 F. Supp. 2d at 1022-23 nn.6-9. A state may not, for example, fail to replace those who leave the HCBS Waiver program with eligible wait-listed individuals, and reallocate budgeted Waiver funds to support institutional care. *See id.*

[207] *See Boulet*, 107 F. Supp. 2d at 79 (commenting that states may not "escape the [reasonable] promptness requirement and other requirements that would force them to make the waiver services available simply by providing some other services or some other choice to eligible individuals").

[208] HCBS WAIVER PROGRAM REP. 2000, *supra* note 1, at 2.

[209] *Id.*

[210] *See id.* at 31-32.

[211] Olmstead v. L.C., 527 U.S. 581, 605-06 (1999).

[212] Westmoreland Letter, *supra* note 195; NAPAS REPORT, *supra* note 196; BAZELON REPORT, *supra* note 197, at 5.

populations.[213] A necessary prerequisite for effective planning is determining the number of individuals who are unnecessarily institutionalized or are at risk of institutionalization.[214] The plan must also provide for the expansion of existing community services infrastructure to ensure that the state has an adequate capacity for serving individuals with disabilities in the community.[215] This will ensure that there are sufficient providers to meet the demand, and that the individuals served receive quality care.[216] An "effectively working" plan should also provide for funding, and should include schedules and timetables for implementation and objective, measurable standards to define a "reasonable pace" for providing community-community-based services to specific groups of consumers.[217] The ultimate success of any plan will depend on the provisions for ensuring that the plan is implemented[218] and that it is "effectively working" to move the wait list at a "reasonable pace."[219]

In short, states that collaborate with stakeholders and consumers in developing, implementing and effectuating a comprehensive state plan and demonstrate a continuing commitment to providing individuals with disabilities with community-based services without unreasonable delay—states that make a commitment to "do the right thing" and honor their obligations—could reasonably be found to satisfy the fundamental alteration defense articulated in *Olmstead*.

Lastly, Congress should consider taking action to clarify the scope of states' obligations under the Medicaid HCBS Waiver program. Although few courts have had the opportunity to address this specific issue, inconsistencies are already apparent, raising the very real possibility that courts will develop conflicting interpretations of the states' obligations to provide community-based services under the Medicaid HCBS Waiver program.[220] Because

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[213] BAZELON REPORT, *supra* note 197, at 6. For example, different standards could be developed for children, adults with long term care needs, and adults with acute episodes. *Id.*

[214] *Id.*

[215] *Id.* at 5; NAPAS REPORT, *supra* note 196.

[216] NAPAS REPORT, *supra* note 196.

[217] *Id.*; *see also* BAZELON REPORT, *supra* note 197, at 6.

[218] Such provisions include those dealing with implementation, objective assessment and evaluation, quality assurance, provider participation, and funding. NAPAS REPORT, *supra* note 196; BAZELON REPORT, *supra* note 197, at 6.

[219] Olmstead v. L.C., 527 U.S. 581, 605-06 (1999).

[220] *Compare* Boulet v. Cellucci, 107 F. Supp. 2d 61, 82 (D. Mass. 2000) (holding that "the waiver statute provides eligible individuals with an entitlement to waiver services" and ordering Massachusetts to provide appropriate services within ninety days to all eligible individuals on wait lists for Medicaid HCBS Waiver services) *with* King v. Sullivan, 776 F. Supp. 645, 652, 656 (D.R.I. 1991) and King v. Fallon, 801 F. Supp. 925, 933 (D.R.I. 1992), two opinions in the same case, *cited in Boulet*, 107 F. Supp. 2d at 78-79 (finding that "the state [is] not obligated to provide any more than it promised in its state plan and that, where private[, community-

Medicaid is such a large program and is jointly administered by federal and state government, such jurisdictional inconsistencies could significantly affect both the administration of the HCBS Waiver program and the provision of services to individuals with disabilities, and may result in the reinstitutionalization of such individuals, in violation of the ADA and *Olmstead*. Courts, already reluctant to address issues that implicate federalism concerns,[221] will likely defer to Congress in construing state obligations under the Medicaid Act. Congressional action to clarify the scope of states' obligations to provide community-based services to individuals, with disabilities under the Medicaid HCBS Waiver program should be a priority. This would ensure that the interests of both individuals in receiving community-based services, and states, in defining the scope of their obligation to provide such services, would be addressed in a consistent manner. This would also preserve uniform program standards and facilitate administration of this major federal program.

V. CONCLUSION

A strong commitment by policymakers to address and eliminate discrimination against individuals with disabilities, evidenced in the passage of the ADA,[222] has contributed to the phenomenal growth in Medicaid Home and Community-Based Services ("HCBS") Waiver programs, which support the inclusion of individuals with disabilities by providing the necessary medical services and supports to enable them to live at home in the community, rather than in institutions.[223] The Supreme Court further strengthened the rights of individuals with disabilities to receive public benefits and services in the most integrated setting appropriate in *Olmstead v. L.C.*,[224] the landmark case that reexamined the scope of a state's obligations

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based] placements [are] scarce and not mandated by the state plan, a waiting list [is] appropriate").

[221] *See Olmstead*, 527 U.S. at 612-13 (Kennedy, J., concurring) ("Grave constitutional concerns are raised when a federal court is given the authority to review the State's choices in basic matters such as establishing or declining to establish new programs."); *id.* at 624 (Thomas, J., dissenting) (commenting that there are "significant federalism costs, [in] directing States how to make decisions about their delivery of public services").

[222] *See supra* notes 45-51 and accompanying text.

[223] 42 U.S.C. §§ 1396, 1396n (1994). The HCBS Waiver provisions, section 1915(c) of the Medicaid Act, allow a State to waive certain statutory requirements and determine the types of home and community based services that will be offered to a specified number of individuals (with a minimum of 200 persons per year) each year under the approved Waiver, subject to additional restrictions. *See* 42 U.S.C. § 1396n(c) (1994); *see also* discussion *supra* section II.A.

[224] 527 U.S. 581 (1999).

under the ADA to provide Medicaid HCBS Waiver services to disabled individuals.[225]

This paper has suggested that the population limits approved under a HCBS Waiver are properly regarded as an additional eligibility requirement. Once the population limits have been reached, the state may place individuals on a wait list for HCBS services.[226] Although the Medicaid Act is not applicable to individuals wait-listed for services, the ADA's integration mandate requires states to provide community-based services in the most integrated setting appropriate to the individual's needs.[227] The Supreme Court in *Olmstead* suggested that a state would be in compliance with the ADA if it had a "comprehensive, effectively working" plan to move individuals off the wait list at a "reasonable pace."[228]

Although the Court did not define the terms "effectively working" or "reasonable pace," the federal government,[229] advocacy groups,[230] and the courts[231] have begun this process. Based on these efforts, this paper suggests that it is reasonable to require that a state affirmatively demonstrate its willingness to fulfill its obligations under the Medicaid Act by providing community-based services to wait-listed individuals without unreasonable delay, in accordance with a comprehensive state plan developed and implemented with community partners.[232] Moreover, a state could reasonably be expected to expend its best efforts to serve the maximum number of individuals possible under the Waiver, before adding to the wait list.[233] Lastly, a state could reasonably be required to develop objective standards for a "reasonable pace" for community-based placements, based on its specific characteristics, and to implement quality assurance and outcome-based evaluation to ensure that the standards are met.[234] In short, states that take substantive action to fulfill their commitment to provide required HCBS services to individuals with disabilities in the most integrated setting appropriate to their individual needs without delay, will likely be found to

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[225] *Id.* at 581.

[226] *See* discussion *supra* section IV.A.

[227] *See supra* notes 55, 186-187.

[228] *Olmstead*, 527 U.S. at 605-06.

[229] *See supra* note 195 and accompanying text.

[230] *See supra* notes 196-97 and accompanying text.

[231] *See* discussion *supra* section III.

[232] *See* discussion *supra* section IV.

[233] *See supra* notes 107-08, 206 and accompanying text. The court in *Makin v. Hawai'i*, for example, required that the State demonstrate an increase in the number of people proposed to be served each year under Medicaid HCBS Waiver program, and also required the State to use its best efforts to obtain Health Care Financing Administration approval and state funding to implement the proposed increase. *See supra* notes 110-11 and accompanying text.

[234] *See supra* notes 213-19 and accompanying text.

have satisfied the fundamental alteration defense suggested by the *Olmstead* Court. Finally, this paper suggests that Congress should consider clarifying the scope of states' obligation to provide community-based services under a federally-approved Medicaid HCBS Waiver program, in order to prevent jurisdictional inconsistencies and potential conflicts between states in the administration of the Medicaid program.

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[235] J.D. Candidate, May 2002, William S. Richardson School of Law, University of Hawai'i at Manoa. I wish to express my sincere appreciation to the many people whose involvement and support contributed so much to this project: to my editor, Anneliese Pak, whose unfailingly wise editorial judgment and tireless advocacy shaped my work; to everyone at the Hawai'i Disability Rights Center who generously shared their time and knowledge with me; to Matthew Bassett, Shawn Luiz, Neva Keres, and Michael Rabanal, whose insightful comments informed my work.. Most of all, I want to thank my family, whose constant encouragement, support, and child care helped make this possible; John, for being there; and Avery, my little prince, who brings sunshine wherever he goes. I couldn't have done this without you.

No Free Music: Effect of *A & M Records, Inc. v. Napster, Inc.* on the Music Industry and Internet Copyright Law

I. INTRODUCTION

The world has gone digital.[1] There are digital TVs, digital phones, digital business transactions, movies and music stored digitally on DVDs and CDs, and more recently, music stored digitally on personal computers and transferred digitally via the Internet. The latter advance in the digital arena has spawned litigation between members of the music industry[2] and Napster, Inc. (Napster), a small Internet start-up company that allows users to share music files.[3] The *A & M Records, Inc. v. Napster, Inc.* dispute[4] "concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings."[5]

Because of recent advances in digital technology this dispute has come to the forefront. In the past, music files were too big to store and transfer between computers in a convenient manner because downloading a single song from the Internet for storage on a personal computer could take hours.[6] With

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[1] Digital signals are signals that are "[r]epresented by discrete digits, each distinct from the next" using a "method of representing and manipulating information by switching current on or off." JOHN MARKUS & NEIL SCLATER, MCGRAW-HILL ELECTRONICS DICTIONARY 148 (5th ed. 1994). This method is contrasted to the analog method of signal representation that consists of a "continuous representation of physical phenomena that can be plotted as points of amplitude versus time with each point merging imperceptively into the next." *Id.* at 21.

[2] A & M Records, Inc., Geffen Records, Inc., Interscope Records, Sony Music Entertainment, Inc., MCA Records, Inc., Atlantic Recording Corp., Island Records, Inc., Motown Records Co. L.P., Capital Records, Inc., La Face Records, BMG Music, Universal Records Inc., Elektraentertainment Group, Inc., Artista 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., No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *1 (N.D. Cal. May 5, 2000) [hereinafter *Napster I*].

[3] *See generally* Napster, Inc. Homepage, *at* http://www.napster.com/ (last visited Mar. 5, 2001).

[4] *Napster I*, 2000 U.S. Dist. LEXIS 6243; A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. Aug. 10, 2000) [hereinafter *Napster II*]; A & M Records, Inc. v. Napster, Inc., No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001) [hereinafter *Napster III*]; A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, No. C 00-1369 MHP, 2001 U.S. Dist. LEXIS 2186 at *4 (N.D. Cal. Mar. 5, 2001) [hereinafter *Napster IV*].

[5] *Napster II*, 114 F. Supp. 2d at 900.

[6] Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072, 1073 (9th Cir. 1999).

the advent of new data compression algorithms like MPEG-1 Audio Layer 3 (MP3),[7] which reduces the data size by a factor of 12 with no perceivable reduction in sound quality,[8] the time required to transfer songs between personal computers now takes minutes.[9]

With MP3-type technology, transferring what is essentially CD quality music between computers is as simple and easy as sending email. Like CDs, the format is digital, so the sound quality will not degrade with repetitive playbacks, unlike older media such as analog audiotapes. This is a great windfall for the home user who can download[10] her favorite music and develop personal music libraries so long as she can find it on the web. Companies like Napster have played a leading role in facilitating this activity by creating the MP3 music file sharing industry. Napster servers store library or directory-type information of the music files that other users have available for transfer, and the Napster servers and user-side Napster software facilitate the transfer of the desired music.[11]

Everyone is happy except the music industry and the musicians who want to get paid for their efforts in creating this music.[12] It is specifically these types of unauthorized uses of copyrighted material that copyright law is

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[7] *See id.* at 1073-74. MP3's popularity is due in large part to the fact that it is a standard, non-proprietary compression algorithm freely available for use by anyone, unlike various proprietary and copyright secure, competitor algorithms. *Id.*

[8] *See* L. Chiariglione, *MPEG -1 FAQs, International Organisation for Standardisation* (June 1996), *at* http://www.cselt.it/mpeg/faq/faq_mpeg-1.htm (last visited Mar. 5, 2001). MPEG encoding schemes reduce the data size by using perceptual audio coders that eliminate portions of the audio signal that cannot be heard by the human ear, thus reducing data size without degradation in perceived sound quality. *Id.*

[9] *Diamond Multimedia*, 180 F.3d at 1074.

[10] "To download means to receive information, typically a file, from another computer . . . ." *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *8 (9th Cir. Feb. 12, 2001).

[11] *Napster II*, 114 F. Supp. 2d at 905-07.

[12] *See Senate Judiciary Committee Hears Testimony on Future of Digital Music and the Internet*, BNA WASHINGTON INSIDER, July 12, 2000. "Lars Ulrich, co-founder and member of the group Metallica criticized Napster for 'hijacking our music without asking.'" *Id.*; *Access to Digital Entertainment on the Internet: Testimony Before the House of Representatives Commerce, Telecommunications, Trade and Consumer Protection*, FEDERAL DOCUMENT CLEARING HOUSE, Oct. 28, 1999 (statement of Hillary Rosen, Recoding Industry Association of America). Artists want "their creative works protected online, as in the physical world." *Id.*; Anandashankar Mazumdar, *Small Record Producers Not Necessarily Troubled by Internet Piracy of Recordings*, BNA WASHINGTON INSIDER, May 25, 2000. Tom Silverman, pioneer in marketing of rap music stated "[p]irating opportunities, in the form of Napster, are creating a 'culture of theft' . . . in which every citizen may come to believe it is his or her right to make unauthorized copies of recorded works just because they can be done so easily." *Id. Contra* statement by Chuck D, "[t]he Internet is becoming 'a watchdog method for squeezing out the small entrepreneur with its lawyer-accountant mentality . . . .'" *Id.*

designed to eliminate.[13] Copyright law protects musicians and the music industry by giving owners of works of authorship, which includes sound recordings,[14] the exclusive right "to reproduce the copyrighted work in copies" and "to perform the copyrighted work publicly by means of a digital audio transmission."[15]

This Recent Development focuses on how *Napster*[16] will affect copyright law as it relates to the Internet, specifically how the doctrines of contributory infringement, vicarious infringement, and certain defenses will be applied under the framework of the Digital Millennium Copyright Act.[17] Part II summarizes copyright law prior to *Napster*,[18] discussing previous decisions that define the terms contributory infringement, vicarious infringement and the defenses of fair use and the staple article of commerce doctrine. It also sets out pertinent sections of the Digital Millennium Copyright Act[19] that limit liability for certain Internet entities and discusses why Congress deemed these limitations necessary. Part III analyzes the *Napster* decisions,[20] and Part IV discusses the possible effect these decisions will have on copyright law, specifically whether it will enable or stifle further technological Internet advances.

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[13] *See* EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 537-38 (Foundation Press, 5th ed. 1998). "The basic idea of copyright . . . enables authors of any type of work to capture most of the identifiable monetary gains which the work makes possible." *Id.* at 537. Technological advances have made this issue more controversial because of the ease at which the infringer can copy. *Id.* This has meant that often the law alone is all that protects copyright owners from massive infringement. *Id.*

[14] 17 U.S.C. § 102 (2000). Section 102 states:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories: . . . sound recordings . . . .

Id.

[15] 17 U.S.C. § 106 (2000).

[16] *Napster I*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243 (N.D. Cal. May 5, 2000); *Napster II*, 114 F. Supp. 2d 896 (N.D. Cal. Aug. 10, 2000); *Napster III*, Inc., No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001).

[17] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[18] *Napster I*, 2000 U.S. Dist. LEXIS 6243; *Napster II*, 114 F. Supp. 2d 896; *Napster III*, 2001 U.S. App. LEXIS 1941.

[19] 112 Stat. 2860.

[20] *Napster I*, 2000 U.S. Dist. LEXIS 6243; *Napster II*, 114 F. Supp. 2d 896; *Napster III*, 2001 U.S. App. LEXIS 1941.

II. BACKGROUND

A. Potential Liabilities for Internet Entities

Although the Copyright Act of 1976[21] does not specifically address contributory or vicarious infringement, courts recognize that these forms of liability are accepted legal doctrines that hold one individual accountable for the actions of another.[22] To fill this void, courts look to the Patent Act,[23] which expressly defines contributory and vicarious liability as to patent infringement, and extend these liabilities to copyright infringement.[24] Courts have little trouble with this extension because "vicarious liability is imposed in virtually all areas of law, and the concept of contributory infringement is merely a species of the broader problem identifying the circumstances in which it is just to hold one individual accountable for the actions of another."[25]

1. Contributory copyright infringement

Courts apply contributory liability in copyright infringement action when it would be equitable to hold one party responsible for the actions of another.[26] An advantage of this form of liability to the plaintiff is that the plaintiff does not have to individually sue each of potentially thousands or millions of direct

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[21] 17 U.S.C. §§ 101-810; 1001-1010; 1101; 1202-1205; 1301-1332 (2000).

[22] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 434-35 (1984). The Court stated:

> The Copyright Act does not expressly render anyone liable for infringement committed by another. In contrast, the Patent Act expressly brands anyone who 'actively induces infringement of a patent' as an infringer, 35 U.S.C. § 271(b), and further imposes liability on certain individuals labeled 'contributory' infringers, § 271(c). The absence of such express language in the copyright statute does not preclude the imposition of liability for copyright infringements on certain parties who have not themselves engaged in the infringing activity. For vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.

Id.

[23] 35 U.S.C. §§ 1-376 (2000).

[24] 35 U.S.C. § 271(b), (c) (2000). *See Sony Corp. of Am.*, 464 U.S. at 435. "[T]he Patent Act expressly brands anyone who actively induces infringement of a patent 'as an infringer, 35 U.S.C. § 271 (b), and further imposes liability on certain individuals labeled 'contributory' infringers, § 271(c)." *Id.*

[25] *Sony Corp. of Am.*, 464 U.S. at 435.

[26] David N. Weiskopf, *The Risks of Copyright Infringement on the Internet: A Practitioner's Guide*, 33 U.S.F. L. REV. 1, 15 (1998).

infringers.[27] Contributory liability focuses on the third party defendant's relationship with the direct infringing activity.[28]

Courts find contributory copyright infringement[29] when one "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another."[30] This requires direct infringing activity by a third party, which occurs whenever a party violates one of the copyright owner's exclusive rights.[31] Actual knowledge of the infringing activity is not required; it will be inferred if one has a "reason to know of the infringing nature" of the activity.[32] A drawback of this form of liability is that courts have not clearly or consistently defined exactly what behavior rises to the level of "inducing, causing or materially contributing to the directly infringing activity" creating uncertainty as to what behavior constitutes contributory infringement as to Internet activities.[33]

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[27] *Id.* at 16.

[28] Michelle A. Ravn, Note, *Navigating Terra Incognita: Why the Digital Millenium Copyright Act Was Needed to Chart the Course of Online Service Provider Liability for Copyright Infringement*, 60 OHIO ST. L.J. 755, 764 (1999).

[29] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (finding a swap meet operator knew of and materially contributed to infringing activity of vendors selling counterfeit music recordings): Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1163 (2d Cir. 1971) (finding an artists management corporation's "pervasive participation in the formation and direction" of local community concert associations' programming of compositions caused copyright infringement): Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc., 907 F. Supp. 1361, 1382 (N.D. Cal. 1995) (finding the pleadings sufficient to raise an issue of contributory infringement as to an operator of a computer bulletin board service for the infringing activity of bulletin board users).

[30] *Gershwin Publ'g*, 443 F.2d at 1162.

[31] Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1293 (D. Utah 1999). The exclusive rights of the copyright holder include the right to reproduce the copyrighted work, to prepare derivative works, to perform the copyrighted work publicly, to display the copyrighted work publicly, and to perform the copyrighted sound recording publicly by means of digital audio transmission. 17 U.S.C. § 106 (2000).

[32] *See Gershwin Publ'g Corp.*, 443 F.2d at 1162; Cable/Home Comm. Corp. v. Network Prods., Inc., 902 F.2d 829, 846 (11th Cir. 1990) (finding that advice from an attorney that use of pirated computer chips to descramble video signals was sufficient to find apparent knowledge of the infringing activity on the part of seller of the chips); SEGA Enter. Ltd v. MAPHIA, 857 F. Supp. 679, 686 (N.D. Cal. 1994) (finding a bulletin board operator who facilitated, directed, knew of, and encouraged infringing activity amounted to contributory infringement even if it didn't know exactly when computer games would be uploaded or downloaded). *But see* Bernstein v. J.C. Penney, Inc., No. 98-2958 R (Ex), 1998 U.S. Dist. LEXIS 1904, at *3 (C.D. Cal. Sept. 29, 1998) (finding that J.C. Penney's website which provided a hyperlink to another website that in turn led to multiple hyperlinks each containing infringing copies did not constitute substantial participation based on the facts presented).

[33] Weiskopf, *supra* note 26, at 16.

2. Vicarious copyright infringement

Whereas contributory infringement concerns the defendant's relationship with the act of direct infringement, vicarious infringement focuses on the defendant's relationship with the person who is directly infringing.[34] Even though courts also look to equity under this form of liability, the circumstances in which vicarious liability will apply are slightly different from contributory infringement.[35] While knowledge and participation are indicative contributory infringement,[36] benefit and control are central to vicarious liability.[37]

Courts find vicarious copyright infringement[38] if a defendant "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities."[39] The greater the degree of control the defendant has over the direct infringer, the more likely a court is to find vicarious infringement.[40] For example, courts often find vicarious copyright liability in the landlord-tenant relationship that exists in the operation of night clubs.[41] This is because landlords have a great degree of control over the operation of the night club through such devices as lease agreements. However, the level of control that courts will require for vicarious copyright infringement on the Internet remains uncertain.[42] In addition, claims of contributory or vicarious infringement often must withstand the affirmative defenses of fair use and staple article of commerce.

B. Potential Defenses for Internet Entities

1. Fair use

The fair use doctrine is an affirmative defense to direct infringement.[43] It has its roots in common law and is defined as a privilege of those other than

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[34] Ravn, *supra* note 28, at 764.

[35] Weiskopf, *supra* note 26, at 17.

[36] *See Gershwin Publ'g*, 443 F.2d at 1162; Weiskopf, *supra* note 26, at 28-30.

[37] *Intellectual Reserve*, 75 F. Supp. 2d at 1293.

[38] *E.g.*, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262-63 (2d Cir. 1996) (finding that a swap meet operator had the right to terminate vendors and therefore had the ability to control activities of the vendors; finding direct financial benefit by collection of admission fees, incidental payments for parking, food and other services by infringing customers); *Gershwin Publ'g*, 443 F.2d at 1163 (finding that a bulletin board operator was in a position to police the infringing conduct and derived substantial benefit from it).

[39] *Gershwin Publ'g*, 443 F.2d at 1162.

[40] Ravn, *supra* note 28, at 765.

[41] Weiskopf, *supra* note 26, at 17-18.

[42] *Id.* at 18.

[43] *See* Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 549 (1985).

the copyright holder to use the copyrighted material in a reasonable manner without consent.[44] When Congress codified this common law doctrine, it stated that courts implied the author's consent to reasonable use of the copyrighted works because it was necessary to further the constitutional goal of promoting the progress of science and the useful arts.[45] Without the doctrine, subsequent authors and artists would have little incentive to improve prior works.[46]

Fair use limits the exclusive rights inuring to a copyright holder as defined in § 107 of the Copyright Act of 1976.[47] In a list that is meant to illustrate and not limit,[48] § 107 describes the works Congress intended fair use to apply, works such as "criticism, comment, news reporting, teaching . . . scholarship, and research."[49] Section 107 also sets forth the four factors the court must consider.[50] These are the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market for or value of the copyrighted work.[51] Congress intended these factors to be weighed on a case-by-case basis because of the fact intensive nature of the balancing test.[52]

As to the first factor of fair use, the purpose and character of the use, courts consider two aspects of the use: whether the new work is transformative[53] and

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[44] *Id.*

[45] *Id.* The Constitution provides: "The Congress shall have Power . . . 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." U.S. CONST. art. I, § 8.

[46] *Id.*

[47] 17 U.S.C. § 107 (2000).

[48] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (finding that a parody by the rap group 2 Live Crew of the Roy Orbison song, Pretty Woman, may be the type of work to which the fair use doctrine applies).

[49] 17 U.S.C. § 107 (2000).

[50] *Id.*

[51] *Id.* The statute provides:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
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> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
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> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
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> (4) the effect of the use upon the potential market for or value of the copyrighted work.
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> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

[52] *Acuff-Rose Music*, 510 U.S. at 577.

[53] *Id.* at 579.

whether it is commercial in nature.[54] In considering the second factor of fair use, if the copy is creative in nature, courts are less apt to find fair use.[55] Determination by the courts of the third factor, the portion used, will not favor fair use if the "heart of the original" is taken.[56] When considering the fourth factor, the effect on the market, courts will not find fair use if it finds the use in question is harmful or potentially harmful, should the use become widespread.[57]

2. Staple article of commerce

While the fair use defense applies to direct infringing activity, the staple article of commerce doctrine applies to some activities of contributory infringement.[58] The staple article of commerce doctrine allows certain products that are capable of infringing uses to remain in the market.[59] In this context, an article of commerce is a product or commodity that may be used or sold in connection with copyrighted material.[60] Under this doctrine, the sale of an article of commerce does not constitute contributory infringement if the product is capable of substantial noninfringing uses.[61]

For example, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Court applied the staple article of commerce doctrine to the VCR finding that because it was a household product that could be used for both infringing and noninfringing uses, its sale could not be restricted based on a contributory infringement claim.[62] In the context of copyright law, courts strike a balance

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[54] *Id.* at 579, 584-85. In determining whether a work is transformative, courts consider whether the new work merely supplants the original, or alters the work creating a new meaning or message. *Id.* at 579. Courts in general consider a use that is commercial in nature to weigh against finding fair use. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

[55] *Acuff-Rose Music*, 510 U.S. at 586. Courts will generally find bare factual reporting of an event fair use but courts will be less likely to find more creative works like motion pictures fair use. *Id.*

[56] *Id.* at 587.

[57] *Sony Corp. of Am.*, 464 U.S. at 451.

[58] *Id.* at 440-42. The Court stated that this doctrine has its roots in patent law. *Id.* at 440. "When a charge of contributory infringement is predicated entirely on the sale of an article of commerce that is used by the purchaser to infringe a patent, the public interest in access to that article of commerce is necessarily implicated." *Id.* at 440. Because a finding of infringement will create a negative monopoly in the article of commerce by in effect declaring it to be contraband, courts will scrutinize such a claim. *Id.* at 441.

[59] *See id.* at 442.

[60] *See id.* at 440-43.

[61] *Id.* at 442.

[62] *Id.* at 446-47. Because many important producers of television programs did not object to the manner in which the VCR was being used, the Court found the staple article of commerce doctrine applied and allowed the continued use of the VCR. *Id.*

between the copyright holder's legitimate demand for protection and the rights of others to engage in substantially unrelated areas of commerce.[63] Otherwise, an injunction against an infringing use of an article of commerce, might adversely affect noninfringing uses of that article.[64]

C. *Recent Legislation Addressing Technological Advances and the Internet*

In an effort to ensure that traditional copyright liabilities and defenses keep pace with the requirements of the technological advances of the Internet and digital arena, Congress passed two acts: the Digital Performance Rights in Sound Recordings Act of 1995,[65] and the Digital Millennium Copyright Act of 1998 (DMCA).[66] While the latter limits liability as to certain infringing activity,[67] the former ensures rights for the copyrightholder of a digital recording.[68]

The central aspect of the DMCA is that it limits copyright liability of providers of on-line services for certain acts of transmitting or providing access to on-line information.[69] This is commonly referred to as the safe harbor provision.[70] Its goal is to advance Internet technology by limiting liability for certain Internet entities that transmit, route, or provide connections for material that goes through or is temporarily stored on the Internet entities' equipment.[71] According to Senator Orrin Hatch who led efforts to pass the DMCA, its purpose is to "harmonize the copyright laws" with technological changes ensuring that digital copyright content would continue to be protected

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[63] *Id.*

[64] *See, e.g., id.* at 443. If infringing uses of the VCR were enjoined, the public would be deprived of the ability to use the VCR for noninfringing uses. *Id.*

[65] Digital Performance Rights in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[66] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[67] 105 CIS Legislative History Pub. L. No. 304.

[68] KITCH & PERLMAN, *supra* note 13, at 606.

[69] 105 CIS Legislative History Pub. L. No. 304.

[70] *See, e.g., Napster I*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *2 (N.D. Cal. May 5, 2000).

[71] 17 U.S.C. 512(a) (2000). The statute provides:

> A service provider shall not be liable for monetary relief, or . . . for injunctive relief or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections . . . .

Id.

while at the same time allowing the "flexibility necessary to allow the Internet technology and businesses to flourish . . . ."[72]

While the safe harbor provision of the DMCA limits liability for service providers,[73] the Digital Performance Rights in Sound Recordings Act ensures rights in digital recordings.[74] The Digital Performance Rights in Sound Recordings Act amended the Copyright Act "to provide an exclusive right to perform sound recordings publicly by means of digital transmissions . . . ."[75] Congress passed the DMCA partly in response to concerns of the music industry that digital transmissions would become a "celestial jukebox" that would replace the sale of tangible sound recordings.[76] It is against this backdrop of recently passed legislation affecting digital copyright that the Napster controversy arose.

III. *A & M Records, Inc. v. Napster, Inc.*

A. Facts

Napster is a small Internet start-up company that developed a system that allows users to share MP3 music files with others.[77] Napster makes its proprietary software freely available for users to download from the Napster website.[78] The procedure to set up a personal computer to use the Napster system involves three basic steps.[79] After downloading Napster's software, a user can access the Napster system from her computer.[80] The server-side Napster software reads the list of MP3 files[81] that the user has elected to share and adds these to a directory and index on the Napster server.[82] To locate a song, the user enters a name on the search page of the user software and clicks

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[72] *Senate Judiciary Committee Hearing on The Future of Digital Music: Is There an Upside to Downloading?*, FEDERAL DOCUMENT CLEARING HOUSE, July 11, 2000 (statement by Sen. Orrin G. Hatch).

[73] 105 CIS Legislative History Pub. L. No. 304.

[74] KITCH & PERLMAN, *supra* note 13, at 606.

[75] Digital Performance Rights in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[76] KITCH & PERLMAN, *supra* note 13, at 606.

[77] *Napster I*, 2000 U.S. Dist. LEXIS 6243, at *3.

[78] *Id.*

[79] *Id.*

[80] *Id.* This allows access to one of approximately 150 servers that Napster operates. *Id.*

[81] *Id.* "Consumers typically acquire MP3 files in two ways. First, users may download audio recordings that have already been converted into MP3 format by using an Internet service such as Napster. Second, 'ripping' software makes it possible to copy an audio compact disc ('CD') directly onto a computer hard-drive . . . ." (citation omitted) *Id.*

[82] *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *9-10 (9th Cir. Feb. 12, 2001).

the "Find It" button.[83] The server software then searches the directory that currently logged on[84] users have elected to share and returns a list of files that match.[85]

The user downloads the desired file by highlighting it on the returned list and clicking the "Get Selected Song(s)" button.[86] This signals the Napster server to initiate communication between the user and host computer.[87] At this point, the Napster server obtains the IP address[88] from the host and sends it to the user computer that will use the information to establish an Internet connection with the host.[89] Although the MP3 file is never routed directly through the Napster server, Napster servers locate the files and facilitate the transfer.[90] At no time in this process is payment sought or provided.[91]

The plaintiffs,[92] A & M Records, among others, are music publishers that financially depend upon the sale of sound recordings because they earn royalties from the sales.[93] They filed suit against Napster alleging contributory and vicarious federal copyright infringement.[94] Napster responded by filing a motion for summary judgment claiming its system falls within the safe harbor provision of the DMCA, 17 U.S.C § 512(a).[95] Alternatively, Napster

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[83] *Napster I*, 2000 U.S. Dist. LEXIS 6243, at *4.

[84] *Napster II*, 114 F. Supp. 2d at 905. The file names in the directory are short lived. They are "added or purged every time a user signs on or off the network." *Id.*

[85] *Napster I*, 2000 U.S. Dist. LEXIS 6243, at *4.

[86] *Id.*

[87] *Napster II*, 114 F. Supp. 2d at 906-07.

[88] *See generally* Chuck Semeria, *Understanding IP Addressing: Everything You Ever Wanted To Know, at* http://www.3com.com/nsc/501302.html (last visited Mar. 5, 2001). An IP address is an identifier for a computer similar to a telephone number that is used for routing purposes. *Id.*

[89] *Napster II*, 114 F. Supp. 2d at 907.

[90] *Id.*

[91] *Id.* at 900-02. Although this is a free service, it is not a non-profit organization. *Id.* Napster plans to delay the maximization of revenues while the user base grows and increases the quantity and quality of available music until "critical mass" is achieved. *Id.* At this point, Napster will "monetize" its user base by "targeting email; advertising; commissions from links to commercial websites; and direct marketing of CDs, Napster products, and CD burners and rippers." *Id.*

[92] *Id.* at 896. 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 Record Co. L.P., Capitol Records, Inc., La Face Records, BMG Music, Universal Records, Inc., Electra Entertainment Group Inc., Artista Records, Inc., Sire Records Group Inc., Polygram Records, Inc., Virgin Records America Inc., Warner Bros. Records Inc. *Id.*

[93] *Id.* at 908.

[94] *Napster I*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *1 (N.D. Cal. May 5, 2000).

[95] *Id.* at *2.

asserted the affirmative defenses of fair use and staple article of commerce doctrine.[96] The District Court for the Northern District of California first addressed the applicability of the safe harbor provision and in a following proceeding addressed the infringement claims and defenses.[97]

B. Applicability of the Safe Harbor Provision to Napster

Napster argued that its entire system, which Napster defined as its hardware and software that facilitated searching for, indexing and downloading files, qualified as a "service provider"[98] as defined in the safe harbor provision.[99] In the alternative, Napster asked the court to apply the safe harbor provision to its role in downloading MP3 files only.[100] The district court relied on a narrow reading of the safe harbor provision, 17 U.S.C. §512(a), and the legislative history of the DMCA in finding that Napster does not meet the requirements of § 512(a).[101] This provision states: "[a] service provider shall not be liable . . . for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider . . . ."[102] The court's analysis hinged on its interpretation of the individual terms "transmitting," "routing," and "providing connections" through a system.[103]

By relying on its narrow interpretation of the statute and Napster's own statements,[104] the district court determined that MP3 files were "not transmitted 'through' the system within the meaning of subsection 512(a)."[105] The court rejected Napster's broad interpretation of this term.[106] The court

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[96] *Napster II*, 114 F. Supp. 2d at 912.

[97] *Id.* at 900.

[98] 17 U.S.C § 512(k) (2000). Section 512(k) provides:

Definitions.-

(1) Service Provider.-(A)As used in subsection (a), the term "service provider" means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

Id.

[99] *Napster I*, 2000 U.S. Dist. LEXIS 6243, at *2, *21.

[100] *Id.*

[101] *See id.* at *19-25.

[102] 17 U.S.C. § 512(a) (2000).

[103] *Napster I*, 2000 U.S. Dist. LEXIS 6243, at *22.

[104] "Napster has expressly denied that the transmission of MP3 files ever passes through its servers." *Id.* at *20-21.

[105] *Id.* at *22.

[106] *Id.* at *21-22. "Even assuming that the system includes the browser on each user's computer, the MP3 files are not transmitted 'through' the system within the meaning of subsection 512(a)." *Id.*

used Napster's statements on the "passivity of its role"[107] as indicative that the transmission does not go through the system but between parts of the system.[108]

To refute Napster's contention that it "provided connections" by providing IP addresses between users, the district court again relied on § 512(a)'s legislative history.[109] It stated that even though Napster's servers convey address information, the connection itself occurs through the Internet, and the legislative history demonstrates that the safe harbor provision was meant to apply only to activities "in which a service provider plays the role of a 'conduit' for the communications of others."[110]

Although the court relied on its own interpretation of the term "routing," it similarly determined that Napster does not route[111] files through its system.[112] The court found that the route the MP3 files took was through the Internet not the Napster server.[113] The court went on to hold that "[b]ecause Napster does not transmit, route, or provide connections through its system, it has failed to demonstrate that it qualifies for the 512(a) safe harbor," and thus, denied summary judgment to Napster.[114]

On appeal, the Ninth Circuit Court of Appeals agreed with the district court that the balance of hardships tipped in the music industry's favor such that summary judgment should be denied.[115] However, the Ninth Circuit warned that it "need not accept a blanket conclusion that § 512 . . . will never protect secondary infringers."[116] Therefore, it left final determination of issue for trial where the parties would develop the facts more completely.[117]

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[107] *Id.* at *22. In its defense, Napster admitted that all files are transferred via the Internet directly from one user to another and not through the Napster server. *Id.*

[108] *Id.* at *21-22.

[109] *Id.* at *23-24.

[110] *Id.* (quoting H.R. REP. NO. 105-551 (II) (1998), 1998 WL 414916, at *130 (1998)).

[111] A "router" is known throughout the electronics industry as a device that is commonly used between computers and servers, on a local area network (LAN), wide area network (WAN) or in internet service provider hardware to provide connections between and among computers. The files or signals pass through the router. *See Router* (last visited Mar. 17, 2001), *at* http://www.learnthat.com/define/r/router.shtml.

[112] *Napster I*, 2000 U.S. Dist. LEXIS 6243, at *24.

[113] *Id.* at *25.

[114] *Id.*

[115] *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *54-55 (9th Cir. Feb. 12, 2001).

[116] *Id.* at *53.

[117] *Id.* at *54.

C. Application of Contributory and Vicarious Infringement Liability

Because Napster's motion for summary judgment was denied, the district court considered the music industry's motion to preliminarily enjoin Napster from "engaging in or assisting others in copying, downloading, uploading, transmitting, or distributing copyrighted music without the express permission of the rights owner."[118] This required the district court to consider whether it should hold Napster liable for contributory or vicarious copyright infringement and whether any defenses apply.

1. Contributory infringement liability and the staple article of commerce defense

As to the contributory infringement claim, the court found that the music industry satisfied its initial burden of establishing a prima facie case of direct copyright infringement by a third party.[119] The music industry then satisfied the "knowledge of the infringing activity"[120] prong of contributory infringement by advancing sufficient evidence to show that Napster had actual knowledge of the infringing activity, or at least, had reason to know about the infringing activity.[121]

The music industry's evidence of direct knowledge consisted of documents written by a Napster co-founder "mention[ing] the need to remain ignorant of users' real names . . . 'since they are exchanging *pirated music*,'" and that Napster is "pushing demand" for pirated music.[122] The music industry also provided evidence that it had informed Napster that its service contained more than 12,000 infringing files.[123] The Ninth Circuit agreed with the district court that Napster had direct knowledge of infringement.[124]

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[118] *Napster II*, 114 F. Supp. 2d 896, 900 (N.D. Cal. Aug. 10, 2000).

[119] *Id.* at 911. The court was satisfied by evidence that "virtually all Napster users engage in the unauthorized downloading or uploading of copyrighted music" because up to eighty-seven percent of the files were copyrighted, and more than seventy percent of those files may be owned or administered by the plaintiffs. *Id.*

[120] Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971). The *Gershwin* court stated the test for contributory infringement. Courts find contributory copyright infringement when one "with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . ." *Id.*

[121] *Napster II*, 114 F. Supp. 2d at 918-19.

[122] *Id.* at 918.

[123] *Id.*

[124] *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *37 (9th Cir. Feb. 12, 2001).

As evidence of constructive knowledge,[125] the district court accepted the following facts: Napster executives had experience in the recording industry, Napster had sufficient knowledge of intellectual property laws to sue the music group Offspring for unauthorized use of the Napster logo, and Napster promoted its website service with depictions of infringing files.[126]

In its defense, Napster was unable to convince the district court that the Napster service was "capable of substantial noninfringing uses"[127] such that the staple article of commerce doctrine advanced in *Sony Corp. of Am. v. Universal City Studios, Inc.*[128] should apply.[129] The district court found the potentially noninfringing use of space-shifting was not a substantial use because the "most credible explanation for the exponential growth of traffic to the website is the vast array of free MP3 files" and not the ability to space-shift.[130] In addition, the district court stated that Napster's service was unlike Sony's sale of the VCR because "Napster exercises ongoing control over its service[,]" whereas "'the only contact between Sony and the users of the [VCR] . . . occurred at the moment of sale.'"[131]

The Ninth Circuit did not agree with the breadth of the district court's application of the staple article of commerce doctrine.[132] It did not find *Sony* as distinguishable as the lower court, stating that the lower court erred by ignoring the potential noninfringing uses by focusing on the current uses of the Napster system.[133] Based on *Sony*, the Ninth Circuit stated that when an article of commerce is "capable of both infringing and 'substantial noninfringing uses[,]" constructive knowledge of infringing activity will not be sufficient to

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[125] In its analysis of whether Napster had "reason to know" about the infringing activity, the district court substituted the term "constructive knowledge" without specifically defining the term. *Napster II*, 114 F. Supp. 2d at 918-19.

[126] *Id.* at 919 (citations omitted).

[127] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984). "[T]he sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." *Id.*

[128] 464 U.S. 417 (1984). In *Sony*, Universal Studios sought to enjoin Sony from manufacturing VCR's because consumers allegedly used them to record Universal's copyrighted works. *Id.* at 420. Sony claimed the primary use of the VCR was for time-shifting with other possible uses being the recording of programs that the copyrightholders do not object to. *Id.* at 423.

[129] *Napster II*, 114 F. Supp. 2d at 916.

[130] *Id.* at 916.

[131] *Id.* at 916-17 (quoting *Sony Corp. of Am.*, 464 U.S. at 438).

[132] *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *35-42 (9th Cir. Feb. 12, 2001).

[133] *Id.* at *39.

find contributory infringement.[134] It stated that "in an online context, evidence of actual knowledge of specific acts of infringement is required . . . ."[135]

Although the Ninth Circuit did not agree with the district court imputing the required level of knowledge based on evidence of constructive knowledge, it did agree that Napster evidenced sufficient knowledge to satisfy the "knowledge of infringing activity" prong of contributory infringement.[136] The Ninth Circuit based this on a finding that Napster had sufficient direct knowledge.[137] After agreeing with the district court that Napster satisfied the "knowledge of infringing activity" prong of contributory infringement, the court considered whether Napster's actions constituted material contribution to the infringing activity of its users.[138]

The district court found and the Ninth Circuit agreed that this prong was met by categorizing Napster as an "Internet swap meet" of infringing material.[139] The district court based this determination on a finding that the *Napster* fact pattern was similar to previous cases in which courts found material contribution.[140]

The court's characterization of Napster as an "Internet swap meet" is a reference to *Fonovisa, Inc. v. Cherry Auction, Inc.*[141] In *Fonovisa*, the court found that a swap meet operator knew of and materially contributed to the infringing activity of vendors selling counterfeit music recordings by providing the space for the infringers to sell the counterfeit music.[142] Similarly, in *SEGA Enterprises Ltd v. MAPHIA*, the court found an electronic bulletin board service acting as a central depository for unauthorized computer game copies materially contributed by providing software, hardware, and phone lines needed for uploading and downloading of copyrighted material.[143] The district court found that Napster, like the defendants in *Fonovisa* and *MAPHIA*, materially contributed by providing the software and database information essential to facilitate the downloading of copyrighted material.[144] After finding that the music industry demonstrated a likelihood of success as

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[134] *Id.* at *38-39 (citing *Sony Corp. of Am.*, 464 U.S. at 442).

[135] *Id.* at *40 (citing Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc., 907 F. Supp. 1361, 1371 (N.D. Cal. 1995). The court of appeals also stated that further evidence of actual knowledge exists if the copyright holder provides documentation of likely infringement. *Id.* at *41 (citing *Religious Tech. Ctr.*, 907 F. Supp. at 1374).

[136] *Id.* at *39-42.

[137] *Id.* at *43.

[138] *Id.* at *44.

[139] *Napster II*, Inc., 114 F. Supp. 2d 896, 919-20 (N.D. Cal. Aug. 10, 2000).

[140] *Id.* at 920.

[141] 76 F.3d 259 (9th Cir. 1996).

[142] *Fonovisa*, 76 F.3d at 264.

[143] SEGA Enter. Ltd v. MAPHIA, 857 F. Supp. 679, 686-88 (N.D. Cal. 1994).

[144] *See Napster II*, 114 F. Supp. 2d at 920.

to contributory infringement, the district court considered the vicarious liability claim.[145]

2. Vicarious copyright infringement

The district court found Napster satisfied the "right and ability to supervise the infringing activity"[146] prong of vicarious copyright infringement based partly on Napster's own assertions.[147] Napster argued that it is technologically difficult to distinguish legal from illegal conduct, while at the same time touted "its improved methods of blocking users about whom the rights holders complain[ed]."[148] The district court found that the latter was "tantamount to an admission that the defendant can, and sometimes does, police its service."[149]

The Ninth Circuit agreed that Napster "had the right and ability to police its system[,]" but determined that the district court failed to recognize the limitations of this ability.[150] It noted that the district court failed to recognize that Napster's ability is limited by the system's architecture, which does not read the content of the files other than to determine that they are properly formatted.[151] The Ninth Circuit concluded that Napster's ability to police its system is limited to terminating users' access to the system upon locating infringing material in its databases based on the file name only.[152]

The Ninth Circuit agreed with the district court that Napster satisfied the financial interest prong of vicarious copyright infringement.[153] The district

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[145] *See id.*

[146] *Fonovisa*, 76 F.3d at 262 (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)). The Second Circuit stated: "even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Gershwin Publ'g*, 443 F.2d at 1162.

[147] *Napster II*, 114 F. Supp. 2d at 920.

[148] *Id.*

[149] *Id.* at 921. This finding is in accord with previous decisions. *See, e.g., Gershwin Publ'g Corp.*, 443 F.2d at 1160–63 (holding that although the artists' management company had no formal power to control the artists, the fact that the artists depended on management for direction was sufficient evidence of the right and ability to supervise); Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc., 907 F. Supp. 1361, 1376 (N.D. Cal. 1995) (holding that the plaintiff advanced sufficient evidence of Netcom's ability to police users' conduct by pointing out that Netcom suspended subscribers' accounts on over 1000 occasions and can delete specific postings to defeat summary judgment).

[150] *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *49 (9th Cir. Feb. 12, 2001).

[151] *Id.*

[152] *Id.*

[153] *Id.* at *46-47; *Napster II*, 114 F. Supp. 2d at 921.

court found that Napster "has a direct financial interest"[154] in the infringing activities even though the company currently makes no money.[155] The future expectation of a profit rather than actual financial gain was sufficient for the court to make this determination.[156] In finding a reasonable likelihood of success as to vicarious infringement claim, the Ninth Circuit affirmed that "[t]he ability to download myriad popular music files without payment seems to constitute the glittering object that attracts Napster's financially-valuable user base."[157]

D. Napster's Defense of Fair Use

Lastly, the district court considered Napster's claim that sampling and space-shifting were fair uses.[158] In its analysis, the court focused predominantly on the first and fourth factors of fair use, which are the purpose and character of the use and the effect of the use on the market for the copyrighted work respectively.[159] As to the second factor, the nature of the copyrighted work,[160] the court merely stated that the original work and digital recording were similar in nature because they both constituted entertainment, cutting against a finding of fair use.[161] As to the third factor, the amount copied in relation to the work as a whole,[162] there was no dispute that the process of downloading MP3 files involves copying the entire copyrighted song.[163]

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[154] Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (quoting *Gershwin Publ'g*, 443 F.2d at 1162) (finding that "even in the absence of an employer-employee relationship one may be vicariously liable if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities").

[155] *Napster II*, 114 F. Supp. 2d at 921. Findings of Fact 3 stated that Napster is a free service. *Id.* at 902.

[156] *Id.* at 902, 921. Findings of Fact 3 stated that Napster eventually plans to "monetize" its user base via "email, advertising, commissions from links to websites, and direct marketing" of hardware products and may begin to charge for a commercial version of its software. *Id.* at 902.

[157] *Id.* at 922.

[158] *Id.* at 912; *see also* discussion *supra* section II.B.1.

[159] 17 U.S.C. § 107 (2000).

[160] *See* discussion *supra* section II.B.1.

[161] *Napster II*, 114 F. Supp. 2d at 913.

[162] *See* discussion *supra* section II.B.1.

[163] *Napster II*, 114 F. Supp. 2d at 913. The Ninth Circuit cited use of a VCR to time-shift a video program as in *Sony* as an example of fair use even when a work is copied in full. *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *23 (9th Cir. Feb. 12, 2001) (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449-50 (1984)).

As to the first factor, the district court found that the purpose and character[164] of the Napster system weighed against a finding of fair use because Napster's service is commercial in nature.[165] The Ninth Circuit further explained that "commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies."[166]

The Ninth Circuit agreed with the district court that sampling and space-shifting, two activities Napster claimed were noncommercial, were both commercial in nature.[167] The district court's reasoning was that the music industry regulates these activities through royalties and free promotional downloads, and that Napster's free service would affect the commercial market.[168] Thus, it distinguished space-shifting by Napster users from time-shifting by VCR users because Napster users were able to obtain and distribute to millions worldwide, near perfect, permanent copies they otherwise would have to purchase.[169] It also found that space-shifting was only an occasional use of the Napster system, whereas time-shifting was the principal use of the VCR in *Sony*.[170] As to the first factor, the district court held that the global potential of Internet music file swapping, combined with the court's distaste for users getting a CD-quality product for free, militated against fair use.[171]

The district court also found the fourth factor, the effect on the market,[172] weighed against finding fair use, because the music industry produced sufficient evidence to show that Napster's service harmed the market for its songs.[173] The court found Napster's service harmed both the existing market and potential market for the music industry's songs.[174] The existing market was harmed based on evidence that Napster activities reduce sales among college students.[175]

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[164] *See* discussion *supra* section II.B.1.

[165] *Napster II*, 114 F. Supp. 2d at 912.

[166] *Napster III*, 2001 U.S. App. LEXIS 1941, at *21 (citing SEGA Enter. Ltd. v. MAPHIA, 857 F. Supp. 679, 687 (N.D. Cal. 1994), finding commercial use in downloading copies of video games).

[167] *Id.* at *29-34.

[168] *Id.* at *30.

[169] *Napster II*, 114 F. Supp. 2d at 913 (citing *Sony Corp. of Am.*, 464 U.S. at 449-50).

[170] *Id.* at 916. The court addressed surveys conducted by both parties as to the use of Napster. *Id.* Napster's report cites statistics that seventy percent of Napster users engage in space-shifting some of the time. *Id.* The district court, however, relied on the music industry's survey, which indicated ten percent were potentially space-shifted. *Id.*

[171] *Id.* One music industry report showed that 10,000 files were shared per second, and the Napster service was growing 200% per month. *Id.* at 902.

[172] *See* discussion *supra* section II.B.1.

[173] *Napster II*, 114 F. Supp. 2d at 913.

[174] *Id.* at 913-14.

[175] *Id.* at 913.

Even if there was an increase in sales in the existing market, the district court stated this fact would not favor Napster.[176] The court based this finding on its determination that the potential market was harmed because Napster's activities created barriers to the music industry's entry into the derivative[177] digital music downloading market.[178] The court found that the music industry advanced sufficient evidence of its plans to enter the downloading market of secure music using measures such as encryption and watermarking.[179]

Because the district court found the scales tipped against Napster on all four fair use factors, it did not have to do any balancing to find against Napster on its copyright infringement defense of fair use.[180] Accordingly, the district court found, and the Ninth Circuit agreed that "any potential non-infringing use of the Napster service is minimal or connected to the infringing activity or both. The substantial or commercially significant use of the service was, and continues to be, the unauthorized downloading and uploading of popular music, most of which is copyrighted."[181]

Since the district court found substantial evidence of contributory and vicarious infringement, and no defenses applicable, it granted the music industry's preliminary injunction against "engaging in, or facilitating others

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[176] *Id.* at 914-15; *see also* DC Comics, Inc. v. Reel Fantasy, Inc., 696 F.2d 24, 28 (2d Cir. 1982) (holding that the fair use defense did not apply to a comic store owner's use of one of DC Comic's characters on flyers in the store). The Second Circuit stated that "[s]ince one of the benefits of ownership of copyrighted material is the right to license its use for a fee, even a speculated increase in DC's comic book sales . . . would not call the fair use defense into play as a matter of law." *Id.* Similarly, the court in UMG Recordings, Inc., v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000) held that an Internet company that copied songs onto its servers and replayed them to subscribers could not assert a fair use defense because "[a]ny allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works." *UMG Recordings*, 92 F. Supp. 2d at 352.

[177] *See* 17 U.S.C. § 101, 106 (2000). Section 106 states: "the owner of copyright under this title has exclusive rights to do and to authorize any of the following: . . . to prepare derivative works upon the copyrighted work." *Id.* § 106. Section 101 defines derivative work as: "a work based upon one or more preexisting works, such as a . . . sound recording . . . ." *Id.* § 101.

[178] *Napster II*, 114 F. Supp. 2d at 903, 913. "Defendant's internal documents indicate that it seeks to take over, or at least threaten, plaintiffs' role in the promotion and distribution of music." *Id.* at 903. One document stated, "ultimately Napster could evolve into a full-fledged music distribution platform, usurping the industry . . . [but] we should focus . . . on wooing the industry before we try to undermine it." *Id.*

[179] *Id.* at 910, 918. *See generally* Ioannis Pitas, *Digital Watermarks for Copyright of Still Images, Audio and Video* (1998), *at* http://Poseidon.csd.auth.gr/signatures/#What_Wat (last visited Mar. 6, 2001) (stating that watermarks are imperceptible digital signals that are embedded into the desired signal that can be detected only by the person holding the watermark code).

[180] *See Napster II*, 114 F. Supp. 2d at 912.

[181] *Id.*

in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings[,]" which had the effect of essentially shutting the service down.[182]

The Ninth Circuit agreed with this preliminary injunction in concept, but on remand instructed the district court to narrow its scope to reflect the limited ability of the Napster system to detect infringing files and imposed a burden on both parties to police infringing files.[183] The Ninth Circuit disagreed with the district court over the level of knowledge required to find contributory liability, and level of control over the infringing activity to find vicarious liability.[184]

To be held liable for contributory infringement, the Ninth Circuit held that Napster must "(1) receive[] reasonable knowledge of specific infringing files with copyright musical compositions and sound recordings; (2) know[] or should know that such files are available on the Napster system; and (3) fail[] to act to prevent viral distribution of the works."[185] To be held liable for vicarious infringement, the Ninth Circuit held that Napster must fail "to affirmatively use its ability to patrol its system and preclude access to potentially infringing files listed in its search index."[186] On remand, the district court ordered Napster to prevent files from being included in the Napster index that it has "reasonable knowledge" is infringing based on information provided by the music industry[187] or through its own policing efforts.[188]

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[182] *Id.* at 927.

[183] *Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *61-63 (9th Cir. Feb. 12, 2001).

[184] *Id.* at *61-62.

[185] *Id.* at *61.

[186] *Id.* at *62.

[187] *Napster IV*, No. C 99-05183 MHP, No. C 00-1369 MHP, 2001 U.S. Dist. LEXIS 2186, at *4 (N.D. Cal. Mar. 5, 2001). The content of the notice the music industry must provide Napster includes "(A) the title of the work; (B) the . . . artist name[]; (C) the name(s) of one or more files available on the Napster system containing such work; and (D) a certification that the plaintiffs own or control the rights allegedly infringed." *Id.* at *3-5 (citations omitted).

[188] *Id.* at *5-8. The district court stated although Napster's duty exists within the confines of the limits of its system, Napster must search for infringing files even though the transitory nature of its system makes this difficult. *Id.* at *5-6. The court stated that it "anticipates that it may be easier for Napster to search the files available on its system at any particular time against lists of copyrighted recordings provided by plaintiffs." *Id.* at *6. "Given the limited time an infringing file may appear on the system and the individual user's ability to name her files, relief dependent on plaintiffs' identifying each 'specific infringing file' would be illusory." *Id.* at *6 n.2.

IV. EFFECT OF *NAPSTER* ON COPYRIGHT LAW AS IT APPLIES TO THE INTERNET

The *Napster* litigation is one of the latest efforts of the courts to reign in and define the limits of Internet copyright law. It manifests the tension between Congress's desire to provide copyright protection while at the same time promote technological advances on the Internet.[189] Due to this tension, which is magnified by the Internet's unique capabilities and worldwide implications, copyright law is changing with the goal of finding the proper balance between these desires.

> The establishment of high-speed, high-capacity electronic information systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to scores of other individuals . . . . The emergence of integrated information technology is dramatically changing, and will continue to change, how people and businesses deal in and with information and entertainment products and services, and how works are created, reproduced, distributed, adapted, displayed, performed, owned, licensed, managed, presented, organized, sold, accessed, used and stored. This leads, understandably, to a call for adaptation of—or change in—the law.[190]

The *Napster* litigation is evidence of a recent trend in copyright law toward increased liability for certain Internet entities. Based on *Napster*, courts applying the safe harbor provision of the DMCA will narrow its scope,[191] resulting in increased liability for contributory and vicarious infringment.[192]

A. Narrowing of the Scope of Application of the Safe Harbor Provision

The *Napster* litigation is helping to define which Internet entities the courts will grant safe harbor. Although the purpose of the DMCA is to limit

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[189] *See* INFORMATION INFRASTRUCTURE TASK FORCE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 8-10, 14, http://www.uspto.gov/web/offices/com/doc/ipnii/ (Sept. 1995). The report describes the Internet as part of the National Information Infrastructure. *Id.* at 1. Benefits of this infrastructure include boosting the ability of U.S. firms to compete in the global economy, increasing the opportunity to participate in government, spurring economic growth, providing benefits to authors and consumers, supporting the education system, providing cultural access to the arts and humanities, and increasing access to information and entertainment resources. *Id.* at 8-10. The goal of the National Information Infrastructure is to maintain the balance between protection and technological advances. *Id.*

[190] *Id.* at 12.

[191] *See* discussion *supra* section II.C, III.B.

[192] *See* discussion *supra* section III.C.1-2.

liability,[193] courts are leaning toward narrowly construing application of the safe harbor provision.[194] This is evidenced by the district court's scrutiny of what communication it considers to be "through" a system.[195]

For the safe harbor provision to apply, it appears that the data or bits must physically travel through the service provider's hardware.[196] Control and facilitation of communication, like the service Napster provides, will not suffice.[197] This trend of increased scrutiny is further evidenced by the courts' application of copyright infringement liability for Internet entities.

B. Shift in Liability as to Contributory and Vicarious Liability

Napster and other recent case law support the claim that courts are imposing increased liability on Internet equipment manufacturers and service providers for copyright infringement.[198] The *Napster* litigation indicates that courts will apply a standard for copyright liability for Internet entities somewhere between the standard applied in *Sony Corp. of Am. v. Universal City Studios, Inc.*,[199] for third party infringement, and applied in *UMG Recordings, Inc. v. MP3.com, Inc.*[200] for direct infringement.

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[193] 105 CIS Legislative History Pub. L. No. 304.

[194] *See Napster I*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *21-25 (N.D. Cal. May 5, 2000).

[195] *See id.* The district court emphasized Congress' intent that the safe harbor only apply to activities "in which a service provider plays the role of a 'conduit' for the communications of others." *Id.* at *20 (citing H.R. REP. NO. 105-551(II) (1998), 1998 WL 414916, at *130).

[196] *See id.* at *19-25. The district court stated: "[i]t is clear from both parties' submissions that the route of the allegedly infringing material goes through the Internet from the host to the requesting user, not through the Napster server." *Id.* at *25.

[197] *See id.* at *24. The Napster server communicates with the user and host, facilitating a connection, which results in downloading of a file. *Id.* at 23.

[198] *See* UMG Recordings, Inc., v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (finding against fair use when an Internet company copied songs onto their servers and replayed the same to subscribers); Religious Tech. Ctr. v. Netcom On-Line Comm. Serv., Inc., 907 F. Supp. 1361, 1382 (N.D. Cal. 1995) (finding the pleadings sufficient to raise an issue of contributory infringement as to an operator of a computer bulletin board service for the infringing activity of bulletin board users); SEGA Enter. Ltd v. MAPHIA, 857 F. Supp. 679, 686 (N.D. Cal. 1994) (finding a bulletin board operator who facilitated, directed, knew of, and encouraged infringing activity had contributorily infringed even if the operator did not know exactly when computer games would be uploaded or downloaded); Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (finding that a bulletin board operator is in a position to police the infringing conduct and derived substantial benefit from it).

[199] 464 U.S. 417 (1984).

[200] No. 00-Civ.472 JSR, 2000 U.S. Dist. LEXIS 13293 (S.D. N.Y. Sept. 6, 2000).

The *Sony* standard allows a certain amount of infringing activity[201] as to third party infringement because of an overriding benefit to the consumer and to industry advancement.[202] Courts weigh the inherent technological limitations of the device against the harm created by the infringing activity.[203] If the infringing activity is limited in scope of distribution and duration of use, courts are more willing to allow a certain amount of infringement based on the greater benefit achieved by the continued use of the infringing device.[204]

On the other end of the spectrum, when courts apply the *MP3.com* standard for direct infringement, they do not balance the benefit to the consumer if the device is used directly to infringe copyrighted material.[205] Courts have little trouble finding that even if an infringers' actions actually provide a benefit to the consumer and/or the copyright owner, the infringer is still not free "to usurp a further market that directly derives from reproduction of [a] plaintiffs' copyrighted works."[206] Courts will not consider the overriding benefit to the consumer.[207] Instead, they will be concerned only with protecting the copyrightholders' interests.[208]

Because both *Napster* and *Sony* concern contributory and vicarious infringement as to the use of a new technology, the courts were compelled to consider whether benefits to the consumer and industry justify the invasion of

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[201] *See Sony Corp. of Am.*, 464 U.S. at 442. In *Sony*, the Court allowed the continued use of the VCR even though a substantial number of survey respondents accumulated a library of tapes. *Id.* at 423.

[202] *See id.* at 446. The *Sony* Court recognized the benefits of VCR usage by focusing on the testimony of Fred Rogers from the children's television show Mister Rogers' Neighborhood: "'[s]ome public stations, as well as commercial stations, program the 'Neighborhood' at hours when some children cannot use it. I think that it's a real service to families to be able to record such programs and show them at appropriate times.'" *Id.* 445-46. The Court implied that if "Mister Rogers" will allow consumers to tape his children's show, then VCR sales should not be stifled. *Id.* at 446.

[203] *See id.* at 449-50.

[204] The analog tapes at issue in *Sony* have a fidelity that is noticeably reduced from the original production that continues to degrade with each successive replay or secondary copy, thus limiting the extent of potential distribution. *See* Mark R. Johnson, Amateur Recording, Part 3. Endemic Noise (1997) (paper by master's degree candidate in Information Design and Technology at Georgia Institute of Technology), *at* http://www.mindspring.com/~cityzoo/mjohnson/papers/recording/noise3.html.

[205] *See* UMG Recordings, Inc., v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000). The *MP3.com* court rejected a defense by MP3.com that because it provides a useful service it should be allowed to continue by stating that copyright "is not designed to afford consumer protection or convenience but, rather to protect the copyrightholders' property interests." *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* The court was not convinced by MP3.com's argument that it provides a "useful service to consumers that, in its absence, will be served by 'pirates.'" *Id.*

the copyrightholders' rights.[209] However, after *Napster*, it is evident that courts will more carefully scrutinize the extent of the invasion of the copyrightholders' rights, and limit the weighing of consumer benefit in its analysis.

Although courts will now scrutinize third party infringing activity on the Internet to a greater degree than the *Sony* Court, courts will not go so far as to apply the standard of the *MP3.com* court. The decision of the Ninth Circuit Court of Appeals to limit the scope of the preliminary injunction of Napster users' infringing activity supports this conclusion.[210] Unlike *MP3.com*, a blanket finding of infringing activity will not suffice for courts to impose third party liability, instead there must be a sufficient level of knowledge to impose contributory liability and an ability to police the system to impose vicarious liability.[211] This distinction recognizes the concerns of Internet service providers in lobbying for limited liability as to infringing activity on the Internet.[212]

The most significant justification for the overall trend toward increased liability for Internet entities is the potential worldwide implications of Napster-like activity.[213] Unlike *Sony*, one Napster user could distribute essentially perfect copies worldwide in a matter of minutes creating significant and far reaching harmful effects.[214] Technology has developed significantly since *Sony*, and the *Napster* decision is evidence that copyright law is developing accordingly. Even in *Sony*, the Court recognized that copyright law would

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[209] *See Napster II*, 114 F. Supp. 2d 896, 915 (N.D. Cal. Aug. 10, 2000). "The court concludes that, even assuming the sampling alleged in this case is a non-commercial use, the record company plaintiffs have demonstrated a meaningful likelihood that it would adversely affect their entry into the online market if it became widespread." *Id.*; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). The Court stated that time-shifting does not entail negative consequences for the copyright holder. *Id.* at 450. It stated that "the time-shifter no more steals the program by watching it once than does the live viewer, and the live viewer is no more likely to buy prerecorded videotapes than is the time-shifter." *Id.*

[210] *See Napster III*, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941, at *61-63 (9th Cir. Feb. 12, 2001).

[211] *Id.* at *42, 48-49.

[212] *See* Weiskopf, *supra* note 26, at 49-53.

[213] Judge Patel recognized this concern when she stated, "[t]he matter before the court concerns the boundary between sharing and theft, personal use and the unauthorized worldwide distribution of copyrighted music and sound recordings." *Napster II*, 114 F. Supp. 2d at 900; UMG Recordings, Inc., v. MP3.com, Inc., No. 00-Civ.472-JSR, 2000 U.S. Dist. LEXIS 13293, at *17-18 (S.D. N.Y. Sept. 6, 2000). In the court's mind there is potential for huge profits on the Internet. *Id.*

[214] *Napster II*, 114 F. Supp. 2d 896, 909 n.12. The music industries' report claims that if digital music on the Internet is not protected, "an individual consumer may become a worldwide distributor of copyrighted material after obtaining a single, promotional copy in digital format." *Id.*

continue to adapt as technology advances.[215] The strong statement made by the *MP3.com* court in setting its award for damages provides additional support for this rationale.[216] The court stated that:

> [s]ome of the evidence in this case strongly suggests that some companies operating in the area of the Internet may have a misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary application of the laws of the United States, including copyright law. They need to understand that the law's domain knows no such limits.[217]

V. CONCLUSION

In recent years, the Internet has transformed the manner and method that people perform personal and business transactions.[218] At least in the United States, nearly half of all households have access to the Internet.[219] It naturally follows that there will be implications as to the law, especially copyright law. Congress recognized these changes by passing the Digital Performance Rights in Sound Recordings Act of 1995[220] and the DMCA in 1998.[221]

The courts are now beginning to interpret these acts and how they interact with traditional copyright law. *Napster* is one of the first cases to do so.[222] To

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[215] *Sony Corp. of Am.*, 464 U.S. at 430. "From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection." *Id.*

[216] *MP3.Com*, 2000 U.S. Dist. LEXIS 13293, at *18. The court ruled contingent upon further factual determinations at the final phase of trial it would award damages of $25,000 per CD. *Id.* To date the court has not made a factual finding as to the number of infringing CD's, but speculated that if MP3.com's estimate of 4700 is correct, the award would be $118,000,000. *Id.*

[217] *Id.*

[218] *See E-Commerce, Mobile Access Drawing Interest from Net Users*, *at* http://cyberatlas.Internet.com/big_picture/geographics/article/0,,5911_494701,00.html (last visited Mar. 8, 2001). In a recent survey by cyberatlas.com, fifty-six percent of Internet users shop online, forty-nine percent plan to increase their Internet purchases, sixteen percent bank online, eleven percent trade stocks online, and seventy-six percent get news information online. *Id.*

[219] *See Digital Divide Shows Signs of Narrowing*, *at* http://cyberatlas.Internet.com/big_picture/demographics/article/0,,5901_487971,00.html (last visited Mar. 8, 2001). A recent survey by cyberatlas.com revealed that in 2000, 41.5 percent of all U.S. households have Internet access. *Id.*

[220] Digital Performance Rights in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[221] Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[222] *Napster I*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243 (N.D. Cal. May 5, 2000), 2000 U.S. Dist. LEXIS 6243; *Napster II*, 114 F. Supp. 2d 896 (N.D. Cal. Aug. 10, 2000);

date, this litigation indicates that courts will scrutinize infringing activity on the Internet, while at the same time consider possible fair uses so as not to restrict the potential for technological advances via the Internet. In addition, if infringing activity is found, courts are willing to send strong messages that this activity will not be tolerated.[223] Future litigation will further refine Internet copyright law beyond the steps taken in *Napster* and *MP3.com*.

Emily E. Larocque [224]

Napster III, No. 00-16401, No. 00-16403, 2001 U.S. App. LEXIS 1941 (9th Cir. Feb. 12, 2001); *Napster IV*, No. C 99-05183 MHP, No. C 00-1369 MHP 2001 U.S. Dist LEXIS 2186 (N.D. Cal. Mar. 5, 2001).

[223] *See* UMG Recordings, Inc., v. MP3.com, Inc., No. 00-Civ.472-JSR, 2000 U.S. Dist. LEXIS 13293, at *18 (S.D. N.Y. Sept. 6, 2000).

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The Price of Precedent: *Anastasoff v. United States*[1]

"It is a question of priorities, of how highly we value precedent when calculating the most 'efficient' distribution of resources. The courts cannot afford to ignore efficiency, but at the same time judicial integrity is an intangible. An equation cannot adequately measure the costs of selling the integrity of the system of precedent."[2]

I. INTRODUCTION

Federal and state courts across the nation have been suffocating under the weight of swelling dockets for decades.[3] As a method of coping with court congestion, selective publication plans, which allow for disposition of a case by unpublished opinion[4] and restrict such opinion's precedential value, have

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[1] While crafting this note, several significant events took place that bear mentioning. Shortly after the *Anastasoff* decision was rendered, the Second Circuit decided *Weisbart v. United States*, 222 F.3d 93 (2d Cir. 2000), in direct conflict with *Christie v. United States*, No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished), the Eighth Circuit case upon which the holding of *Anastasoff* was based. Plaintiff Anastasoff consequently filed a petition for a rehearing en banc. In response to this petition, the United States, as defendant in *Anastasoff*, informed the court that it was paying Anastasoff her claim in full, thereby abandoning its previous position based on *Christie* and unequivocally adopting the *Weisbart* rule. Upon these occurrences, Anastasoff, the United States and the court agreed that the case had become moot, and in customary fashion, the *Anastasoff* opinion, on which this note is based, was vacated. *See* Anastasoff v. United States, No. 99-3917EM, 2000 U.S. App. LEXIS 32055 (8th Cir. Dec. 18, 2000). Regarding the subject of this note, the court stated:

> [t]he controversy over the status of unpublished opinions is, to be sure, of great interest and importance, but this sort of factor will not save a case from becoming moot. We sit to decide cases, not issues, and whether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.

Id. at *4. The court thus held that the constitutionality of rules, like 8TH CIR. R. 28A(i), "which says that unpublished opinions have no precedential effect, remains an open question in this Circuit." *Id.* at *5.

[2] Howard Slavitt, *Selling the Integrity of the System of Precedent*, 30 HARV. C.R.-C.L. L. REV. 109 (1995).

[3] *See* discussion *infra* section II.B.

[4] The term "unpublished opinion" has been used to describe any judgment or opinion issued by a court that goes unprinted in the pages of a reporter. While unpublished opinions come in many forms, from full opinions to summary dispositions, as used in this article the term will refer to full opinions that, for one reason or another, were not deemed by a court to be worthy of publication. In Hawai'i and elsewhere these are also known as memorandum opinions.

been implemented nation wide.[5] Based on the values of practicality and efficiency, selective publication plans were viewed by courts and commentators as a necessary measure to ensure the continued administration of justice.[6] However, these plans compromised the integrity of the judicial system by relegating the doctrine of precedent to secondary status.[7] On August 22, 2000, the Eighth Circuit Court of Appeals ruled in *Anastasoff v. United States*[8] that this sacrifice of precedent for the sake of practicality is not only unwise, but also unconstitutional.[9]

In so holding, the *Anastasoff* court restored the doctrine of precedent to its proper place in our common law system of justice and realigned the scope of judicial power under Article III of the U.S. Constitution. This article will attempt to explain why the court's holding was correct and why it should be followed, not only in Hawai'i, but also across the nation. Part II of this note will provide background information on the doctrine of precedent and will trace the emergence of selective publication plans. Part III will lay out the facts, procedural posture, holding, and summary of the *Anastasoff* opinion, and Part IV will provide an analysis as to why the opinion is correct and should be followed. Part V will explore the impact that *Anastasoff* will have on Hawai'i, and finally, Part VI will offer the conclusion that no matter what practical difficulties may result, unpublished opinions should be precedential.

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[5] *See* Charles E. Carpenter, *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235 (1998); Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119 (1994); Edwin R. Render, *On Unpublished Opinions*, 73 KY. L.J. 145 (1984); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent: Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988).

[6] Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999); *see also* Douglas A. Berman & Jeffrey O. Cooper, *In Defense of Less Precedential Opinions: A Reply to Chief Judge Martin*, 60 OHIO ST. L.J. 2025, 2026-27 (1999).

[7] *See generally* Slavitt, *supra* note 2 (commenting that the doctrine of precedent is undermined when legal opinions are effectively erased through the use of selective publication plans).

[8] No. 99-3917, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000). This opinion may also be cited as *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), however, the former citation will be used throughout this note.

[9] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *5. "Accordingly, we conclude that 8th Circuit Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional." *Id.*

II. BACKGROUND

A. The Value of Precedent

"Inherent in every judicial decision is a declaration of a general principal or rule of law."[10] "This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties."[11] These principles form the doctrine of precedent, a doctrine that is well established as the hallmark of our common law system of justice.[12]

The doctrine of precedent requires that "previous treatment of occurrence *X* in manner *Y* constitutes, *solely because of its historical pedigree*, a reason for treating *X* in manner *Y* if and when *X* again occurs."[13] In other words, as Frederick Schauer, a noted scholar on the subject, stated, "[a] naked argument from precedent thus urges that a decisionmaker give weight to a particular result regardless of whether that decisionmaker believes it to be correct and regardless of whether that decisionmaker believes it valuable in any way to rely on that previous result."[14]

Together with the doctrine of stare decisis,[15] precedent serves several crucial roles in the administration of justice.[16] First, precedent provides certainty in the law.[17] "Adherence to precedent ensures that like cases will be treated alike,

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[10] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *4 (citing Marbury v. Madison, 5 U.S. 137 (1803)).

[11] *Id.* (citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) and Cohens v. Virginia, 19 U.S. 264 (1821)).

[12] *Id.* at *4-*5. The *Anastasoff* court began their opinion by articulating the importance of precedent in a common law system of justice. In fact, the court suggested that the idea of precedent was so essential at the time our nation was founded that the Framers of the Constitution incorporated the doctrine into Article III. The court stated, "The Framers of the Constitution considered these principles to derive from the nature of judicial power, and they intended that they would limit the judicial power delegated to the courts by Article III of the Constitution." *Id.* at *5. For further support, see Larry Alexander, *Constrained By Precedent*, 63 S. CAL. L. REV. 1 (1989), stating, "[t]he notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems." *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *3.

[13] Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987).

[14] *Id.* at 576.

[15] The maxim *stare decisis et non quieta movere* stands for the following principle: "let stand what has been decided, and do not disturb what is settled." Weaver, *supra* note 5, at 483-84.

[16] Many commentators have devoted entire articles to the role that the doctrine of precedent serves in a common law system. *See, e.g.*, Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367 (1988); James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345 (1986); Schauer, *supra* note 13.

[17] Maltz, *supra* note 16, at 368.

and that similarly situated [parties will be] subject to the same legal consequences."[18] Because precedent functions as a guard against the arbitrary and capricious, it allows citizens to arrange and conduct their affairs with stability and predictability.[19] In short, precedent provides the public with the necessary certainty so that they may expect what consequences may arise from their actions.[20]

Second, the doctrine of precedent fosters judicial economy.[21] By allowing judges to rely on the reasoning and analysis of past decisions, their task of deciding the case before them becomes relatively easier and thus promotes efficiency.[22] As articulated by Justice Cardozo, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."[23]

Perhaps most importantly, however, precedent encourages the public to have faith that justice will be done and consequently allows the public to trust their affairs to the adjudication of the courts.[24] One of the most important values in our political system is that all people should be subject to "'rules of law and not merely the opinions of a small group of men who temporarily occupy high office.'"[25] The doctrines of precedent and stare decisis support this value by: (1) fostering impartiality by providing a neutral source of authority by which judges must justify their decisions and (2) limiting the

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[18] Rehnquist, *supra* note 16, at 347.

[19] Maltz, *supra* note 16, at 368. Maltz argues that the most commonly asserted justification for following precedent rests on the need for certainty in the law. *Id.* He states, "[i]n planning their affairs, it is argued, people should be able to predict the legal consequences of their actions. Such predictability can only be obtained if judges can be expected to follow precedent in making their decisions." *Id.*

[20] *Id.*; *see also* Weaver, *supra* note 5, at 485. "[C]ourts adhere to the doctrine so that people can know what the law is. For these policy reasons, courts recognize an obligation to follow precedent even though they might decide the issue differently if it were a matter of first impression." *Id.* "In Justice Douglas' words, 'there will be no equal justice under the law if a negligence rule is applied in the morning but not in the afternoon.'" Rehnquist, *supra* note 16, at 347 (citing William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

[21] Rehnquist, *supra* note 16, at 348.

[22] *Id.*; *see also* Maltz, *supra* note 16, at 370 (stating "the ability to rely on precedent no doubt simplifies the task of judging").

[23] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

[24] Maltz, *supra* note 16, at 371.

[25] *Id.* (quoting Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring)). The author also cites *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895) (White, J., dissenting), that states "'[t]he fundamental conception of a judicial body is that of one hedged about by precedents that are binding on the court without regard to the personality of its members.'" *Id.* at 652.

actual impact that a single person has on shaping the law.[26] Therefore, by offering a framework in which judges must decide a case, precedent minimizes the influence of personal bias or beliefs on judicial decisions and consequently promotes the public's faith in our system of justice.[27]

B. History of Selective Publication

If it is true that "[a]dherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice,"[28] the widespread phenomenon of selective publication should have been regarded as a threat to our common law system of justice. Instead, in the last few decades, federal and state courts across the nation, with few exceptions, have adopted rules that severely limit the precedential value of certain decisions.[29] The rule of the Ninth Circuit Court of Appeals is typical:[30]

> Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral

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[26] Maltz, *supra* note 16, at 371.

[27] *Id.* Because precedent restricts a judge's capacity to decide a case contrary to the settled body of the law, the doctrine reflects the basic notion about the proper function of judges in the lawmaking process. *Id.* at 372.

[28] CARDOZO, *supra* note 23, at 34. Justice Cardozo was a firm believer in the doctrine of precedent's ability to provide the public with faith and trust in the justice system. On this subject he stated:

> I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another. . . . Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.

Id. at 33-34.

[29] Martineau, *supra* note 5, at 119. In the federal system, only the rules of the Fourth, Fifth, Sixth and Eleventh Circuits provide either expressly or impliedly that unpublished opinions are precedent. Weaver, *supra* note 5, at 480 nn.19-20.

[30] Among the federal courts, the Ninth Circuit rule is representative of the rules of the other circuits in providing either expressly or impliedly that unpublished opinions are not precedent. Other circuits that have adopted similar rules include: First Circuit, *see* 1ST CIR. R. 14, 36.1, 36.2, Second Circuit, *see* 2D CIR. R. 0.23, Third Circuit, *see* 3D CIR. R. APP. 1, Seventh Circuit, *see* 7TH CIR. R. 35(b)(2)(iv), Eighth Circuit, *see* 8TH CIR. R. 28A(i), Tenth Circuit, *see* 10TH CIR. R. 36.3), D.C. Circuit, *see* D.C. CIR. R. 8(f), Federal Circuit, *see* FED. CIR. R. 18(a). Weaver, *supra* note 5, at 480 nn.17-18.

> argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.[31]

What would possess a court to do away with such a fundamental doctrine of the common law, adhered to and respected as essential to the effective administration of justice since the establishment of the common law system itself? The answer lies in one word: volume.[32]

The 'crisis of volume' can be summarized by the phrase "too many cases and too few judges"[33] and is illustrated by the following statistics. In 1970, the U.S. courts of appeals disposed of 10,669 cases.[34] By 1980, their caseload had nearly doubled to 20,877.[35] Ten years later, the numbers doubled again to 38,520. In 1997, the number reached 51,194,[36] and last year alone, the number of cases rose by almost 2% from 1998 to 54,693.[37] However, in stark contrast to the rapidly expanding dockets, the number of appellate judges is hardly keeping pace. In 1970, there were ninety-seven circuit judgeships.[38] Today, there are 167, and the probability of new judgeships being created in the near future is slim.[39] Thus, while federal caseloads have swelled to five times their size since 1970, federal judgeships have only doubled in the same amount of time.

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[31] 9TH CIR. R. APP. P. 36-3.

[32] Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 221 (1999). Judge Arnold is the author of the opinion in *Anastasoff v. United States*, No. 99-3917, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000). Arnold wrote this article less than a year before writing the opinion in *Anastasoff*.

[33] Ed Kempner, *Chief Justice Moon Interview: The Judicial Prospective*, HAW. B.J. (March 1995).

One commentator argues that the court's burgeoning caseloads can be attributed to the increasingly litigious nature of American society:

> The ability of courts to serve their purpose and to serve the citizens who employ them has not kept pace with the increases in demand. Stressed trial courts, stressed lawyers, rocket dockets, new legislation, new causes of action, enhanced rights of criminal defendants, more educated citizens, and increased prosperity all properly generate more appeals. Other factors have also increased the need for access to courts. Courts, like schools, have more burdens shifted upon them from eroding families, eroding churches, transitory communities, a heterogeneous society, technology, and urbanization. Citizens are more confrontational, as seen in sports, the streets, the classroom, and ultimately in the appellate courts.

Carpenter, *supra* note 5, at 243.

[34] Arnold, *supra* note 32, at 221-22.

[35] *Id.*

[36] *Id.*

[37] U.S. Courts of Appeals – Table B (Sept. 30, 1999), *at* http://www.uscourts.gov/judbus1999/b00sep99.pdf. These statistics do not include data for the U.S. Court of Appeals for the Federal Circuit.

[38] Arnold, *supra* note 32, at 222.

[39] *Id.*

At the state level as well, the crisis is evident. In 1998, state courts across the nation were faced with the filing of over ninety-one million cases[40] to be decided by 28,793 judges and quasi-judicial officers.[41] According to the National Center for State Courts' statistics, in 1998, Idaho's judges faced the smallest number of filings per judge with 473, while South Carolina's judges faced the largest with 3,763 filings per judge.[42] On average, however, state court judges across the nation faced approximately 1,500 filings per judge in 1998 alone.[43]

This crisis is nothing new.[44] In fact, concern with the volume of cases facing judges and the corresponding volume of opinions to be rendered, published and stored was expressed as early as 1915.[45] Eventually, in response to this volume crisis, courts began implementing a wide range of solutions from establishing intermediate appellate courts to increasing the number of staff attorneys and law clerks.[46] The most controversial response, however, originated in 1971, with the Federal Judicial Center's[47] Annual Report, which

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[40] Statistics were taken from the National Center for State Courts' table on cases filed in state courts. This table can be found at http://www.ncsc.dni.us/divisions/research/csp/csp-stat01.html.

[41] National Center for State Courts, *Examining the Work of State Courts* (1998), http://www.ncsc.dni.us/divisions/research/csp/zippdf/2-Overview.pdf.

[42] *Id.*

[43] *Id.* This number represents a raw estimate derived by averaging the filings per judge.

[44] Reynolds & Richman, *supra* note 5, at 1168.

[45] *Id.* As early as 1915, it was observed by a prominent judge that the federal and state courts of last resort had produced over 65,000 opinions, filling 630 volumes within a period of five years. *Id.* at 1168-69. One commentator noted:

> Looking ahead a half century to the time when there shall be two or three times as many inhabitants within our borders and a corresponding increase in our litigation, what are we to expect if the present rate of production of precedents be maintained? The law library of the future staggers the imagination as one thinks of multitudes of shelves which will stretch away into the dim distance, rank upon rank, and tier upon tier, all loaded with their many volumes of precious precedent. One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must needs be supermen indeed.

Id. (quoting John Winslow, *The Courts and the Papermills*, 10 ILL. L. REV. 157, 158 (1915)).

[46] Martineau, *supra* note 5, at 120. Other solutions to combat the crisis include technological advances, such as providing judges and law clerks with word processors and computer terminals, and internal changes to streamline the internal functions of the court. *Id.*

[47] The Federal Judicial Center, established in 1967 by the Federal Judicial Center Act, Pub. L. No. 90-219, 81 Stat. 664 (codified at 28 U.S.C. §§ 620-29 (1994)), was created to perform the following functions: 1) to research and study the operation of the federal court system; 2) to develop improved techniques of judicial administration; 3) to stimulate, create and conduct programs of continuing education and training for all personnel of the federal judiciary; and 4) to provide staff research and planning assistance to the Judicial Conference of the United States. 28 U.S.C. § 620(b) (1994). A thorough exposition of the Center's genesis can be found in Tom

noted a "widespread consensus that too many opinions are being printed or published or otherwise disseminated."[48] This report spawned investigation and research into the caseload problems facing the federal courts, which culminated in 1972 when the Advisory Council for Appellate Justice[49] recommended that appellate courts adopt strategies of limited publication in order to reduce the number of published opinions.[50] The Council urged the courts to come up with plans whereby only those opinions of "general precedential value"[51] would be published.[52] The world of opinions was thus divided into two classes: published and unpublished.[53]

However, the Council did not merely recommend placing limits on the publication of opinions, but also urged the circuits to adopt rules forbidding or restricting citation to unpublished opinions and judgments.[54] Although this recommendation essentially called for restricting or eliminating the precedential value of an unpublished opinion, almost all the circuits implemented no-citation rules because they recognized that "the purpose of the

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Clark, *The Federal Judicial Center*, 53 JUDICATURE 99 (1969); *see also* William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129 (1995). In addition, the Federal Judicial Center's website provides further information about the Center and its beginnings. This information is available at http://www.fjc.gov.

[48] Reynolds & Richman, *supra* note 5, at 1170 (quoting FEDERAL JUDICIAL CENTER'S ANN. REP. 7-8 (1971)).

[49] The Advisory Council for Appellate Judges is an organization of the Federal Judicial Center comprised of lawyers, law professors and judges. *Id.* at 1170-71. They produced a draft report that considered standards for publication, procedures for deciding which opinions should be published, and the desirability of allowing citation of unpublished decisions. *Id.* This report was published as *Standards for Publication of Judicial Opinions* and served as the template for many of the rules subsequently promulgated by the federal circuits. *Id.*

[50] Martineau, *supra* note 5, at 122.

[51] The publication plans devised by each circuit provide guidelines to determine which opinions are of "general precedential value" such that they should be published. While the guidelines differ among the circuits, an example of specific criteria for a publication plan can be found in the Fourth Circuit, which calls for publication of an opinion if:

> (i) It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or (ii) It involves a legal issue of continuing public interest; or (iii) It criticizes existing law; or (iv) It contains a historical review of a legal rule that is not duplicative; or (v) It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

4TH CIR. R. 36(a). For a detailed summary of the rules for publication in each circuit, see Reynolds & Richman, *supra* note 5, at 1176-77.

[52] Kurt Schuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CAL. L. REV. 541, 546 (1997).

[53] David M. Gunn, *"Unpublished Opinions Shall Not be Cited As Authority": The Emerging Contours of Texas Rule of Appellate Procedure 90(i)*, 24 ST. MARY'S L.J. 115, 118 (1992).

[54] Reynolds & Richman, *supra* note 5, at 1172.

limited publication rules would be frustrated if citation of unpublished opinions were permitted."[55]

The historical justifications given for restricting citation of unpublished opinions were twofold. First, without the no-citation rule, a market for unpublished opinions would develop, causing the savings in judicial resources resulting from unpublished opinions to be lost.[56] Second, prohibiting citation was considered necessary to prevent unfairness based on differential access to unpublished opinions.[57] Therefore, to guard against an underground market and unfairness to litigants as a result of unpublished opinions, the doctrine of precedent was sacrificed. No longer did every opinion, judgment or decision of a common law court carry the weight of precedent.[58] Rather, as Eighth Circuit Judge Richard S. Arnold described the situation:

> If we mark an opinion as unpublished, it is not precedent. We are free to disregard it without even saying so. Even more striking, if we decided a case directly on point yesterday, lawyers may not even remind us of this fact. The bar is gagged. We are perfectly free to depart from past opinions if they are unpublished, and whether to publish them is entirely our own choice.[59]

The unpublished opinion thus emerged as a weapon to combat the crisis of volume. Along with it emerged the no-citation rule restricting an unpublished opinion's precedential value. Together, the unpublished opinion and the no-

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[55] *Id.* at 1185. This sentiment was echoed by a number of scholars and judges, including Judge Sprecher of the Seventh Circuit, who stated, "I would think that if a no-citation rule did not go hand in hand with a no publication rule, I would feel that we should do away with the no-publication rule and go back to the old full publication rule." *Id.* at 1186 (quoting *Hearings Before the Comm'n on Revision of the Federal Court Appellate System* 532 (2d phase 1974-75) (testimony of Seventh Circuit Judge Robert A. Sprecher)).

[56] If citation to unpublished opinions were allowed, a market for unpublished opinions would develop. Lawyers and legal researchers would feel obliged to search for and monitor unpublished opinions. Practitioners and law libraries would feel compelled to purchase and index unpublished opinions in response to the developing market. Judicial efficiency would thus be hindered and the savings in costs would thus be lost. *See* Carpenter, *supra* note 5, at 242; Reynolds & Richman, *supra* note 5, at 1186-87; Shuldberg, *supra* note 52, at 549-50.

[57] Unpublished opinions are considered more difficult to access since they are not widely available through the traditional avenues of legal research. Thus, it is argued that permitting citation to unpublished opinions would unjustly benefit those lawyers and litigants with the resources necessary to monitor unpublished opinions. *See* Carpenter, *supra* note 5, at 242; Reynolds & Richman, *supra* note 5, at 1187; Shuldberg, *supra* note 52, at 550.

[58] Before the advent of the no-citation rule, it was widely regarded that in a common law system, all decisions are precedent, regardless of whether or not they are published. Martineau, *supra* note 5, at 134. This is because "all decisions make law, or at least contribute to the process, for each shows [prospective litigants] how courts actually resolve disputes." *Id.*

[59] Arnold, *supra* note 32, at 221.

citation rule comprise the phenomenon referred to as selective publication.[60] Within a few years of the recommendation by the Advisory Council for Appellate Justice, every federal court of appeals[61] and a majority of state appellate courts[62] had embraced selective publication by adopting rules limiting publication and prohibiting citation to those decisions that were unpublished.[63]

C. The Benefits of Selective Publication

Proponents of selective publication plans argue that practicality is the objective even if it comes at the expense of sacrificing precedent.[64] They believe that all cases are not created equally, essentially, that there are "too many cases with too little merit."[65] Under this assumption, they argue that selective publication has the following benefits.

First and foremost, proponents believe that restricting publication and limiting the precedential effect of unpublished decisions promotes the value of judicial economy and enhances the court's productivity.[66] They assert that if every decision were published, judges would need more time and more resources to write an opinion suitable for publication.[67] Because unpublished decisions usually "tend to involve straightforward points of law"[68] they do not

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[60] Elizabeth M. Horton, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 U.C.L.A. L. REV. 1691, 1693 (1995).

[61] Martineau, *supra* note 5, at 125.

[62] *Id.*; *see also* Jane Williams, *Survey of State Court Opinion Writing and Publication Practices*, 83 LAW LIBR. J. 21, 22 (1991). At least thirty-five states have rules limiting the publication of opinions. *Id.* at 22-49. Most of them are accompanied by a no-citation corollary. *Id.*

[63] Martineau, *supra* note 5, at 125.

[64] *See, e.g.*, Martin, *supra* note 6.

[65] *Id.* at 181. Other commentators have echoed this sentiment: "[t]he selective publication camp believes, in essence, that only opinions which overtly make law are worthy of publication." Carpenter, *supra* note 5, at 249. Also, Judge Richard S. Arnold argues, "[j]udges have been persuaded that a great deal of what they do lacks any significance except to the parties, that some cases have no 'precedential significance', and that, therefore, nothing will be lost by refusing to recognize them as precedent." Arnold, *supra* note 32, at 222.

[66] Martin, *supra* note 6, at 190. "The answer is quite simple and was verified by Professor Beyler in his empirical study of unpublished opinions: '[S]elective publication significantly enhances the courts' productivity.'" *Id.* (quoting Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 7 (1989)). *But see* Reynolds & Richman, *supra* note 5, at 1191.

[67] Carpenter, *supra* note 5, at 249. "Fewer published decisions mean fewer volumes for libraries to purchase. Moreover, if judges do not have to spend time crafting publishable opinions for every case, then dockets will move along faster." *Id.*

[68] Martin, *supra* note 6, at 190. Judge Martin comments:

> I keep unpublished decisions short because they tend not to include extensive renditions

require as much research, are easier to write and save time and money for everyone involved.[69] As James Burns, Chief Judge of the Hawai'i Intermediate Court of Appeals articulated, "[s]omehow there has to be a system where you can decide a case without all the difficulty of a published opinion. Memo opinions are nice because you don't have to make sure that all your i's are dotted and t's are crossed."[70]

Second, proponents argue that selective publication enhances the quality of those decisions that are published.[71] Because judges are able to dispose of the

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of the facts or exhaustive discussions of the law. Unpublished decisions tend to involve straightforward points of law -- if they did not, they would be published. These types of cases are fact-driven. They involve settled law and variations on the facts. I give the facts to the extent necessary and then state the law.

Id. *But see* Carpenter, *supra* note 5, at 248. Carpenter states:

Yet, even when a decision lacks this wide-ranging impact, such as when the court mechanically applies the law to the case at bar, other considerations call for a written opinion. Written opinions encourage judges to produce well-reasoned, well-written decisions because they subject judges' conclusions to public scrutiny. This leads to better, more consistent opinions because it holds judges accountable to the public which they serve. This accountability, in turn, dispels the perception of the judiciary as a self-regulating, secret society, and it legitimizes the judicial branch of the government in the eyes of its citizens.

Id.

[69] Martin, *supra* note 6, at 190. Judge Martin writes:

The relative straightforwardness of the legal questions in an unpublished opinion also saves research time. I would estimate that I spend equal amounts of time researching and writing the average published opinion. It is difficult to say for sure because the activities are intertwined. I will spend less than half as much time researching a typical unpublished opinion as I spend on a published opinion. Some legal questions are easily answered, particularly after eighteen years on the federal bench. A judge sees the same questions repeatedly, and one needs not go back to the research well to answer every question. I assume that my colleagues have the same experience.

Id. Judge Patricia Wald, former Chief Judge for the United States Court of Appeals for the District of Columbia concurs:

[judges] literally agonize over their published opinions, which sometimes take weeks or even months to bring to term. . . . But writing to explain a preordained result with no concern for its precedential effect under a self-imposed time constraint of hours is something else entirely, inviting no backward looks or self-doubt. Rhetoric will always be tied to import and permanence, and its absence in unpublished decisions signifies that they are the product of a different and much-abbreviated decision-making process.

Patricia M. Wald, *Judicial Opinion Writing: The Rhetoric of Results and the Results of Rhetoric*, 62 U. CHI. L. REV. 1371, 1375 (1995).

[70] Phone Interview with James Burns, Chief Judge, Hawai'i Intermediate Court of Appeals (Oct. 19, 2000).

[71] Horton, *supra* note 60, at 1693. Horton poses the argument that relaxing the requirement that every case be decided with an elaborate opinion suitable for publishing allows judges the time and opportunity to take greater care with the cases that actually involve new law or important questions. "[I]t is more beneficial for judges to allocate greater time and energy to

garden-variety cases on their dockets with unpublished opinions, they can devote more time and energy into producing published opinions of higher quality.[72] After all, they reason, only published opinions wind up in the red, black and gold volumes of a reporter and are subject to scrutiny by the public and the bar.[73] Therefore, the use of unpublished opinions serves to ensure the quality of the opinions that really matter by allowing the judge the time to produce an opinion with care.[74]

Lastly, the selective publication camp believes that unpublished opinions actually act as "precedent-savers."[75] If judges were to publish an opinion in every case, they argue, the truly meritorious cases will become lost in a flood of opinions and, therefore, judicious use of the unpublished opinion gives greater emphasis to those that are published.[76] As one federal court of appeals judge put it, "[w]e are creating a body of law. There is value in keeping that body cohesive and understandable, and not muddying the water with a needless torrent of published opinions."[77]

Few can dispute that these arguments in favor of practicality are highly attractive, but in this instance, practicality has come at a high price. Since the

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resolving disputes where new precedent will be created, rather than to those where no new precedent will result." *Id.*

[72] *Id.* Horton asserts that "the judicial system as a whole [will be] more efficient at its job of resolving disputes if courts spend more time on cases that actually will *clarify* the law than those that will not." *Id.*

[73] Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit writes:

> [f]acing rising caseloads, we are told to be more selective as to which cases we write about for the law books. The rest will likely receive a few sentences of rationale with maybe a citation or two; they will be memorialized, if at all, only in computer data banks, rather than in the red, gold, and black volumes of the Federal Reporter; they cannot be cited as authority for any proposition, rendering them in effect a class of legal 'untouchables.'

Wald, *supra* note 69, at 1373.

Robert J. Martineau supports this proposition stating:

> [t]his [published] opinion becomes the object of study by the bar, judges, and scholars, who will dissect, analyze, and apply or distinguish the language of an opinion with the care given to few written works apart from the Bible and the works of Shakespeare. Judicial opinions, like the Bible, become the bases on which people arrange their lives and conduct their affairs. As time permits, these opinions should be written with the greatest of care and precision in language.

Martineau, *supra* note 5, at 142.

[74] *See* Horton, *supra* notes 71 and 72.

[75] Berman & Cooper, *supra* note 6, at 2041 ("[T]hough unpublished opinions clearly have value and importance as time-savers, it is their ability to serve as 'precedent-savers' that makes the case for them compelling.").

[76] Martin, *supra* note 6, at 191.

[77] *Id.* at 192.

inception of selective publication plans, some scholars have been questioning whether the sacrifice of precedent for the sake of practicality was a wise and proper decision.[78] The U.S. Court of Appeals for the Eighth Circuit in *Anastasoff v. United States*[79] recently answered this question with a resounding "no."[80]

III. ANASTASOFF V. UNITED STATES

A. Facts and Procedural Posture

In the recent Eighth Circuit case of *Anastasoff v. United States*,[81] taxpayer Faye Anastasoff sought a refund of overpaid federal income tax.[82] Anastasoff mailed her refund claim to the Internal Revenue Service (IRS) on April 3, 1996 for taxes paid on April 15, 1993.[83] However, the claim was not filed by the IRS until April 16, 1996, and thus, Anastasoff missed the three year deadline set forth in 26 U.S.C. § 6511(b)[84] by one day. Although the mailbox rule[85] usually serves to save claims like Anastasoff's, the IRS determined that

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[78] *See generally* Carpenter, *supra* note 5 (discussing the strains unpublished opinions place on fundamental concerns such as transparency of justice, accountability of the appellate courts, access to the common law and judicial precedent as a body of law); Reynolds & Richman, *supra* note 5 (attacking the traditional arguments put forth by proponents of selective publication); Slavitt, *supra* note 2 (describing the benefits that would follow from the elimination of selective publication plans).

[79] No. 99-3917, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000).

[80] *Id.* at *21-*23.

[81] No. 99-3917, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000).

[82] *Id.* at *1.

[83] *Id.* at *2.

[84] 26 U.S.C. § 6511(b) (1994), Limitation on allowance of credits and refunds, states: "If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim." 26 U.S.C. § 6511(b)(2)(B) (1994).

[85] 26 U.S.C. § 7502(a) (1994). The mailbox rule saves tax refund claims that would have been timely if received when mailed by deeming them received when postmarked. The provision, entitled "Timely mailing treated as timely filing and paying," states:

(1) Date of delivery –

If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under the authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment; as the case may be.

(2) Mailing requirements –

it was inapplicable in her situation pursuant to 26 U.S.C. § 7502, which sets forth that the mailbox rule only pertains to claims that are untimely.[86] Because Anastasoff had conceded that her claim was timely under 26 U.S.C. § 6511(a), the IRS denied her refund. Anastasoff responded by initiating suit.[87]

The United States District Court for the Eastern District of Missouri[88] held the mailbox rule could not apply to any part of a timely claim pursuant to § 7502 and subsequently granted judgment for the IRS.[89] However, Anastasoff appealed, alleging that § 7502 "should apply whenever necessary to fulfill its remedial purpose, i.e., to save taxpayers from the vagaries of the postal system, even when only part of the claim is untimely."[90]

B. Holding

The Eighth Circuit Court of Appeals, in an opinion by Judge Richard S. Arnold, affirmed the decision of the District Court.[91] Significant to this ruling

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this subsection shall apply only if –
(A) the postmark date falls within the prescribed period or on or before the prescribed date (i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or (ii) for making the payment (including any extension granted for making such payment), and (B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

26 U.S.C. § 7502 (a)(1)-(2).

[86] *See* 26 U.S.C. § 7502(a)(1). Pursuant to 26 U.S.C. § 7502, the mailbox rule applies only to claims that are considered untimely under 26 U.S.C. § 6511(a). For examples of claims considered "untimely", see *Jones v. Liberty Glass Co.*, 332 U.S. 524 (1947), holding that taxpayer's income tax refund claim could not be allowed where it was filed more than three years after filing of income tax return and more than two years after payment of tax, even though the claim arose out of an income tax alleged to have been erroneously or illegally assessed or collected; *see also* Curry v. United States, 774 F.2d 852 (7th Cir. 1985) (holding that even if the hardship exception to the pre-payment rule for district court jurisdiction of the taxpayer's refund suit were carved out, taxpayers were barred from obtaining a refund, where more than two years had elapsed from the year the tax was paid and more than three years from the time the return was filed).

[87] Anastasoff v. United States, No. 99-3917, 2000 U.S. App. LEXIS 21179 (8th Cir. Aug. 22, 2000).

[88] The Hon. Catherine D. Perry, United States District Judge for the Eastern District of Missouri. *See id.* at *2.

[89] *Id.*

[90] *Id.*

[91] *Id.*

was the Eighth Circuit's prior holding in *Christie v. United States*,[92] an unpublished, per curiam opinion in which Anastasoff's "remedial purpose" argument was precisely rejected.[93] Although it was the only case in the jurisdiction directly on point, Anastasoff argued that the court of appeals was not bound by *Christie* because it was an unpublished decision and thus not precedent under Eighth Circuit Rule 28A(i).[94] In rejecting this argument, the court held that "Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our decisions, purports to expand judicial power beyond the bounds of Article III of the U.S. Constitution,[95] and is therefore unconstitutional."[96]

C. Summary of Opinion

The court's analysis hinged on the doctrine of precedent, which was described as not merely well established, but "the historic method of judicial decision-making, and well regarded as a bulwark of judicial independence in past struggles for liberty."[97] The court explained that the Framers of the Constitution intended the nature of judicial power, as embodied in Article III, would be limited by the doctrine of precedent in two ways.[98]

First, precedent served to limit the scope of judicial power by restricting the role of a judge to determine the law in each case, not according to his own judgment, but according to the known laws.[99] Judicial power, therefore, does not allow a judge to invent laws, but to determine only what the law is in

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[92] No. 91-2375MN, 1992 U.S. App. LEXIS 38446 (8th Cir. Mar. 20, 1992) (per curiam) (unpublished) (holding that even if § 7502 could apply to a timely claim it would not save the claim since if § 7502 were applied, it would be deemed received before the return, but, § 6511(a) provides that a claim must be submitted within two years of overpayment if no return has yet been filed. In other words, to save a claim under § 6511(b) only makes it untimely under § 6511(a)).

[93] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *2.

[94] The rule states:

> Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well . . . .

8TH CIR. R. 28A(i).

[95] Article III of the U.S. Constitution states in relevant part: "The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain." U.S. CONST. art. III, § 1, cl. 1.

[96] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *5.

[97] *Id.* at *6.

[98] *Id.* at *5.

[99] *Id.* at *8.

accordance with laws previously pronounced.[100] The rationale for this principle was so that "the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule."[101] The court thus stated that because precedent is the most authoritative guide on what the law is, judicial power is limited by it.[102]

In addition to this stabilizing function, the doctrine of precedent also limits the scope of the judiciary by ensuring the separation of legislative and judicial power.[103] The court stated, "[i]f judges had the legislative power to 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions.'"[104] Again, the court looked to the Framer's intent for authority that this limit on judicial decision-making is a crucial sign of the separation of powers inherent in the Constitution.[105] The Framers intended that, unlike legislators who are empowered to make law, judges are limited to pronouncing the law after interpretation and application of the law to the facts of the particular case.[106] The court explained that judges must therefore exercise 'judgment' in determining what the law is rather than 'will' what the law should be.[107] Thus, as Alexander Hamilton concluded, "to avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down

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[100] *Id.* at *8-*9.

[101] *Id.* at *8 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 69).

[102] *Id.* at *9.

[103] *Id.* at *10.

[104] *Id.* at *11 (quoting BLACKSTONE, *supra* note 101, at 259).

[105] *See id.* at *12. For a general explanation of the doctrine of separation of powers see 16 C.J.S. *Constitutional Law* § 111, stating:

> [t]he concept of separation of powers is fundamental to our constitutional form of government and, even though not expressly enunciated in the constitution, it is a doctrine inferred from the organizing principles underlying the constitution itself. Indeed, constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separated departments, and in forbidding any encroachment by one department on another in the exercise of the authority so delegated. The constitutional mandate requires that the three branches remain separate and distinct and that such separation be strictly enforced. . . . The primary purpose of such provisions is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government, that is, to protect the governed from arbitrary oppressive acts on the part of those in political authority, and to avoid the tyranny of any branch of government being supreme in all fields.

16 C.J.S. *Constitutional Law* § 111 (1984) [hereinafter *Constitutional Law*].

[106] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *11.

[107] *Id.* at *12.

by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[108]

Furthermore, the court looked to the Framers for guidance with respect to publication of opinions.[109] Despite the Framers' strict adherence to the doctrine of precedent, limited publication of judicial decisions was the rule in their time, and the practice was never questioned.[110] The court explained, however, that the absence of publication was no impediment to the precedential authority of a judicial decision, and in fact "judges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory . . . ."[111] In this light, the court announced that publication has no bearing on the authoritative effect of any court decision since every decision, whether published or not, carries the weight of precedent.[112]

Significantly, the court realized and stated throughout its opinion that it was not ignorant to the practical implications of its holding. First, the court advised that opinions need not be published in a reporter, nor be of the quality considered suitable for publication in order to fulfill their precedential role.[113] Thus, even summary dispositions or memorandum opinions carry the weight of precedent so long as "[t]he record of the judicial proceedings and decision alone is sufficient evidence of the legal principles necessary to support the decision to provide 'light or assistance' when 'any critical question arises.'"[114]

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[108] *Id.* (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

[109] *Id.* at *14-*16.

[110] *Id.* at *16. This practice can be traced back to the origins of the common law in England. *See* Martineau, *supra* note 5, at 136. The English reporting system has never and does not today publish every opinion, even though the total number of opinions issued each year is substantially less than those issued in the United States. *Id.* Instead, English courts limit published opinions to only those for which a barrister prepares a summary of the opinion. *Id.* This system arose from the practice of rendering most opinions orally, rather than in writing. *Id.*

[111] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *16.

[112] *Id.* at *19-*20. This argument has been advanced by other commentators. For example, one commentator states:

> [i]n the common law system, all decisions are precedent, regardless of whether they are published. To deny that they are precedent is to deny that they exist, an impossibility. An unpublished, uncitable decision cannot fit with the definition of stare decisis and the purpose of the common law, regardless of its compliance with a set of standardized guidelines to determine its precedential value. This is because "all decisions make law, or at least contribute to the process, for each shows [prospective litigants] how courts actually resolve disputes."

Martineau, *supra* note 5, at 134 (quoting William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 579 (1981)).

[113] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *10.

[114] *Id.* at *10 n.9 (quoting BLACKSTONE, *supra* note 101, at 69).

Second, the court stressed that it is not "creating some rigid doctrine of eternal adherence to precedents."[115] Rather, it recognized that precedents can and sometimes should be overruled if the reasoning of a case is exposed as faulty or if other demanding circumstances compel doing so.[116] However, the court cautioned that the precedent from which one is departing should be stated and the reasons for rejecting it should be convincingly clear so that the law may grow and change incrementally, "in response to the dictates of reason, and not because judges have simply changed their minds."[117]

Finally, the court acknowledged the practical constraints facing judges in the wake of swelling court dockets, especially in the courts of appeals.[118] As some assert, judges do not have enough time to give each decision enough care to justify treating each decision as precedent.[119] However, according to the court, the remedy should not be to "create an underground body of law good for one place and time only."[120] Rather, more judgeships should be created, and if that is not possible, then judges have no choice but to "take enough time to do a competent job with each case."[121] Whatever the costs, the doctrine of precedent cannot be sacrificed for the sake of efficiency.[122] Not only would such a sacrifice be unconstitutional,[123] but as Joseph Story warned, a departure from precedent would be "justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."[124] Thus, the court concluded that whatever practical difficulties may result, "the price still must be paid."[125]

IV. ANALYSIS

The *Anastasoff* opinion is the first step in the right direction, since the inception of selective publication plans nearly thirty years ago, to correct the

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[115] *Id.* at *21.

[116] *Id.* at *21-*22.

[117] *Id.* at *22.

[118] *Id.* at *20.

[119] *Id.*

[120] *Id.* at *21.

[121] *Id.*

[122] *See id.*

[123] According to the *Anastasoff* court, sacrificing precedent for any reason would be unconstitutional because limiting the precedential value of a decision (whether published or not) allows judges to avoid the precedential effect of prior decisions and thereby expands the judicial power beyond the bounds of Article III. *See id.* at *5.

[124] *Id.* at *19 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 377-78 (1833)).

[125] *Id.* at *21.

mistake of sacrificing the doctrine of precedent for the sake of practicality. In holding that all judicial decisions carry precedential weight regardless of whether or not they are published, *Anastasoff* restored precedent to its proper role in our common law system of justice and realigned the scope of judicial power under Article III of the Constitution.

A. The Doctrine of Precedent has been Restored to its Proper Place in a Common Law System of Justice

Proponents of selective publication assert that not all opinions are of precedential value.[126] For three decades, their assertion has reigned, as evidenced by the fact that the general rule in federal courts of appeals is that unpublished opinions have no precedential value.[127] However, their assertion is based on a faulty premise, namely, that decisions not worthy of publication do not make new law, and thus, are not precedential.[128] In essence, proponents of selective publication have confused two very separate issues: unpublished and unprecedential. The two cannot and should not be interchangeable.

Indeed, the *Anastasoff* court alluded to this erroneous assumption on several occasions throughout the opinion. The court first stated "the Framers did not regard this absense of a reporting system as an impediment to the precedential authority of a judicial decision. . . . [J]udges and lawyers of the day recognized the authority of unpublished decisions even when they were established only by memory. . . ."[129] And, again before concluding, the court reiterated, "[c]ourts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but . . . they have nothing to do with the authoritative effect of any court decision."[130] Finally, to ensure that their words were clear, the court added, "[t]he question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not."[131]

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[126] *See* Horton, *supra* note 60, at 1702.

[127] Gunn, *supra* note 53, at 124.

[128] *See* Horton, *supra* note 60, at 1702-03, stating:

> This criticism assumes that all opinions are of precedential value. Not all are. Many involve mere factual determinations or well-established law applied in its standard fashion. The inability to cite such opinions should not affect stare decisis for there is no new precedent in them to constrain future judicial determinations.

Id.; *see also* Martin, *supra* note 6, at 196. Martin illustrates this faulty assumption with the following statement: "[w]e will have to prepare unpublished opinions as we do published opinions – as if they were creating precedent." *Id.*

[129] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *16.

[130] *Id.* at *19-*20.

[131] *Id.* at *20.

Similarly, many commentators have expressed their concerns with the assumption that unpublished equals unprecedential.[132] First, they assert that the assumption is faulty simply because all decisions have precedential value in a common law justice system, irrespective of whether or not they are published.[133] "To deny that they are precedent is to deny that they exist, an impossibility . . . . This is because 'all decisions make law, or at least contribute to the process, for each shows [prospective litigants] how courts actually resolve disputes.'"[134] In fact, "[t]he notion that courts ordinarily should follow precedent in deciding cases is one of the core structural features of adjudication in common-law legal systems."[135] Consequently, for proponents of selective publication to assert that decisions unworthy of publication are unworthy of being labeled 'precedent' is not only improper, but also clearly erroneous.[136]

Second, commentators have also illustrated the dangers inherent in such an assumption. If unpublished is equivalent to unprecedential, then judges are perfectly free to depart from their past published decisions as well as make unilateral determinations to publish the decision in the first place.[137] Obviously, there are concerns with such a system where judges have unfettered discretion. For instance, it is doubtful that judges can really determine today which decisions will be important tomorrow.[138] One judge has even admitted that, "'when we make our *ad hoc* determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed."[139]

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[132] *See, e.g.*, Arnold, *supra* note 32; Carpenter, *supra* note 5; Martineau, *supra* note 5.

[133] Martineau, *supra* note 5, at 134.

[134] *Id.*

[135] Alexander, *supra* note 12, at 3; *see also* Maltz, *supra* note 16, at 367. "[R]eliance on precedent is one of the distinctive features of the American judicial system." *Id.*

[136] One commentator makes the convincing argument that:

> [M]any cases look like previous cases and [may seem] almost identical. In each instance, however, it is possible to think of conceivable reasons why the previous case can be distinguished, and when a court decides that it cannot be, it is necessarily holding that the proffered distinctions lack merit under the law. This holding is itself is a conclusion of law with precedential significance.

Arnold, *supra* note 32, at 222-23.

[137] *Id.* at 221.

[138] Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 790 (1995).

[139] *Id.* Also, Justice Stevens has noted that this practice "'rests on a false premise' in that it 'assumes that an author is a reliable judge of the quality and importance of his own work product.'" *Id.* (quoting John P. Stevens, *Address to the Illinois State Bar Association's Centennial Dinner*, 65 ILL. B.J. 508, 510-14 (1977)); *see also* Render, *supra* note 5, at 153

Moreover, this is not merely an irrational fear, but rather, numerous studies have demonstrated that opinions that were precedential did indeed go unpublished.[140] Our common law system is grounded in the belief that lawmakers cannot anticipate every factual context in which disputes will develop, and therefore, "[r]equiring judges to determine which cases will have future import [when deciding whether or not to publish] ignores the purpose of an evolutionary system of rule making"[141] and exposes a serious flaw in the assumption that unpublished equals unprecedential.

Thus, in holding that all decisions are precedent regardless of whether or not they are published, the *Anastasoff* court restored the doctrine of precedent to its proper place in a common law system of justice by ensuring that the effect of prior decisions will not be undermined by something as simple as a determination of whether or not that decision should be published. In other words, *Anastasoff*'s holding affirms that the doctrine of precedent will function as it should, assuring that "judges must respect what they have done in the past, whether or not it is printed in a book."[142]

B. The Scope of Judicial Power has been Realigned with that Given to the Courts Under Article III of the Constitution

Anastasoff's holding also served to realign the scope of judicial power under Article III of the Constitution by limiting the role of judges through the doctrine of precedent. The court held that "Rule 28A(i), insofar as it would allow us to avoid the precedential effect of our prior decisions, purports to expand the judicial power beyond the bounds of Article III, and is therefore unconstitutional."[143] This holding is constitutionally sound for the following reasons.

First, it is a well-regarded principle that the question as to what particular powers are judicial is to be answered by determining the definition and scope of such powers at the time the constitution was adopted.[144] The *Anastasoff* court, thus looked to the established practice of courts in 1787 to discern that the Framers intended that the judicial power under Article III of the Constitution be limited by the doctrine of precedent. This was evidenced not

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(1984). "A case that does not seem particularly important today may become important in the future for reasons that are entirely unknown to the court at the time the decision is made. The 'precedential importance' of an opinion thus cannot be predetermined by its author." *Id.*

[140] Martineau, *supra* note 5, at 135.

[141] Slavitt, *supra* note 2.

[142] Arnold, *supra* note 32, at 225.

[143] Anastasoff v. United States, No. 99-3917, 2000 U.S. App. LEXIS 21179, at *5 (8th Cir. Aug. 22, 2000).

[144] *See Constitutional Law*, *supra* note 105, § 169.

by explicit mention in the Constitution's text, but by the very *nature of judicial power* itself.[145] In other words, the Framers considered the limiting power of precedent to be so inherent and natural that there was no need to explicitly spell this out within the text of Article III.[146] Therefore, because the doctrine of precedent naturally served as a limit on judicial power at the time the Constitution was created, as *Anastasoff* so held, it also serves to limit judicial power with no less force today.

Second, the *Anastasoff* court recognized that ignoring the doctrine of precedent would expand the judicial power beyond the bounds contemplated in Article III by giving courts the power to make, not interpret, law.[147] The court stated, "[t]he judicial power to determine law is a power to determine only what the law is, not to invent it. Because precedents are the best and most authoritative guide on what the law is, the judicial power is limited by them."[148] This sentiment is in line with the general principle that, in accordance with the very definition of the judiciary as one that interprets, construes and applies the law, the primary responsibilities of the judiciary are to declare what the law is and to determine the rights of parties accordingly.[149] The judiciary must therefore accept the law as it is set forth by the legislature (unless inconsistent with the Constitution) and only depart from the law when the rules of the common law are in conflict, when a situation is presented that is not covered by established precedents, or when it is suitable to take into

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[145] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *5. "The Framers of the Constitution considered these principles to derive from the nature of judicial power, and intended that they would limit the judicial power delegated to the courts by Article III of the Constitution." *Id.* Justice Story is in accord, stating, "[t]his known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in full view of the framers of the constitution. It was required, and enforced in every state in the Union...." *Id.* at *19 (quoting STORY, *supra* note 124, §§ 377-78).

[146] *Id.* at *8. The opinion states:

> [m]odern legal scholars tend to justify the authority of precedents on equitable or prudential grounds. By contrast, on the eighteenth-century view (most influentially expounded by Blackstone), the judge's duty to follow precedent derives from the nature of judicial power itself.... The Framers accepted this understanding of judicial power (sometimes referred to as the declaratory theory of adjudication) and the doctrine of precedent *implicit in it.*

Id. at *8-*12 (emphasis added).

[147] *Id.* at *8.

[148] *Id.* at *8-*9.

[149] Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that "it is emphatically the province and duty of the judicial department to say what the law is"); *see* Willy v. Coastal Corp., 503 U.S. 131 (1992) (holding that federal courts are not free to extend the judicial power of the United States described in the Constitution); *see also Constitutional Law*, *supra* note 105, § 169.

account changes in customs and modern conceptions of justice.[150] A court's disregard of precedent thus exceeds the power of the judiciary to determine what the law is, and consequently, as stated in *Anastasoff*, absent some exceptional circumstance, the doctrine of precedent must be adhered to.[151]

Finally, it is an established principle that under the theory of separation of powers the judiciary must stay within the bounds of its constitutional grant[152] and therefore cannot exercise powers given to the legislative or executive branches of government.[153] It is not a proper judicial function to determine what the law should be, or to make law, or to substitute its discretion for that of other departments of government - these functions are exclusively reserved to the legislatures.[154] Since courts lack the constitutional authority to legislate, they cannot set forth new laws, but rather, courts are confined to the functions of interpreting and applying existing laws to factual situations.[155]

Disregarding precedent consequently exceeds the judiciary's power by allowing judges the ability to exercise the discretionary functions normally reserved to legislatures.[156] As one judge observed,

> When a government official, judge or not, acts contrary to what was done on a previous day, without giving reasons, and perhaps for no reason other than a change of mind, can the power that is being exercised properly be called "judicial"? Is it not more like legislative power, which can be exercised whenever the legislator thinks best, and without regard to prior decisions?[157]

If a judge is allowed to disregard precedent, not only is he exceeding his judicial power under Article III of the Constitution, but he is also violating the

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[150] *Constitutional Law*, *supra* note 105, § 171.

> The judiciary cannot, however, in declaring what the law is, disregard the presently existing law by reason of considerations based on public or humane grounds. Also, in performing such function, the judicial department should not be influenced by considerations of popular opinion or approval, or ethical principles for which there is no support in constitution, statute, or judicial decision.

Id.

[151] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *8.

[152] *See* RD-DR Corp. v. Smith, 183 F.2d 562 (5th Cir.), *cert. denied*, 340 U.S. 853 (1950) (holding that no matter how desirable the results may be, it is the essence of our system that judges must stay within the bounds of their constitutional power). "Nothing is more fundamental – even the Bill of Rights. To depart from this fundamental is, in Mr. Justice Black's own words, 'to frustrate the great design of a written constitution.'" *Id.* at 565-66.

[153] *Constitutional Law*, *supra* note 105, § 173.

[154] *Id.*

[155] *See* Diamond v. Chakrabarty, 447 U.S. 303 (1980) (holding that the function of the courts is not to make, but to interpret and apply the laws).

[156] Slavitt, *supra* note 2.

[157] Arnold, *supra* note 32, at 226.

doctrine of separation of powers by encroaching into the legislative realm.[158] This is exactly what concerned the *Anastasoff* court when it stated, "the doctrine is . . . essential . . . for the separation of legislative and judicial power . . . . If judges had the power to 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions.'"[159] By declaring that all decisions, whether published or not, have precedential value, the court was able to uphold the doctrine of separation of powers by limiting judges to their prior decisions so that they would not have the power "to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not."[160]

In these three ways, the *Anastasoff* opinion served to realign the scope of judicial power with that given to the courts under Article III of the Constitution. By adhering to the doctrine of precedent, the court ensured that the exercise of its power would not exceed its Constitutional grant nor encroach on the legislative arena. *Anastasoff* thus sent a message to all courts operating under the false notion that the doctrine of precedent is dispensable. This message was clear: "we can exercise no power that is not 'judicial'. That is all the power we have."[161]

V. IMPACT ON HAWAI'I

A. Application to Hawai'i

Hawai'i is not obligated to follow the Eighth Circuit's lead. However, while not bound by *Anastasoff*, the court's analysis and holding are applicable to Hawai'i's courts because Hawai'i has repeatedly established that their judicial power, under Article VI of Hawai'i's Constitution,[162] is analogous to the judicial power extended to federal courts under Article III of the United States Constitution.[163] Indeed, the Supreme Court of Hawai'i has specifically stated

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[158] Anastasoff v. United States, No. 99-3917, 2000 U.S. App. LEXIS 21179, at *10-*11 (8th Cir. Aug. 22, 2000).

[159] *Id.* at *11 (quoting BLACKSTONE, *supra* note 101, at 259).

[160] *Id.* at *21.

[161] Arnold, *supra* note 32, at 226.

[162] The language contained in Article VI of the Constitution of the State of Hawai'i mirrors the language contained in Article III of the U.S. Constitution and states in relevant part: "The judicial power of the State shall be vested in one supreme court, one intermediate appellate court, circuit courts, district courts and in such other courts as the legislature may from time to time establish." HAW. CONST. art. VI, § 1.

[163] *See* Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981) (holding that though the courts of Hawai'i are not subject to a "cases or controversies" limitation like the federal judiciary, judicial power to resolve public disputes in a system of government where

that "like the federal government, ours is one in which the sovereign power is divided and allocated among three co-equal branches"[164] and therefore "judicial intrusion into matters which concern the political branch of government" is inappropriate.[165] Consequently, if the doctrine of precedent serves to limit judicial power in the federal context by confining the role of judges to determine what the law is and not invent it,[166] then the same should be true for Hawai'i's courts.

While the application of *Anastasoff*'s holding to Hawai'i may be doctrinally sound, its implementation, if pursued, will undoubtedly be costly for Hawai'i's courts. As isolated and unique as Hawai'i may be from the mainland United States,[167] its courts have not been insulated from the crisis of volume.[168] To the contrary, Hawai'i's recent economic depression has served to amplify the problems that come with court congestion.

B. Use of Unpublished Opinions in Hawai'i

In a 1995 interview for the Hawai'i Bar Journal, Chief Justice Moon of the Hawai'i Supreme Court stated, "[t]here is no doubt that our appellate court dockets are clogged with old cases."[169] Although Hawai'i has instituted numerous procedures to address this problem of congestion,[170] the statistics are still concerning. In the last decade alone, cases filed in Hawai'i's appellate courts nearly doubled from approximately 2,300 in 1990 to approximately 4,400 in 1998.[171] And last year, the load grew to 5,008 cases to be decided by

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there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context); Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (holding that, like the federal government, the government of Hawai'i is one in which the sovereign power is divided and allocated among three co-equal branches).

[164] *Yamasaki*, 69 Haw. at 170-71, 737 P.2d at 455.

[165] *Id.* at 172, 737 P.2d at 456.

[166] Anastasoff v. United States, No. 99-3917, 2000 U.S. App. LEXIS 21179, at *8-*9 (8th Cir. Aug. 22, 2000).

[167] The word "mainland" is synonymous with "continental" when referring to the continental United States.

[168] Kempner, *supra* note 33.

[169] *Id.*

[170] *Id.* These procedures include temporary suspension of oral argument, early jurisdictional review, staff review of pending appeals, early disposition, additional staff, internal procedures, rule changes regarding transcripts, appellate ADR, and appellate rules review. *Id.*

[171] STATE OF HAWAI'I, JUDICIARY, ANNUAL REPORT 13 (1999) [hereinafter ANNUAL REPORT], http://www.state.hi.us/jud/99ar.pdf.

one Supreme Court, consisting of five justices, and four Intermediate Court of Appeals judges sitting in panels of three.[172]

Despite this increase in appeals, however, there have been signs of improvement. For example, in 1997, there were over 900 appeals pending[173] and, on average, the amount of time that an appeal remained pending was 327 days.[174] Yet, by 1999, these numbers dropped significantly to approximately 700 pending appeals,[175] which, on average, were pending for 168 days.[176] Furthermore, from fiscal year 1993-94 to fiscal year 1998-99, the Hawai'i Supreme Court was able to reduce its backlog by 35.4%, despite the fact that the number of appeals filed increased during that same period by 21.7%.[177] The Intermediate Court of Appeals (ICA), made similar strides. For the same period, the ICA reduced its backlog by 72.4%, while the number of appeals filed grew by 3%.[178]

These statistics demonstrate that in the face of consistently burgeoning dockets, Hawai'i's appellate courts have been able to reduce their backlogs. Acknowledgement for these improvements must be given to the efforts made by Chief Justice Moon over the last few years to reform the courts' system of case-flow management. These efforts include the temporary suspension of oral arguments, early jurisdictional review, staff review of pending appeals, early disposition, internal procedures to streamline day-to-day matters, and encouraging appellate alternative dispute resolution.[179] However, the frequent use of unpublished opinions has been a powerful tool that the ICA has used in the disposition of many appeals and their role in reducing court congestion cannot be overlooked.

Rule 35 of the Hawai'i Rules of Appellate Procedure provides that cases may be disposed of by published opinion, memorandum opinion, or dispositional order.[180] The rule further instructs that memorandum opinions

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[172] STATE OF HAWAI'I, JUDICIARY, ANNUAL REPORT, Statistical Supplement, tbl. 1 *Caseload Activity in the Courts of Appeals* (1999) [hereinafter *Caseload*], http://www.state.hi.us/jud/99Stat.pdf.

[173] *Id.*

[174] ANNUAL REPORT, *supra* note 171, at 14.

[175] *Caseload*, *supra* note 172, at tbl. 1.

[176] ANNUAL REPORT, *supra* note 171, at 14.

[177] STATE OF HAWAI'I, JUDICIARY, ANNUAL REPORT, Statistical Supplement, tbl. 2 *Courts of Appeal Changes* (1999) http://www.state.hi.us/jud/99Stat.pdf.

[178] *Id.*

[179] Kempner, *supra* note 33. Some of these reform efforts, such as the temporary suspension of oral argument, have been controversial in and of themselves. However, whether these reform efforts are desirable is beyond the scope of this article.

[180] Hawai'i Rule of Appellate Procedure 35 states:

Dispositions.

(a) Class of Dispositions. Dispositions may be rendered by a designated judge or justice, and may take the form of published, per curiam, or memorandum opinions or

and dispositional orders shall not be published and shall not be cited in any other action or proceeding.[181] This rule is mirrored by ICA Rule 2(b).[182] In essence, these rules provide that, in Hawai'i, memorandum opinions and dispositional orders are not precedent. This summary is confirmed by a visit to the judiciary's website, where the full text of memorandum opinions and summary disposition orders can be accessed by any member of the public. It reads: "Under Rule 35(b) of the HRAP [Hawai'i Rules of Appellate Procedure], memorandum opinions shall not be published, and dispositional orders shall not be published except upon the order of the court. *They are without precedential effect* and may *not* be cited. They are provided for informational purposes."[183]

In spite of, or perhaps because of, their non-precedential status the ICA often disposes of appeals via memorandum opinion or dispositional order. In the period from July 1999 to June 2000, only fifty-eight cases (roughly 29% of the total cases decided) received a published opinion, while ninety-four were disposed of by memorandum opinion, and forty-four by summary disposition.[184] Given the frequency with which unpublished opinions are utilized by the courts to dispose of opinions and given their impact on the court's ability to reduce its appellate backlog, can Hawai'i afford to pay the high price of precedent?

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dispositional orders.

(b) Publication. Memorandum opinions shall not be published. Dispositional orders shall not be published except upon order of the court.

HAW. R. APP. P. 35.

[181] Hawai'i Rule of Appellate Procedure 35 states:

Dispositions.

(c) Citation. A memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

HAW. R. APP. P. 35.

[182] Hawai'i Intermediate Court of Appeals Rule 2(b) states:

Citation of opinions – A memorandum opinion shall not be cited by a court or by a party in any other action or proceeding except when the opinion establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

HAW. INT. CT. APP. R. 2(b).

[183] Hawai'i Supreme Court Law Library, *Hawai'i Appellate Court Opinions and Orders* [hereinafter *Opinions and Orders*], *available at* http://www.state.hi.us/jud/ctops.htm (last updated Oct. 23, 2000) (emphasis added).

[184] Phone Interview with James Burns, *supra* note 70.

C. Effects of Anastasoff in Hawai'i

If *Anastasoff*'s holding were adopted in Hawai'i, the effects would be difficult to predict. Such adoption would simply mean that all decisions rendered by the ICA and Hawai'i Supreme Court would have precedential value, including memorandum opinions and summary dispositions.[185] These types of decisions can continue to go officially "unpublished," the only difference being that litigants and lawyers will be able to cite to them in court.[186]

It is acknowledged that the transformation of unpublished opinions in Hawai'i from non-precedent to precedent could very likely aggravate some of the caseload problems facing Hawai'i's appellate courts. Potentially, judges will spend more time crafting unpublished opinions with all the agony usually reserved for published opinions, which could lead to a depletion of the judiciary's resources and an increase in caseflow management problems. It is also possible that precedential unpublished opinions could result in unfairness based on the differential access that litigants and lawyers may have to them. However, several factors mitigate these potential adverse effects.

First, as we have seen in the last ten years, Hawai'i's appellate judges have proven to be creative and resourceful in dealing with the crisis of volume.[187] The reform efforts implemented by Chief Justice Moon to combat caseload problems, while not without some controversy, have been sufficiently successful.[188] If drafting unpublished opinions proves to be problematic, the public should trust that our judiciary would have the capacity and ability to

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[185] Anastasoff v. United States, No. 99-3917, 2000 U.S. App. LEXIS 21179, at *10 n.9 (8th Cir. Aug. 22, 2000). The opinion suggests that elevating an unpublished opinion to precedential status need not be done by way of a reported opinion. Rather, the record of the judicial proceeding alone is sufficient evidence of the legal principles necessary to support the decision. *Id.* For summary dispositions, this would mean that a mere one word decision, such as "AFFIRMED", would suffice, provided that the record below was complete enough to illustrate why the trial court ruled the way it did.

[186] *Anastasoff* emphasized that the issue was not whether unpublished decisions should be published, but rather, whether a decision should have precedential value regardless of whether it is published or unpublished. *Id.* at *20.

> Courts may decide, for one reason or another, that some of their cases are not important enough to take up pages in a printed report. Such decisions may be eminently practical and defensible, but in our view they have nothing to do with the authoritative effect of any court decision.

Id. at *19-*20.

Significantly, in Hawai'i, the issue of whether a decision should be published or unpublished has become relatively moot. Since all unpublished opinions are available on-line, anyone can conveniently obtain access to any unpublished opinion with little difficulty.

[187] *See* discussion *supra* section V.B; *see also* Kempner, *supra* note 164.

[188] *See* discussion *supra* section V.B.

adjust their resources and come up with new techniques, as they have in the past.[189] Second, Hawai'i has already taken steps to ensure that unfairness as a result of differential access to unpublished opinions among litigants and lawyers will be minimized. All of Hawai'i's unpublished opinions, in their entirety, can be easily accessed through the internet (available at the public library).[190] The judiciary updates its website frequently, posting unpublished decisions usually within four days.[191]

Moreover, regardless of whether adverse effects result, Hawai'i should implement *Anastasoff*'s holding for several important reasons that take no account of practical costs. Allowing unpublished decisions to be cited[192] and recognizing them as precedential is not only consistent with the proper role and function of the doctrine of precedent in a common law system of justice, but is arguably also required by Hawai'i's Constitution.[193] Even if practical difficulties may result, judges should be bound by their past decisions, whether published or not,[194] and the exercise of their power should be limited by them.[195] Furthermore, if lawyers were able to cite and argue unpublished opinions, case law conflicts could be reconciled and erroneous decisions could be overruled.[196] "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of

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[189] Of course, lobbying the legislature to increase the judiciary's budget in order to provide more appellate judges would be most ideal. However, as a staff attorney for the Hawai'i Supreme Court acknowledged, that request has been made and denied many times and it is unlikely that things will change in the near future. Phone Interview with Jim Branham, Staff Attorney, Hawai'i Supreme Court (Oct. 25, 2000). Mr. Branham attributes the legislature's denial of more funds to the fact that courts have no constituencies and thus no one to champion their purpose or budgets. This is due to the fact that lawyers are a small group and litigants are an unwilling group who demand an efficient system in the midst of litigation, but who otherwise remain unaware and unsympathetic to the situation of the courts. *Id.*

[190] Unpublished opinions for the past two years are posted at http://www.state.hi.us/jud/ctops.htm.

[191] *Opinions and Orders*, *supra* note 183.

[192] Although it is the contention of this note that unpublished opinions should be citable, it does not follow that they should be cited. The substantive benefits of citing to memorandum opinions and summary dispositions is minimal, save the exceptional circumstance where the unpublished opinion clearly makes new law (in which case it would most likely be published).

[193] *See* Anastasoff v. United States, No. 99-3917, 2000 U.S. App. LEXIS 21179, at *22-*23 (8th Cir. Aug. 22, 2000).

[194] *See id.* at *19-*21.

[195] *Id.*

[196] Render, *supra* note 5, at 164.

antecedent principles."[197] Consequently, whatever the price of precedent may be, as *Anastasoff* asserted, the price still must be paid.[198]

VI. CONCLUSION

Whether or not courts across the nation choose to accept the holding of *Anastasoff v. United States*, this landmark case has, at the least, drawn attention to the dangers that come with sacrificing the doctrine of precedent for the sake of practicality. Increasing efficiency and alleviating overloaded appellate courts are laudable goals, but in the end, as *Anastasoff* warns, they may come at a price that is too high to bear. For now, it is up to each jurisdiction to decide where their priorities lie. As they do, they should keep in mind that the judicial integrity that results from adhering to the doctrine of precedent is, in essence, priceless.

Sheree L. K. Nitta[199]

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[197] *Anastasoff*, 2000 U.S. App. LEXIS 21179, at *19 (quoting STORY, supra note 124, §§ 377-78).

[198] *Id.* at *21.

[199] J.D. Candidate, May 2002. William S. Richardson School of Law, University of Hawai'i at Manoa.

Right Against Self-Incrimination v. Public Safety: Does Hawai'i's Sex Offender Treatment Program Violate the Fifth Amendment?

I. INTRODUCTION

The Hawai'i State Legislature has determined that "[s]exual assault is one of the most heinous crimes against a person not only because of the physical violence involved but also because of its often devastating and long-term psychological impact on the victim."[1] Sex offenders are often afflicted with serious psychological conditions that pose an increasing threat to the community if left untreated.[2] Like many other jurisdictions,[3] Hawai'i has recognized the pressing need to prevent recidivism of sex crimes by establishing an extensive and successful program for the treatment of sex offenders.[4] Hawai'i's Sex Offender Treatment Program (HSOTP), however, imposes specific requirements that may infringe upon the constitutional rights of its participants.[5] The program requires its participants to sign an admission of guilt and to submit to regular polygraph testing.[6] These requirements,

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[1] Susan K. Claveria, SEX OFFENDER TREATMENT—INTERAGENCY COORDINATION IN HAWAI'I 1 (1991).

[2] Eric Lotke, *Sex Offenders—Does Treatment Work?*, CORRECTIONS COMPENDUM, THE NAT'L J. CORRECTIONS, May 1996 at 3; *see also* CLAVERIA, *supra* note 1, at 1 (stating that "incarceration without appropriate treatment only increases the offender's propensity to reoffend").

[3] Almost all states have implemented some sort of sex offender treatment program. Lotke, *supra* note 1, at 12-18 tbl.1.

[4] The Hawai'i State Legislature enacted HRS § 353E-1 to establish a statewide, integrated program for the treatment of sex offenders to respond to the problem of sex offender recidivism. HAW. REV. STAT. § 353E-1 (Michie 2000).

[5] U.S. CONST. amend. V. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." HSOTP requires all of its participants to admit to guilt of their crimes and to submit to regular polygraph testing as required by his therapist. Letter from Dr. Barry Coyne, Administrator, *HSOTP*, to Jamie Tanabe, Staff Writer, *University of Hawai'i Law Review*, at 2 (Sept. 5, 2000) (on file with author) (hereinafter "Coyne letter"). The offender is also required to sign a Waiver of Confidentiality in order to receive treatment. HAWAI'I SEX OFFENDER TREATMENT TEAM, PROGRAM IMPLEMENTATION REFERENCE MANUAL, Program Admission Criteria at 2, June 1990, (unpublished manual, on file at Hawai'i Department of Public Safety, Sex Offender Treatment) (hereinafter "Program Implementation Manual"). Together, these three requirements may violate a person's right against self-incrimination. *See infra*, section III.

[6] Program Implementation Manual, *supra* note 5, Program Admission Criteria at 2; *see also* Coyne letter, *supra* note 5, at 2.

coupled with a mandatory waiver of confidentiality, allow incriminating disclosures made by the offender in treatment to be used against him.[7] There are three situations where an inmate has a legitimate fear of incrimination: (1) where an inmate offered trial testimony maintaining his innocence, subsequent admissions of guilt can incriminate the inmate for perjury;[8] (2) incriminating statements made by an inmate during treatment may affect his ability to obtain post-conviction remedies;[9] and (3) an inmate's statements made in treatment and during polygraph testing may uncover unrelated crimes leading to prosecution for a second crime.[10] While conditioning parole or probation on completion of HSOTP is constitutionally permissible, a state's revocation of such a privilege on the grounds that an offender failed to admit to guilt or answer incriminating questions in treatment violates the right against self-incrimination.[11] Requiring an offender to choose between answering an

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[7] *See* Program Implementation Manual, *supra* note 5, Program Admission Criteria at 2, Guidelines on Providing, Evaluating, & Selecting Assessment Services at 1, Guidelines on Providing and Selecting Primary Treatment Group Services in the Community at 1. The offender must sign a waiver of confidentiality to participate in the program. "Information will be disclosed, as deemed appropriate, to individuals who have a need to know for purposes of treatment and community safety . . ." *Id.*, Procedure on Completing Acknowledgment of Non-Confidentiality Waiver. *See also infra* section II.A.

[8] *See* State of Montana v. Imlay, 813 P.2d 979, 985 (Mont. 1991) (noting that the defendant, who testified in his own defense at trial and denied committing the offense with which he was charged, would also be vulnerable to perjury charges if compelled to admit guilt); Jessica Wilen Berg, *Note: Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-Ordered Therapy Programs*, 79 CORNELL L. REV. 700, 709-10 (1994) (stating that a defendant who maintained his innocence at trial may be convicted of perjury for lying about his innocence on the stand if he subsequently admits to the crime).

[9] The Double Jeopardy Clause prohibits a defendant from being charged for the same crime twice. U.S. CONST. amend. V states "nor shall any person be subject for the same offense twice put in jeopardy of life or limb . . . ." Thus a defendant's incriminating statements may not be used to convict him again of the same crime. However, the defendant is still entitled to a motion for new trial, appeal, petition for certiorari, and collateral attack. *See* Minnesota v. Kaquatosh, 600 N.W.2d 153 (Minn. App. 1999) (holding that revocation of defendant's probation for failing to complete sex offender treatment because he refused to admit guilt violated his right against self-incrimination).

[10] *See* Minnesota v. Murphy, 465 U.S. 420 (1984). HSOTP participants must sign a Waiver of Confidentiality as a part of the treatment. It is the policy of the HSOTP to report new violations to the offender's probation officer, who in turn, may revoke the offender's parole. This information may even lead to the prosecution of the offender for new crimes. However, prosecutors are not entitled to polygraph results obtained from HSOTP. Interview with Dr. Barry Coyne, Administrator, HSOTP, (Sept. 5, 2000) (hereinafter "Coyne interview").

[11] State v. Reyes, 93 Hawai'i 321, 329, 2 P.3d 725, 733 (Haw. Ct. App. 2000) (stating that "[c]ourt-ordered programs that require convicted sex offenders to admit responsibility for the offense of which they were convicted under threat of probation revocation and imprisonment violate these protections"); *see also* Brendan J. Shevlin, *"[B]etween the Devil and the Deep Blue Sea:" A Look at the Fifth Amendment Implications of Probation Programs for Sex*

incriminating question or going back to jail, may constitute coercive government conduct prohibited by the Fifth Amendment.[12] Hawai'i case law suggests that as long as there are protections that prevent the use of incriminating statements in future criminal proceedings, there are no such violations.[13] The question of whether the program itself affords such protection remains unanswered.

This paper analyzes the competing views about how mandatory admissions of guilt and polygraph testing in sex offender treatment can be aligned with the participant's Fifth Amendment right against self-incrimination. Part II outlines the history of HSOTP and its requirements and presents the framework for analyzing violations of the right against self-incrimination. Part III discusses the recent case law in Hawai'i, where the courts have expressed a concern about self-incrimination in offender treatment.[14] Next, this part will analyze HOSTP's validity under U.S. Supreme Court jurisprudence and how other jurisdictions have dealt with this issue. Finally, Part IV will suggest possible solutions that foster both offender rehabilitation and public safety, such as offering immunity to HSOTP participants, exploring alternative methods of treatment, and mandating strict guidelines for the use of polygraph tests. This paper concludes that, under both Hawai'i and U.S. Supreme Court law, revoking parole or probation based on failure to admit guilt or answer incriminating questions in HSOTP violates the Fifth Amendment.[15]

Offenders Requiring Mandatory Admissions of Guilt, 88 KY. L.J. 485 (2000) (discussing the constitutionality of similar SOTPs).

[12] U.S. CONST. amend. V. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."

[13] See *infra*, section III.A. (discussing Hawai'i case law).

[14] *Reyes*, 93 Hawai'i at 329, 2 P.3d at 733.

[15] This paper will focus on the validity of HSOTP under the Fifth Amendment of the U.S. Constitution. Article 1, Section 10 of the Hawai'i Constitution provides a self-incrimination provision that is identical to the Fifth Amendment. HAW. REV. STAT. CONST. art. I, § 10 (Michie 2000). The Hawai'i rule against self-incrimination, however, is broader in scope than the federal rule. State v. Nelson, 69 Haw. 461, 468, 748 P.2d 365, 369 (Haw. 1987). Although it is clear that HSOTP must comply with both bodies of law, the Hawai'i courts have focused on the Supreme Court jurisprudence in the context of mandatory sex offender treatment. Thus, this paper will discuss the validity of HSOTP under the Fifth Amendment of the U.S. Constitution.

II. BACKGROUND

A. Overview of HSOTP

In the late 1980s, the number of reported sexual assaults nationwide increased at a steady pace.[16] The Hawai'i State Legislature responded by establishing a committee to examine the problems of an increase in sexual assault crimes in Hawai'i and the lack of treatment for sex offenders.[17] The committee prepared a report for the Hawai'i State Legislature, analyzing for the first time Hawai'i's sex offender population and assessing the State's treatment of these offenders.[18] The report drew the attention of the legislature to a need for some sort of treatment program to protect the community from repeat sex offenders.[19]

In 1992, the Hawai'i State Legislature passed Act 164,[20] authorizing the creation of the HSOTP, which was modeled after nine sex offender treatment programs in Oregon, Minnesota, and Vermont.[21] Based on the findings of the committee, the legislature concluded that "sexual assault is a heinous crime committed by offenders with deviant behavior patterns which cannot be controlled by incarceration alone."[22] The Hawai'i Paroling Authority (HPA)[23] now requires all inmates labeled as a "sex offender" to pass the program to be eligible for parole.[24] HSOTP defines a "sex offender" as someone "having

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[16] CLAVERIA, *supra* note 1, at 1.

[17] *Id.* at 4. The committee consisted of Circuit Court Judge Marie Milks, Hawai'i Paroling Authority Chair Marc Oley, and Correctional Planner Martha Torney.

[18] *Id.*

[19] S. Con. Res. 216, 1991 Leg., 16th Sess. (Haw. 1991); *see also* CLAVERIA, *supra* note 1, at 46.

[20] HAW. REV. STAT. § 353-E (Michie 2000).

[21] HAWAI'I SEX OFFENDER TREATMENT TEAM, MASTER PLAN, ADULT SEX OFFENDER TREATMENT—AN INTEGRATED MODEL, Executive Summary at vii (1989) (unpublished plan, on file at Hawai'i Department of Public Safety, Sex Offender Treatment) (hereinafter "Master Plan"). The Oregon programs focused on a multimodal treatment approach in a state hospital. *Id.* Minnesota's plan focused primarily on institutional and community-based programs for sex offenders. *Id.* The Vermont Treatment Program provided an example of an integrated, statewide system of adult sex offender treatment services. *Id.*

[22] CLAVERIA, *supra* note 1, at 68 (app.D.).

[23] HPA is the central paroling authority for the State of Hawai'i in charge of selecting individuals for parole. HAW. REV. STAT. § 353-62 (Michie 2000).

[24] Neal v. Shimoda, 131 F.3d 818, 822 (9th Cir. 1997) (stating that "[e]ach inmate who is identified as a sex offender must undergo a twenty-five session psychoeducational treatment program in order to become eligible for parole"); *see also*, Program Implementation Reference Manual, *supra* note 5, Program Admission Criteria at 2. (stating that "[e]ventually, all eligible paroled sex offenders will be treated through the prison program").

been convicted, at any time, of any sex offense or [who] engaged in sexual misconduct during the course of an offense."[25]

When an inmate characterized as a "sex offender" is in his final two to three years of incarceration and is free of misconduct,[26] he is eligible to transfer to Kulani Correctional Facility[27] or Halawa Correctional Facility[28] to begin treatment.[29] The treatment curriculum at Halawa normally includes:

> Human sexuality to provide basic anatomy and physiology of reproduction;
> Sex roles to define appropriate interactions between genders and to debunk stereotypes;
> Social skills to practice appropriate communications with adults;
> Cognitive skills to eliminate thinking errors that prevent proper appraisals of situations;
> Self-awareness to heighten one's perceptions of internal thoughts and feelings;
> Assertiveness to eliminate either too little or too much self-assertiveness in communication;
> Anger and stress management to control negative emotions;
> Empathy to experience vicariously what the offender's victim felt during and after his assault; and
> Relapse prevention to identify precursors to assault before situations escalate into new crimes.[30]

An offender at Kulani receives basically the same treatment and, in addition, may also choose to participate in behavior therapy.[31] After a participant is released on parole, he continues treatment with new HSOTP therapists for the full duration of his parole so that therapeutic support is available if he encounters temptations and high-risk situations.[32]

As a fundamental part of the program, an inmate or parolee "must admit, at least in part, to the offense."[33] This rule addresses the concern that an

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[25] *Neal*, 131 F.3d at 822.

[26] Coyne letter, *supra* note 5, at 2. An inmate's custody classification is typically reduced from medium security to minimum security if he is free of misconduct, escape attempts, or medical problems. *Id.*

[27] Kulani Correctional Facility, located on the island of Maui, is the state's only minimum security facility that houses sex offenders.

[28] Halawa Correctional Facility is a general population state prison located in Aiea, Hawai'i on the island of Oahu.

[29] Coyne letter, *supra* note 5, at 2.

[30] *Id.* at 3.

[31] *Id.* at 4. Behavior therapy adds covert sensitization, aversion therapy, olfactory aversion, verbal satiation and desensitization to the self-control skills practiced by the offender. Because behavior therapy includes some aversive modules, an inmate's participation is absolutely voluntary and he may terminate treatment at any time. *Id.*

[32] *Id.* at 3.

[33] Program Implementation Manual, *supra* note 5, Program Admission Criteria at 2. The Consent to Treat form, which a participant is required to sign, states, "I admit that I committed

individual who refuses to acknowledge his problem will not benefit from treatment.[34] Also, because "safety issues must override the usual rights of confidentiality" in the treatment of sex offenders, the participant must also sign a waiver of confidentiality.[35] This waiver states:

> I . . . have been informed and acknowledge that I have *no rights to confidentiality* regarding my evaluation and treatment under the Hawai'i Sex Offender Treatment Program . . . [and that the *program providers] may report to the appropriate authorities*, including but not limited to, the Office of the *Prosecuting Attorney* or the *police department*, any occurrence of a sexual offense on my part.[36]

Once enrolled in HSOTP, a therapist may require a participant to submit to polygraph testing.[37] Polygraph testing is a standard psychological tool that plays a significant role in sex offender treatment programs by serving two primary functions.[38] First, therapists use polygraphs to obtain truthful answers from participants to prescribe appropriate treatment.[39] Second, therapists use polygraph testing to assess the person's risk to the community.[40] Because the intent of the polygraph is therapeutic, not punitive, the therapist does not provide a *Miranda*-type warning before administering the test.[41] Again, since the main purposes of HSOTP are rehabilitation and public safety, the therapist has an obligation to report admissions of sexual misconduct and abuse made during treatment to the offender's parole officer.[42]

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the offense(s) charged against me. I will assume full responsibility for my sexual behaviors." *Id.*, Program Conditions at 1.

[34] Coyne letter, *supra* note 5, at 2; *see also* Shevlin, *supra* note 11, at 494.

[35] Program Implementation Manual, *supra* note 5, Procedure on Completing Acknowledgement of Non-Confidentiality; Waiver. If a sex offender exhibits behavior that indicates he is likely to harm another individual, the offender is not entitled to confidentiality in the interest of public safety. For example, child custody statutes require one to report any known instances of child abuse. HAW. REV. STAT. § 350-1.1 (Michie 2000).

[36] Program Implementation Manual, *supra* note 5, Acknowledgment of Non-Confidentiality; Waiver (emphasis added).

[37] Coyne letter, *supra* note 5, at 2.

[38] Robert Lundell, *The Utility of Polygraph Testing in the Treatment of Sex Offenders*, at 1, Professional Polygraph Service, 125 E. Main, Ste. 201, Medford Oregon, 97501 (on file with author).

[39] *Id.*

[40] *Id.*; *see also* State v. Naone, 92 Hawai'i 289, 304-05, 990 P.2d 1171, 1186-87 (Haw. Ct. App. 1999) (stating that "polygraphs can be useful . . . [to] assess whether a defendant may be approaching a level of imminent danger to the community").

[41] Memorandum from Dr. Barry Coyne to Ellena Young (Feb. 22, 1996) (on file with author) (hereinafter "Coyne Memo").

[42] Program Implementation Manual, *supra* note 5, Procedure on Completing Acknowledgement of Non-Confidentiality; Waiver at 1 (explaining that "[i]nformation will be

Normally, a patient's disclosure to his or her doctor or therapist would be privileged information, and a patient would have no real fear of incrimination.[43] In the context of sex offender treatment, however, the doctor-patient privilege does not apply for several reasons. First, a common law exception to the doctor-patient privilege operates to compel disclosure where there are safety concerns.[44] This exception provides that "once a therapist . . . determine[s], or . . . should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."[45] Second, Hawai'i's child custody statute obligates any individual, including doctors, to report instances of known child abuse. [46] Finally, by signing a Waiver of Confidentiality, all offenders enrolled in the program relinquish all rights to an action for breach of the doctor-patient privilege.[47] Accordingly, an HSOTP participant may still have a real fear of incrimination.

The HSOTP has been extremely successful in reducing recidivism in sex offenders.[48] Perhaps the most important reason Hawai'i's rates have dropped is because the Parole Board requires that all convicted felony sex offenders participate in HSOTP to qualify for parole.[49] Therefore, HSOTP therapists cannot select only the most amenable inmates for treatment.[50] Moreover, offenders remain in therapy until the Parole Board is satisfied they are ready

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disclosed, as deemed appropriate, to individuals who have a need to know for purposes of treatment and community safety . . ."); see *infra* section II.A.

[43] *See* HAW. R. EVID. 504 (2000). Rule 503 provides, "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional condition, including alcohol or drug addiction, among oneself, the patient's physician, and persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family." *Id.*

[44] *See* Tarasoff v. Regents of Univ. of California, 551 P.2d 334, 345 (Cal. 1976).

[45] *Id.*

[46] Child custody statutes require one to report any known instances of child abuse. HAW. REV. STAT. § 350-1.1 (Michie 2000); *see also* Samuel Braddock, *Containing Pedophiles: Benefits and Concerns of Having a Polygraph Examiner on the Team*, J. OF OFFENDER MONITORING, 15, 20 (Summer 1998) (stating that "[t]herapists usually have obligations to report child abuse under state law and are thus obliged to report newly identified victims to child-protective agencies").

[47] Program Implementation Manual, *supra* note 5, Acknowledgement of Non-Confidentiality; Waiver.

[48] *See* Leanne Gillespie, M.S.C.J.A & Barry Coyne, Ph.D., *Recidivism of Sex Offenders Release From Hawai'i's Prisons from 1988 to 1993*, 1 (1996) (unpublished paper) (on file with author) [hereinafter "Recidivism Study"].

[49] Recidivism Study, *supra* note 48, at 4; Program Implementation Manual, *supra* note 5, Program Admission Criteria at 2.

[50] Recidivism Study, *supra* note 48, at 4.

for release.[51] According to a recent study, Hawai'i's recidivism rates for sex offenders has dropped dramatically after the implementation of HSOTP.[52] Of 194 sex offenders who were released from Hawai'i's prison system from 1988 through 1993, only four percent (eight offenders) were convicted of new felony sex crimes.[53] General recidivism rates of sex offenders also dropped, with only twenty-four percent of offenders released in 1993 returning, whereas in 1988, fifty-eight percent returned to prison.[54]

Overall, HSOTP is an effective program that protects the community by rehabilitating convicted sex offenders.[55] It employs standard techniques used throughout the nation to treat sex offenders and prevent them from committing heinous sex crimes.[56] When mandated as a precondition to parole or as a requirement of probation, however, the specific requirements of the program—the mandatory admission of guilt, polygraph examinations, waiver of confidentiality, and lack of immunity—raise genuine self-incrimination concerns.[57]

B. The Fifth Amendment and the Right Against Self-Incrimination

"The Fifth Amendment right against self-incrimination provides us with some of our most treasured protections—preservation of our autonomy, privacy, and dignity against the threat of state coercion."[58] It states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]"[59] There are basically two protections in the right against self-

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[51] *Id.*

[52] *Id.* at 1.

[53] *Id.*

[54] *Id.* The study also revealed that the average sex offender in Hawai'i was between the ages of twenty and twenty-nine (fifty-two percent), and were typically single and never married (fifty-four percent). *Id.* at 2.

[55] *See id.* at 4.

[56] *See* Master Plan, *supra* note 21, Executive Summary at vii; *see also* Lundell, *supra* note 38, at 1 (expressing the utility of polygraph testing in sex offender treatment). *See generally* Jonathan Kaden, *Comment: Therapy for Convicted Sex Offenders: Pursuing Rehabilitation Without Incrimination*, 89 J. CRIM. L. & CRIMINOLOGY 347 (1998) (discussing the constitutionality of other similar SOTPs).

[57] State v. Reyes, 93 Hawai'i 321, 329, 2 P.3d 725, 733 (Haw. Ct. Ap. 2000) (stating that "[c]ourt-ordered programs that required convicted sex offenders to admit responsibility for the offense of which they were convicted under threat of probation revocation and imprisonment violate these protections."). *See generally* Shevlin, *supra* note 11 (discussing the constitutionality of similar SOTPs).

[58] *Id.* at 329, 2 P.3d at 733; *see also* Kaden, *supra* note 56, at 362-64.

[59] U.S. CONST. amend. V.

incrimination, incrimination and compulsion.[60] First, the right ensures an individual of his right to remain silent when there is a real fear of incrimination in a criminal proceeding.[61] Second, the right prohibits the use of coerced confessions.[62] The U.S. Supreme Court has long held that the Fifth Amendment's protection against self-incrimination and compulsion extends beyond the criminal trial setting.[63] In *Lefkowitz v. Turley*,[64] the Court announced that the right against self-incrimination not only applies to an individual's criminal trial but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answer might incriminate him in future criminal proceedings."[65] Accordingly, two elements must be met for the right to apply: first, a person must have a real fear of incrimination; and second, the offender must be compelled to make incriminating statements.[66]

1. Elements of incrimination

The right against self-incrimination does not apply unless the individual seeking to invoke the protection has a real fear of incrimination.[67] That is, the individual must believe that disclosure will subject him to prosecution.[68] The danger of self-incrimination must be "real and appreciable . . . not a danger of an imaginary and unsubstantial character . . . so improbable that no reasonable man would suffer it to influence his conduct."[69] Accordingly, mere fear of humiliation or public embarrassment does not exempt an individual from the duty of disclosure.[70] "The design of the constitutional privilege is not to aid a person in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge."[71]

The second element that must be met for a person to be able to assert the right against self-incrimination is the presence of coercive government

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[60] Lile v. McKune, 224 F.3d 1175, 1179 (10th Cir. 2000); *see also* Kaden, *supra* note 56, at 359.

[61] *Lile*, 224 F.3d at 1179; *see also* Kaden, *supra* note 56, at 359.

[62] *See* Kaden, *supra* note 56, at 359.

[63] Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

[64] 440 U.S. 70 (1973).

[65] *Id.*

[66] United States v. Monia, 317 U.S. 424, 427 (1943).

[67] *See* Brown v. Walker, 161 U.S. 591, 599-600 (1896).

[68] Berg, *supra* note 8, at 706 (stating that prosecution does not have to actually happen, nor does it have to result in a conviction; the defendant need only believe it may happen).

[69] *Brown*, 161 U.S. at 599; Minor v. United States, 396 U.S. 87, 98 (1969) (holding that if the possibility of incrimination is too speculative or insubstantial, the privilege does not attach).

[70] *Brown*, 161 U.S. at 605.

[71] *Id.* at 605-06.

conduct, or compulsion.[72] Compulsion requires the presence of government conduct that compels or coerces the individual to disclose incriminating information.[73] Generally courts will not presume the presence of compulsion, and thus, require an individual to affirmatively invoke his right against self-incrimination to find that he answered against his will.[74]

> The Fifth Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment.[75]

Thus, once a person asserts his rights, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him" in a subsequent criminal proceeding.[76] On the other hand, "if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself."[77]

2. When is the protection self-executing?

In some situations, courts have presumed the presence of compulsion and, consequently, do not require an express assertion of the right against self-incrimination; in these situations, the Fifth Amendment protection is self-executing. [78] The two primary situations that fall under the self-executing exception are custodial interrogations and penalty cases.[79]

A long held exception to the general rule requires the exclusion of incriminating statements made "during custodial interrogation."[80] When a

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[72] Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977) (holding that the government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony that has not been immunized); *see also* Kaden, *supra* note 56, at 359.

[73] Kaden, *supra* note 56, at 359.

[74] United States v. Kordel, 397 U.S. 1, 7-10 (1970) (holding that a person can lose the privilege by failing to assert it).

[75] United States v. Monia, 317 U.S. at 424, 427 (1943).

[76] Maness v. Meyers, 419 U.S. 449, 473 (1975) (White, J., concurring).

[77] Garner v. United States, 424 U.S. 648, 654 (1976). "Witnesses who failed to claim the privilege were once said to have 'waived' it, but [the Supreme Court has] recently abandoned this 'vague term,' . . . and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (quoting *Garner*, 424 U.S. at 654 n.9).

[78] *See Murphy*, 465 U.S. at 429-30; *see also* Kaden, *supra* note 56, at 360.

[79] *See also* Kaden, *supra* note 56, at 360.

[80] *Id.* at 430 (citing Miranda v. Arizona, 384 U.S. 436, 467-69, 475-77 (1966)). This exception, however, does not apply where the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his

suspect is in custody, courts have presumed the presence of coercive government conduct.[81]

> Not only is a custodial interrogation ordinarily conducted by officers who are "acutely aware of the potentially incriminatory nature of the disclosures sought," . . . but also the custodial setting is thought to contain "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[82]

Therefore, because of the "inherently compelling" nature of custodial interrogations, the right against self-incrimination need not be asserted.[83] The term "in custody" for *Miranda* purposes has been limited by the Supreme Court to situations where there has been a formal arrest or restraint on freedom of movement.[84] For example, in *Minnesota v. Murphy*,[85] the Supreme Court held that the defendant's incriminating statements made during a meeting with his parole officer were not made "in custody," because he was not formally arrested and there was no "restraint on freedom of movement of the degree associated with a formal arrest."[86]

A person is also excused from affirmatively invoking the right against self-incrimination in situations that have been deemed "penalty cases."[87] A penalty situation arises when a person is forced to choose between facing a penalty for asserting the right against self-incrimination or avoiding the penalty by incriminating himself.[88] In these cases, the incriminating testimony is considered coerced, because the defendant really has no choice at all.[89] The Supreme Court has deemed these situations impermissible, and thus, a person need not invoke the right for protection in a penalty situation.[90]

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failure to assert it. *See id.* The *Miranda* rule has since become a fundamental concept in criminal law where all persons who are taken into police custody must be given the *Miranda* warning, otherwise all evidence obtained may be suppressed upon trial.

[81] *Murphy*, 465 U.S. at 429-30; *see also* Berg, *supra* note 8, at 712-13.

[82] *Murphy*, 465 U.S. at 429-30 (quoting *Garner*, 424 U.S. at 657, *Miranda*, 384 U.S. at 467) (citations omitted).

[83] *Murphy*, 465 U.S. at 430; Berg, *supra* note 8, at 712-13.

[84] California v. Beheler, 463 U.S. 1121, 1125 (1983).

[85] 465 U.S. 420 (1984).

[86] *Id.* at 430.

[87] Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (holding that compulsion is implied in penalty cases); Berg, *supra* note 8, at 713.

[88] *Thomas*, 368 F.2d at 945.

[89] *Id.*

[90] *Murphy*, 465 U.S. at 434; *see also Thomas*, 368 F.2d at 946.

III. ANALYSIS

The Supreme Court has defined a penalty situation to be one where "the State not only compels an individual to appear and testify, but also seeks to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'"[91] HSOTP, as a condition for parole or probation, facilitates such penalty situations by requiring participants to admit guilt and answer incriminating questions without a grant of immunity. An offender is faced with the impermissible penalty of returning to jail if he chooses to invoke his right against self-incrimination by refusing to admit guilt or to answer incriminating questions.

This Part will first look at the Hawai'i cases that have examined the constitutional validity of HSOTP as a condition for parole or probation. Although no case addressing HSOTP has directly found a constitutional violation, the courts have strongly indicated that further protections must be implemented.[92] Next, this Part will analyze the validity of HSOTP under U.S. Supreme Court law and discuss how other jurisdictions have dealt with this issue.

In analyzing the case law surrounding the issue of self-incrimination in sex offender treatment, it is important to keep in mind the privilege or right that is jeopardized. Hawai'i courts follow U.S. Supreme Court jurisprudence in distinguishing between the denial of a privilege, such as parole or probation, and the revocation of such a privilege. It has been established by the Supreme Court that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[93] The Court noted the "crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires."[94] The judiciary and parole boards have broad discretion to grant these privileges to an offender, but must meet certain due process standards in revoking such a privilege.[95]

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[91] *Murphy*, 465 U.S. at 434.

[92] *See* State v. Reyes, 93 Hawai'i 321, 328-29, 2 P.3d 725, 733-34 (Haw. Ct. App. 2000).

[93] Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979).

[94] *Id.* at 9.

[95] *See id.* at 7-9; Morrissey v. Brewer, 408 U.S. 471 (1972) (holding that unlike parole determination, which is a conditional liberty, a parole-revocation determination must meet certain due process standards); *see also* HAW. REV. STAT. Chapter 353 (Michie 2000).

A. Hawai'i Case Law Suggests a Need to Further Protect the Rights of Offenders in HSOTP

The Ninth Circuit's decision in *Neal v. Shimoda*[96] was the first Hawai'i case to address the constitutionality of HSOTP. In *Neal*, state prisoners, who were required to complete HSOTP to be eligible for parole, brought actions against prison officials and administrators of HSOTP, alleging that labeling them as sex offenders violated their constitutional rights.[97] With regard to the Fifth Amendment claim, the Ninth Circuit held that because "no admission made by [the defendants] could be used against them in a future criminal proceeding," their right against self-incrimination was not violated.[98] The court noted that the prohibition against double jeopardy precluded the use of admissions of guilt regarding current offenses.[99] The court failed to discuss, however, the possibility of other crimes that may be uncovered by the mandatory polygraph testing requirement of HSOTP and the confidentiality waiver that participants are required to sign. Further, the court noted that one defendant, Neal, had entered into a plea agreement, which "prohibit[ed] the State from prosecuting him in the future for those incidents."[100] This determination suggests that some type of protection against use of incriminating statements in future criminal proceedings is required by the court.[101] The court did not discuss whether HSOTP was facially invalid; it simply reasoned that there was no

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[96] 131 F.3d 818 (9th Cir. 1997).

[97] *Id.* at 821. The defendants alleged that Hawai'i's SOTP "labeling them sex offenders and compelling their participation in the SOTP as a precondition to their eligibility for parole, violates the Ex Post Facto clause, violates their due process rights, abridges their privilege against self-incrimination, and constitutes cruel and unusual punishment." *Id.*

[98] *Neal*, 131 F.3d at 833. The Ninth Circuit's opinion in *Neal* focused primarily on the issues of due process, and the alleged ex post facto violation and only glossed over the Fifth and Eight Amendment claims. *Id.* The court held that in light of the Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Ex Post Facto Clause was not violated. *Id.* at 827. The court reasoned that HSOTP is rehabilitative not retributive, thus, it does not impose punishment and does not raise ex post facto concerns. *Id.* Also, since the Act permits involuntary confinement based upon a determination that the person currently suffers from a "personality disorder" or "mental abnormality," the Act is not retroactive. *Id.* On the due process issue, the court held that the HSOTP creates a liberty interest which must be protected by due process. *Id.* at 829-31. Targeted inmates must (1) be notified of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken, and (2) be entitled to a hearing at which he must be allowed to call witnesses and present documentary evidence in his defense. *Id.* at 830-31.

[99] *Neal*, 131 F.3d at 833.

[100] *Id.*

[101] *Id.*

violation as it applied to the defendants in this case.[102] The court's ruling implies, however, that an offender's right against self-incrimination may be violated where there is a real possibility, and thus a legitimate fear, of self-incrimination.[103]

Although the Ninth Circuit held that there was no Fifth Amendment violation, the defendants in *Neal* challenged the constitutionality of HSOTP as a ground for *denial* of parole, not as a ground for *revocation* of parole. This is a very important distinction because, as noted above, the U.S. Supreme Court has clearly held that parole boards are afforded wide discretion in the denial of parole, which is based on the offender's record, observations, and what is best for both the inmate and the community.[104] Thus, paroling boards are free to take into consideration whether the offender is willing to participate in mandatory treatment in denying parole.

The Hawai'i Paroling Authority (HPA) is the administrative agency in Hawai'i that is granted by statute the full power to select individuals for parole, establish the conditions of parole, and supervise the individuals on parole.[105] In *Turner v. Hawai'i Paroling Authority*,[106] the Intermediate Court of Appeals of Hawai'i ("ICA") held that "HPA has broad statutory discretion in determining whether to grant or deny parole to inmates and to set conditions therefor."[107] Thus, it is completely permissible for HPA to condition an inmate's eligibility for parole on the completion of mandatory treatment.

The ICA later addressed the validity of HSOTP's polygraph testing requirement in *State v. Naone*.[108] When Naone refused to take the polygraph test, he was terminated from the program, and the court withdrew his deferred acceptance of nolo contendere[109] (DANC) plea.[110] On appeal, the ICA held

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[102] *Id.* The court merely held that the right against self-incrimination did not apply because "no admission[s] made by . . . [the defendants] could be used against them in a future criminal proceeding." *Id.* The court did not discuss the constitutionality of HSOTP.

[103] *Id.*

[104] Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 8 (1979).

[105] HAW. REV. STAT. § 353-65 (Michie 2000).

[106] 93 Hawai'i 298, 1 P.3d 768 (Haw. Ct. App. 2000).

[107] *Id.* at 302, 1 P.3d at 773. Although *Turner* focuses on due process issues, it provides a lengthy discussion of HPA and its authority to mandate conditions of parole. In this case, the ICA held that, although a parole hearing is not normally subject to judicial review, treatment of Turner as a sex offender implicated a liberty interest because he was convicted of terroristic threatening (not a sex crime *per se*).

[108] 92 Hawai'i 289, 990 P.2d 1171 (Haw. Ct. App. 1999). In *Naone*, an inmate challenged the validity of the HSOTP's requirement that the inmate submit to polygraph testing. The defendant's DANC plea to three counts of sexual assault was set aside by the Family Court after defendant had been terminated from the HSOTP based on his failure to submit to the program's polygraph testing.

[109] A DANC plea can be awarded by the discretion of the court when a defendant voluntarily pleads guilty or nolo contendere and it appears that the defendant is not likely again to engage

that the court has considerable discretion in imposing reasonable terms and conditions on a defendant seeking to enter a DANC plea, and the family court was clearly authorized to require the defendant to participate in HSOTP and undergo polygraph testing,[111] "as long as the polygraph test results are used for investigative or monitoring purposes and not for evidentiary purposes."[112] In so ruling, the court relied on the protections afforded to Naone by the family court's order.[113] The ICA noted that:

> [T]he family court took specific precautions to protect Defendant's right against self-incrimination by providing . . . that "any statements made, or written documents signed, by [Defendant] during sex offender treatment and pertaining or relating to the incidents that gave rise to the . . . matter may not be used against him in this proceeding or any other proceeding."[114]

In light of these precautions, the court held that the polygraph condition that was imposed upon the defendant was reasonable.[115]

Next, the court considered whether the family court validly revoked Naone's DANC plea. The court first distinguished a DANC plea from probation.

> [U]nlike the probation statute, HRS [Hawai'i Revised Statutes] § 706-625(c), which requires probation to be revoked "if the defendant has *inexcusably failed to comply with a substantial requirement* imposed as a condition of the order or has been convicted of a felony," . . . an order granting a DANC plea may be revoked "*[u]pon violation* of a term or condition set by the court."[116]

The court reasoned that if a defendant complies with all the terms and conditions of his DANC plea, not only will he have a clean criminal record, but he may also avoid an admission of civil liability as well.[117] Therefore, a defendant whose DANC plea is accepted is required to acknowledge responsibility of his actions and comply with all the conditions of the DANC order. Under HRS Section 853-3, if a defendant violates a term or condition set by the court for a DANC plea, the court may enter an adjudication of guilt

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in criminal course of conduct and justice does not require that the defendant suffer a penalty. The court may defer the proceedings upon any of the conditions specified by HAW. REV. STAT. § 706-624 (Michie 2000) governing conditions of probation. HAW. REV. STAT. § 853-1 (Michie 2000).

[110] *Naone*, 92 Hawai'i at 289, 990 P.2d at 1171.

[111] *Id.* at 301, 990 P.2d at 1183.

[112] *Id.* at 302, 990 P.2d at 1184.

[113] *Id.* at 303, 990 P.2d at 1185.

[114] *Id.*

[115] *Id.*

[116] *Id.* at 306, 990 P.2d at 1189 (emphasis added).

[117] *Id.*

and proceed as otherwise provided.[118] Thus, the court determined that the family court did not abuse its discretion in revoking Naone's DANC plea because he failed to comply with the conditions of his DANC order after the family court had afforded him many opportunities to do so.[119]

Justice Simeon Acoba expressed concern over the true protection provided by the family court's special condition. In his dissent, Justice Acoba asserted that "despite the special condition to the contrary, Defendant's statements were used against him in this case . . . ."[120]

> Defendant was not "immunized" from the adverse consequences of his statements. The results of the polygraph examination were in fact "used against him in this proceeding." His purported denial of responsibility was the basis for expulsion from . . . [HSOTP], the resulting denial of a DANC disposition, and subsequent probationary sentence of imprisonment. Under such facts, this special condition was violated and Defendant's responses on the polygraph examination should not have resulted in termination from the group program.[121]

Regardless of Justice Acoba's concern about the validity of the "special precautions," the majority argued that the special order by the court ensured that the defendant's rights were not violated.[122] This holding suggests that, in the case of a DANC plea, the court can place a condition that the offender participate in HSOTP and submit to polygraph testing as long as he is afforded some type of protection from self-incrimination. If an offender violates any term of the DANC order, the court may validly revoke his DANC plea and submit an adjudication of guilt.

In *State v. Reyes*,[123] the ICA addressed the conditioning and revocation of probation based on an offender's failure to complete HSOTP. Reyes was charged with thirteen counts of sexual assault.[124] While the jury hung on ten counts, Reyes was convicted of two counts of sexual assault and was sentenced to one year of probation, conditioned upon his successful completion of HSOTP.[125] The court issued an order stating that "nothing [Reyes] says during the course of treatment can be used against him . . . in this case or any other

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[118] HAW. REV. STAT. § 853-3 (Michie 2000). A DANC plea is awarded by the court when a defendant voluntarily pleads guilty or nolo contendere and defers criminal proceedings as long as the defendant complies with its terms. Thus, when a defendant violates one of the conditions, the court may automatically enter an adjudication of guilt and resume the proceedings.

[119] *Naone*, 92 Hawai'i at 307, 990 P.2d at 1189.

[120] *Id.* (Acoba, J., dissenting).

[121] *Id.* at 310, 990 P.2d at 1192 (Acoba, J., dissenting) (citations omitted).

[122] *Id.* at 303, 990 P.2d at 1185.

[123] 93 Hawai'i 321, 2 P.3d 725 (Haw. Ct. App. 2000).

[124] *Id.* at 323, 2 P.3d at 727.

[125] *Id.* at 323-24, 2 P.3d at 727-28.

case."[126] Despite this condition, Reyes continued to maintain his innocence throughout the program and failed his polygraph examinations, resulting in his termination from the program.[127] The circuit court revoked his probation, and Reyes appealed, asserting that his maintenance of innocence did not constitute an inexcusable violation of a requirement of a substantial condition of his probation.[128]

The ICA stated that "[c]ourt-ordered programs that require convicted sex offenders to admit responsibility for the offense of which they were convicted under threat of probation revocation and imprisonment violate . . . [Fifth Amendment] protections."[129] The court suggested that HSOTP would not violate the Fifth if certain protections were adopted.

> Courts and therapists may promote . . . [the state's interest in rehabilitating offenders] by: (1) insulating offenders in therapy who testified in their own defense at trial with immunity and a protection against penalizing a refusal to admit guilt, and (2) utilizing alternative treatment methods that are less confrontational and less concerned with an initial acceptance of responsibility.[130]

Although the ICA recognized that mandatory admission of guilt under threat of revocation of probation or imprisonment is unconstitutional, the ICA held that a Fifth Amendment violation does not exist if the district court denied probation, rather than revoked it,[131] based on Reyes' refusal to admit his sex crimes and to participate in HSOTP. The ICA suggested that "[i]f Reyes had insisted upon his innocence and refused to admit his sex crime(s) and to accept probation on that basis," the district court could have denied probation without violating the Fifth Amendment.[132] The court can also revoke probation for failure to admit guilt if the defendant "personally expressly and explicitly agreed to admit his sex crime(s) and to accept probation on that basis."[133] The

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[126] *Id.* at 324, 2 P.3d at 728.

[127] *Id.*

[128] *Id.* at 327, 2 P.3d at 731.

[129] *Id.* at 329, 2 P3d at 733.

[130] *Id.* (quoting Kaden, *supra* note 56, at 390-91).

[131] The ICA did not expressly distinguish between revocation of probation and denial of probation. Instead, this distinction is implied from the court's suggestion that if Reyes had "personally expressly and explicitly agree[d] to admit his sex crime(s) and to accept probation on that basis," revocation of probation would have been permissible. *Id.* at 329, 2 P.3d at 733. On the other hand, the court recognized that if Reyes refused to admit guilt and, thus, to accept probation, the lower court would have been within its discretion in denying probation. *Id.*

[132] *Id.* at 328, 2 P.3d at 732. If Reyes had insisted upon his innocence and refused to admit his sex crime(s) and to accept probation on that basis, Reyes would have had no basis for arguing that he needed the HSOTP or that he could benefit from the HSOTP and the court would not have abused its discretion if and when it declined to put him on probation and sentenced him to prison. *Id.*

[133] *Id.*

court cannot, however, revoke probation if the defendant did not agree to admit his sex crime and to accept probation on that basis.[134] Thus, the court ruled that Reyes' failure to complete HSOTP was "not done inexcusably because (a) the court cannot order Reyes to admit his sex crime(s) and (b) Reyes did not personally expressly and explicitly agree to admit his sex crime(s) and to accept probation on that basis."[135]

According to *Turner*, *Naone*, and *Reyes*, it seems that where a real threat of incrimination exists,[136] the right against self-incrimination is violated by the polygraph/mandatory admission of guilt requirement, unless the court provides some protection.[137] It is well-established that the courts and HPA have wide discretion in deciding whether to grant probation, parole, and DANC pleas and can condition these privileges on completion of HSOTP and admission of guilt.[138] In contrast, when the court revokes an offender's probation or parole based on failure to complete HSOTP or admit guilt, the offender's right against self-incrimination is violated, unless he "personally expressly and explicitly" agreed to accept probation on that basis.[139] Unlike probation, however, a DANC plea may be revoked upon any violation of its terms or conditions because completion of a DANC order gives the offender an opportunity to "not only to have a clean criminal record but avoid an admission of civil liability as well."[140] In any event, Hawai'i courts have suggested that "[s]entences and approaches to treatment can be modified . . . to preserve the interests protected by the Fifth Amendment while also satisfying the state interest in rehabilitating offenders."[141] The ICA has specifically mentioned a need to (1) insulate offenders in therapy by offering some type of immunity, and (2) explore alternative treatment methods.[142]

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[134] *Id.* at 329, 2 P.3d at 733.

[135] *Id.*

[136] *See supra*, section III.A (discussing on Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997)).

[137] *See supra* section III.A (discussing on State v. Naone, 92 Hawai'i 289, 990 P.2d 1171 (Haw. Ct. App. 1999)).

[138] *See Naone*, 92 Hawai'i at 302, 990 P.2d at 1184. "[A] condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." *Id.*

[139] *Reyes*, 93 Hawai'i at 329, 2 P.3d at 733.

[140] *Naone*, 92 Hawai'i at 307, 990 P.2d at 1189.

[141] *Reyes*, 93 Hawai'i at 329, 2 P.3d at 733.

[142] *Id.*

B. Guidance from the U.S. Supreme Court

The U.S. Supreme Court reached the issue of self-incrimination in sex offender treatment in *Minnesota v. Murphy*,[143] holding that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself."[144] The Supreme Court has defined a penalty situation to be one where "the State not only compel[s] an individual to appear and testify, but also . . . [seeks] to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.'"[145] The Court explained that "if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation," where the failure to assert one's Fifth Amendment right is excused.[146]

Murphy pleaded guilty to a sex related charge and was awarded a suspended sentence and placed on probation.[147] The terms of his probation required him to participate in a treatment program for sexual offenders, to report to his probation officer periodically, and to be truthful with the officer "in all matters."[148] During the course of his court-ordered treatment, Murphy admitted raping and killing a teenage girl to his therapist.[149] The therapist contacted Murphy's probation officer who questioned Murphy about the incident and obtained a confession.[150] Upon trial for the murder, Murphy sought to have his confession suppressed on the ground that it "was obtained in violation of the Fifth and Fourteenth Amendments."[151]

The U.S. Supreme Court held in a six-to-three decision that Murphy's Fifth Amendment rights were not violated because he did not affirmatively invoke his right against self-incrimination, and thus, was not under compulsion to speak.[152] First, the Court determined that Murphy's incriminating statements

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[143] 465 U.S. 420 (1984).

[144] *Id.* at 434 (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977)).

[145] *Id.* (quoting *Cunningham*, 431 U.S. at 806).

[146] *Id.* at 435.

[147] *Id.* at 422.

[148] *Id.*

[149] *Id.* at 423.

[150] *Id.* at 424-25. When Murphy learned that his therapist had reported the confession to his probation officer, he "became angry about what he considered to be a breach of his confidences and stated that he 'felt like calling a lawyer.'" *Id.* at 424.

[151] *Id.* at 425.

[152] *Id.* at 421. The Minnesota Supreme Court stated "Murphy's failure to claim the privilege [against self-incrimination] . . . was not fatal to his claim 'because of the compulsory nature of the meeting, because Murphy was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that Murphy's answers were

did not fall under the self-executing exception for custodial interrogations because there was no "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[153]

The Court also concluded that this was not a penalty situation because the State did not compel Murphy to incriminate himself.[154] Murphy was simply required "to be truthful" with his probation officer; his probation condition "said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution."[155] The Supreme Court concluded that Minnesota did not "attach an impermissible penalty to the exercise of the privilege against self-incrimination[,]" and "Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege."[156] Thus, "[Murphy's] disclosures were not compelled incriminations."[157]

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likely to be incriminating.'" *Id.* at 425; *see also supra* section II.B.2 for discussion of self-executing exceptions.

[153] *Id.* at 430 (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)).

[154] *Id.* at 434 (quoting *Cunningham*, 431 U.S. at 806).

[155] *Id.* at 437.

[156] *Id.* at 437, 440.

[157] *Id.* at 440. Justice Marshall, joined by Justices Stevens and Brennan, wrote an ardent dissent for two independent reasons. First, the State of Minnesota "threatened Murphy with a penalty for refusing to respond to questions" which relieves a person of the duty to assert the privilege against self incrimination. *Id.* at 442-43 (Marshall, J., dissenting). It has been deemed an impermissible penalty when a State presents a person with the decision of incriminating himself or suffering a penalty. If one refuses to respond, the State cannot constitutionally follow through on the penalty. Unif. Sanitation Men v. Comm'r of Sanitation, 392 U.S. 280, 284 (1968). If, on the other hand, one answers the incriminating question, the State cannot use his admission against him. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). Thus, "by threatening Murphy with [a] sanction if he refused to answer, Minnesota deprived itself of constitutional authority to use Murphy's subsequent answers in a criminal prosecution against him." *Murphy*, 465 U.S. at 448.

Second, due to the circumstances under which Murphy was interrogated, the State had the burden of proving that Murphy was aware of his constitutional rights and freely waived them. *Id.* at 442-43. *Miranda v. Arizona* requires that a person under interrogation be shown to have freely waived their rights after being fully apprised of them. *Id.* at 456-57 (citing Miranda v. Arizona, 384 U.S. 436, 475-79 (1966)). Justice Marshall argues that none of the factors that justify the application of the principle that a defendant loses his Fifth Amendment privilege unless he claims it in a timely fashion are present in this case. Justice Marshall argues that in this case, the probation officer knew she would try to induce Murphy to confess the killing; if she were successful, Murphy would be arrested and tried for murder; and deceived him by telling him that her main concern was to talk to him about treatment. *Murphy*, 465 U.S. at 461. "In short, the environment in which the interview was conducted afforded the probation officer opportunities to reinforce and capitalize on Murphy's ignorance that he had a right to refuse to answer incriminating questions." *Id.*

The *Murphy* case turned on the fact that Murphy was free to assert his right against self-incrimination and refuse to answer the probation officer's questions.[158] If Murphy declined to answer, the State of Minnesota could not revoke his probation; to do so, would constitute an impermissible penalty for asserting the right against self-incrimination.[159]

The Court of Appeals of Minnesota, the same jurisdiction that the *Murphy* case originated in, subsequently decided a case illustrating this principle in *Minnesota v. Kaquatosh*.[160] The court held that Kaquatosh's right against self-incrimination was violated when the State of Minnesota revoked his probation after he refused to admit guilt to a crime in which his appeal was pending.[161] The difference between *Kaquatosh* and *Murphy* is that Kaquatosh invoked his right against self-incrimination and refused to answer incriminating questions, while Murphy voluntarily incriminated himself. Although Kaquatosh's probation was conditioned upon his completion of sex offender treatment, the court held that under *Murphy*, the State could not force Kaquatosh to "choose between confessing and invalidating his appeal or going to jail."[162]

The HSOTP program encourages precisely the type of violation that existed in *Kaquatosh* and is prohibited by *Murphy*. An HSOTP participant is required to admit guilt, submit to polygraph testing as prescribed by his therapist, and sign a waiver of confidentiality. Regardless of whether an offender's interest is to preserve his appeal, as in *Kaquatosh*, or to refrain from incriminating himself of another crime, as in *Murphy*, a State may not revoke his parole or probation based on his refusal to answer an incriminating question. Thus, when an HSOTP participant is asked an incriminating question, he may assert his right and refuse to answer. The therapist is free to terminate the offender's treatment, but the state may not revoke his probation or parole on the grounds that he refused to answer the question. This conflict nullifies the objective of HSOTP, which is to successfully rehabilitate convicted sex offenders, because offenders will learn that all they have to do avoid answering a question is invoke their right against self-incrimination. The state then has no recourse to punish or deter this type of reaction since revocation of parole or probation based on one's invocation of his Fifth Amendment right would be a constitutional violation under *Murphy*.

Three years after the *Murphy* case was decided, the Supreme Court established a new test for prison regulations that impinge upon an inmate's constitutional rights. In *Turner v. Safley*,[163] the Court held that "when a prison

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[158] *Murphy*, 465 U.S. at 437.

[159] *Id.*

[160] 600 N.W.2d 153 (Minn. Ct. App. 1999).

[161] *Id.* at 158.

[162] *Id.*

[163] 482 U.S. 78 (1987).

regulation impinges upon inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[164] In determining whether a regulation is "reasonably related to legitimate penological interests," the Court weighed the following four factors: (1) whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest advanced as its justification; (2) "whether there are alternative means of exercising the right that remain open to prison inmates" notwithstanding the policy or regulation; (3) "what impact accommodation of the . . . right would have on guards, other inmates, and the general allocation of prison resources[;]" and (4) whether there are obvious, easy-to-implement alternatives that would accommodate the prisoner's right at little cost to valid penological interests.[165] Although the Court did not specifically discuss the applicability of this four-part test in the sex offender context, this test was used by the Tenth Circuit in conjunction with the Supreme Courts holding in *Murphy* to determine the validity of a sex offender treatment program.[166]

C. Other Jurisdictions Find that Mandatory Sex Offender Treatment Requiring the Admission of Guilt Creates an Impermissible Penalty Situation

In matters of unsettled law, Hawai'i courts look to the decisions of other courts for guidance, which in this case, would again suggest the necessity of providing additional Fifth Amendment protections to HSOTP participants. An examination of the holdings of other courts demonstrates that a majority of jurisdictions have held that the situations created by mandatory admissions of guilt and polygraph testing in SOTPs create impermissible penalty situations.[167] Others have employed a balancing test, weighing the sex offender's constitutional rights against society's interest in rehabilitation and safety.[168]

Perhaps the most important case that illustrates the penalty situation in the sex offender treatment context is *Thomas v. United States*.[169] At the defendant's sentencing hearing, the Fifth Circuit Court of Appeals indicated

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[164] *Id.* at 89.

[165] *Safley*, 482 U.S. at 89-90.

[166] *See infra* section III.C.

[167] *See* Thomas v. United States, 368 F.2d 941, 946 (9th Cir. 1966) (holding that the imposition of a harsher sentence because of an offender's refusal to admit guilt created an impermissible penalty situation); Montana v. Imlay, 813 P.2d 979 (Mont. 1991) (revoking an offender's parole for failure to admit guilt subjected him to a penalty contrary to the Fifth Amendment).

[168] Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969) (upholding a harsher sentence because the defendant refused to admit his guilt, the first step toward his rehabilitation); *see also* Shevlin, *supra* note 11, at 494, 498-99.

[169] 368 F.2d 941 (5th Cir. 1966).

that the defendant had been "proven guilty beyond a reasonable doubt by overwhelming evidence," and, if he would "come clean and make a clean breast of this thing," the court would take that into account in sentencing.[170] Thomas continued to persist in his claim of innocence, and the court sentenced him to the maximum term permitted by law.[171] On appeal, the Fifth Circuit held that forcing Thomas to either admit to guilt or get the maximum sentence violated the Fifth Amendment because it imposed a judicial penalty on the defendant.[172] If Thomas chose the first option, to admit to the crimes, he would be giving up his right against self-incrimination, any post-conviction remedies, and subjecting himself to prosecution for perjury. If he chose the second option, to maintain his innocence, he would be given the maximum sentence.[173] Because in this situation, Thomas really had no choice at all, compulsion is implied and his rights were violated.[174]

The antithesis of *Thomas* is *Gollaher v. United States*,[175] where a U.S. District Court for the District of California gave the defendant a longer sentence, because he failed to confess to the crimes for which he was convicted.[176] On appeal, the Ninth Circuit Court of Appeals held that Gollaher's Fifth Amendment rights were not violated because he was unwilling to take the first step toward rehabilitation, and the judge sentenced him accordingly.[177] Thus, the Ninth Circuit concluded that it is permissible to impose a harsher sentence on an offender who will not admit his guilt.[178] Given that overcoming denial is an essential component of rehabilitation,[179] the court weighed Gollaher's right against self-incrimination against society's interest in rehabilitating criminals.[180] The court distinguished the case from *Thomas* based on a slight difference in the facts of the two cases. In *Thomas*, the judge explicitly told the defendant at his sentencing hearing that if he did not admit to the crime, he would get the maximum sentence.[181] In *Gollaher*,

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[170] *Id.* at 943-44.

[171] *Id.* at 944.

[172] *Id.* at 946.

[173] *Id.* at 945.

[174] The court is said to be enforcing a judicial penalty because Thomas is forced to either forgo his post-conviction remedies or take the maximum sentence. Thus, Thomas has no real choice because in either case, he suffers a loss.

[175] 419 F.2d 520 (9th Cir. 1969).

[176] *Id.* at 529-30.

[177] *Id.* at 530.

[178] *Id.*; *see also* Shevlin, *supra* note 11, at 494.

[179] *See* Shevlin, *supra* note 11, at 494.

[180] *Gollaher*, 419 F.2d at 530 (stating "no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence").

[181] *Thomas*, 368 F.2d at 943-44. In *Thomas*, the judge told the defendant, "[i]f you will come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial,

the judge "made no mention of his thoughts," but took into account the defendant's refusal to "take the first step toward rehabilitation."[182] Although the court acknowledged this distinction, it stated that "[t]o belabor [such] a distinction . . . would be a waste of time[,]" and that "[j]ustice is better served by a forth-right disclosure of the state of mind of the judge."[183] Thus, the court recognizes the penalty situation, but nevertheless, favors the public's interests in rehabilitation and safety over the offender's rights.[184]

The Montana Supreme Court adopted the *Thomas* analysis in *State v. Imlay*[185] and indicated that "[t]he majority of federal courts of appeal which have addressed this issue follow the decision of the . . . Fifth Circuit in *Thomas* . . . ."[186] The *Imlay* court held that "absent any grant of immunity, . . . the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination."[187] The court reasoned that Imlay's right to challenge his conviction, based on newly discovered evidence, or by collateral attack are "important rights guaranteed to every defendant under our criminal justice system [that] would be rendered meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom."[188]

In the recent case *Lile v. McKune*,[189] the Tenth Circuit applied a comprehensive analysis of both the penalty and balancing approach. The court held that Lile's privilege against self-incrimination was violated when the State enforced an impermissible penalty of transferring him to a maximum-security prison for refusing to participate in the program.[190] The court then

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as you did a moment ago, . . . the Court also must take that into account." *Id.* at 944. When Thomas refused to admit guilt, and maintained his innocence, the judge imposed the maximum sentence.

[182] *Gollaher*, 419 F.2d at 530.

[183] *Id.* The court took the position that when the judge discloses up front what he will consider when imposing a sentence, the defendant has the advantage of knowing what those considerations are and can make his decisions accordingly. *Id.*

[184] *Id.* The court recognized that the defendant is "up against a hard choice of whether to forego some potential attacks upon the judgment or face a stiffer sentence." *Id.*

[185] Montana v. Imlay, 813 P.2d 979 (Mont. 1991).

[186] *Id.* at 983.

[187] *Id.* at 985. In this case, the defendant was convicted of sexual assault and was sentenced to probation and ordered to enroll in a sexual therapy program at his own expense. The defendant made every effort possible to enroll in and complete his treatment but he refused to admit he had committed the crime. As a result, his suspended sentence was revoked and he was sent to prison for the remainder of his term.

[188] *Id.* at 985.

[189] Lile v. McKune, 224 F.3d 1175 (10th Cir. 2000). In *Lile* the plaintiff was transferred from a medium to a maximum-security prison and lost privileges for refusing to participate in a prisoner treatment program that required him to disclose his sexual history and sexual offenses.

[190] *Id.* at 1189.

applied the *Turner* balancing test "[b]ecause of the institutional context of [the] case and the great deference that is owed to the management decisions and policies of prison officials, [and the court] believe[d] it [was] appropriate to balance the prison's penological interests against the prisoner's constitutional rights.[191] The court stated that the "real balance turns on the seriousness with which [the court has] always treated the Fifth Amendment right against self-incrimination against the ease with which the State can accommodate or satisfy this right and still meet its legitimate program objectives."[192] Accordingly, the *Turner* balancing test weighed heavily in favor of Lile because granting immunity in no way restricts the State's interest in rehabilitation or public safety.[193]

The analysis of other jurisdictions demonstrates that where a penalty situation exists, an offender does not need to assert his Fifth Amendment right to enjoy its protection.[194] The question then becomes whether the requirement that a sex offender complete treatment, which in turn requires him to disclose incriminating facts, creates a penalty situation. When a state revokes a privilege because an offender refuses to incriminate himself, an impermissible penalty situation arises. The two "ifs" created in this scenario are: (1) participate in HSOTP and risk self-incrimination, or (2) not participate and suffer a penalty, such as revocation of parole, revocation of probation, a longer sentence, or transfer to maximum security.[195]

A majority of courts follow the *Thomas* line of reasoning, holding that forcing a prisoner to choose between incrimination or revocation of a privilege creates a penalty situation.[196] Some courts, *Gollaher* and its following, recognize the penalty situation, but, nevertheless, balance the offender's right against self-incrimination with society's interest in safety and rehabilitation.[197] Subsequent to the Supreme Court's decisions in *Muphy* and *Turner*, however,

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[191] *Id.* at 1190.

[192] *Id.* at 1192.

[193] *Id.*

[194] *See supra* section III.B.1; *see also* Berg, *supra* note 8, at 713.

[195] *See supra*, section II.B.1.

[196] *Imlay*, 813 P.2d at 983; *see also* Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969) (holding that the trial judge should neither participate directly in plea bargaining nor create incentives for guilty pleas by policy of differential sentences); United States v. Laca, 499 F.2d 922 (5th Cir. 1974) (predicating length of sentences on defendants' refusal to confess their crimes violated their privilege against self-incrimination).

[197] *See supra* section III.B.1; *see also* Shevlin, *supra* note 11, at 498-99. The balancing approach, however, may sometimes be unconstitutional where it is employed loosely without weighing specific factors. Cases that employ the balancing approach recognize the difficult position the offender faces, but favors the public's interests in rehabilitation and safety over the offender's rights. The courts that follow the *Gollaher* rule have a legitimate aim in fostering rehabilitation of offenders and protecting the community. This interest, however, can be served while still maintaining an offender's right against self-incrimination.

courts have been consistent in applying the penalty analysis to situations where an offender is forced to incriminate himself. The *Lile* case, decided after *Murphy*, first applied the penalty analysis then utilized the Supreme Court's *Turner* four-part test. The court concluded that the *Turner* factors weighed heavily in favor of the offender because states can easily offer a grant of immunity without restricting its interest in rehabilitation or public safety.[198]

IV. SOLUTIONS

The Tenth Circuit's analysis in *Lile* is one example of how a court may reconcile the competing theories of self-incrimination in sex offender treatment by integrating a balancing approach with traditional penalty analysis.[199] Although courts still struggle with sex offender treatment and Fifth Amendment violations, constitutional challenges can be avoided altogether by amending treatment programs to eliminate penalty situations. This Part will discuss three possible solutions that may assist administrators in dealing with challenges to sex offender treatment: granting immunity, considering alternative methods of treatment, and establishing guidelines for administering polygraph examinations.

A. The Pros and Cons of Immunity

The court in *Lile* sets forth a cogent argument for immunizing incriminating statements made by sex offenders in treatment. One reason immunity is not a widely accepted solution to the problem of self-incrimination in sex offender treatment is that prosecutors are reluctant to grant immunity, because they are not required to pursue treatment of sexual offenders at the expense of foregoing the criminal prosecution of sex crimes.[200] The Supreme Court has stated, however, that:

> [t]he privilege [against self-incrimination] has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well evidence derived directly and indirectly therefrom, affords this protection.[201]

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[198] Lile v. McKune, 224 F.3d 1175, 1192 (10th Cir. 2000).

[199] *Id.*

[200] *Id.* at 1192; *see also* Shevlin, *supra* note 11, at 503.

[201] New Jersey v. Portash, 440 U.S. 450, 457-58 (1979) (quoting Kastigar v. United States, 406 U.S. 441, 453 (1972)).

Accordingly, a defendant is immunized from prosecution based on his immunized statements but is not immunized from any and all prosecution.[202] Thus, prosecutors have no reason to deny sex offenders immunity in treatment.

The absence of immunity results not only in the violation of the offender's constitutional rights, but also prevents offenders from receiving necessary treatment.[203] When an offender refuses to make the mandatory admission of guilt, he is automatically terminated from the program, and his parole or probation is automatically revoked.[204] Thus, the offender does not complete his treatment and will probably be released, untreated, after his sentence is served.[205] The lack of immunity nullifies the twin purposes of the treatment program, rehabilitation and public safety.[206] The grant of immunity seems to provide a win-win situation; the state succeeds in treating sex offenders while the sex offender's constitutional rights are preserved.

The Vermont district court in *Mace v. Amestoy*[207] held that the state bears the burden of eliminating the threat of incrimination.[208] As the court noted, one means of eliminating this threat is to grant immunity to offenders when it compels them to disclose criminal conduct, even when the disclosure is required for rehabilitative purposes.[209] The district court recognized the supremacy of the Fifth Amendment by noting that "[c]ertainly the state has a legitimate rehabilitative purpose in demanding full disclosure, but that does not make the disclosure any less incriminating. '[C]itizens may not be forced to incriminate themselves merely because it serves a governmental need.'"[210]

In Hawai'i, HSOTP therapists and local prosecutors have a "gentleman's agreement" whereby the prosecution promises that no statements obtained in therapy will be used against an offender in court.[211] This agreement seems to be effective, because there has never been a case in Hawai'i where an admission made in therapy has led to the conviction of an offender for a new sex offense.[212] This "gentleman's agreement," however, fails to solve the problem of an offender whose fear of incriminating himself leads to

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[202] *Lile*, 224 F.3d at 1192.

[203] A policy of HSOTP is to exclude from treatment any sex offender who cannot take responsibility for his offense. Coyne letter, *supra* note 5, at 2.

[204] Program Implementation Manual, *supra* note 5, Program Admission Criteria at 2.

[205] *See* State v. Reyes, 93 Hawai'i 321, 327, 2 P.3d 725, 731 (Haw. Ct. App. 2000). After Reyes' probation was revoked for failure to complete HSOTP, the court resentenced him for a longer probationary period, six months in jail, and did not require completion of HSOTP. *Id.*

[206] Master Plan, *supra* note 21, at v; Lundell, *supra* note 38, at 1.

[207] 765 F. Supp. 847 (D. Vt. 1991).

[208] *Id.* at 851.

[209] *Id.* at 851-52.

[210] *Id.* at 852 (citations omitted).

[211] Coyne interview, *supra* note 10.

[212] *Id.*

termination from the program and, ultimately, to release without treatment.[213] Thus, this type of arrangement does not achieve the same objectives as immunity, which should be granted to sex offenders in treatment.

B. Alternative Forms of Treatment

Another way to correct HSOTP's arguable constitutionality is to explore alternative methods of treatment.[214] The ICA noted in *State v. Reyes*[215] that the State should explore "utilizing alternative treatment methods that are less confrontational and less concerned with an initial acceptance of responsibility."[216] Programs that do not require offenders to admit to guilt and do not rely on polygraph tests in treatment eliminate self-incrimination concerns.[217]

One alternative is to accept an offender's initial denial of his crimes and focus on overcoming his denial through treatment.[218] Denial serves a protective function for offenders who are not ready to take responsibility for their crimes.[219] There are several components of denial that therapists recognize: "denial of . . . facts, denial of responsibility, denial of awareness, denial of fantasy . . . , denial of inappropriate feelings, and denial of the serious impact of behavior."[220] Most treatment programs refuse to treat offenders who express "denial of facts – a refusal to admit that the sexual offense ever happened"[221] because it is the conventional view that treatment will not be beneficial to an offender who refuses to acknowledge his guilt.[222]

When an offender is forced to admit his guilt he may not necessarily have overcome his denial. Thus, the offender's coerced confession may only instill

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[213] *See supra* section III.A.

[214] *See Reyes*, 93 Hawai'i at 321-22, P.3d at 733-34.

[215] 93 Hawai'i 321, 2 P.3d 725 (Haw. Ct. App. 2000).

[216] *Id.* at 329, 2 P.3d at 733.

[217] These are generally the two components of sex offender treatment that call into question self-incrimination. *See supra* section II.B.

[218] Kaden, *supra* note 56, at 370. This mode of therapy is often referred to as metaconfrontation. *Id.* This theory was proposed by therapist Mack E. Winn and is designed for offenders who do not respond well to confrontation. Mack E. Winn, *The Strategic and Systematic Management of Denial in Cognitive/Behavioral Treatment of Sexual Offenders*, 8 SEXUAL ABUSE: J. RES. & TREATMENT 25, 26, 30 (1996). For a more detailed discussion on the theory of metaconfrontation, see Anita M. Schlank & Theodore Shaw, *Treating Sexual Offenders Who Deny Their Guilt: A Pilot Study*, 8 SEXUAL ABUSE: J. RES. & TREATMENT 17 (1996). This publication discusses a treatment study that was conducted by Anita Schlank and Theodore Shaw, which emphasized treating offenders in absolute denial. *Id.* Of the ten offenders tested, five responded to motivational treatment and admitted their offenses. *Id.*

[219] Kaden, *supra* note 56, at 370.

[220] *Id.* at 367.

[221] *Id.*

[222] *Id.*; *see also* Coyne letter, *supra* note 5, at 2.

a false sense of security that he is taking the first step towards rehabilitation. On the other hand, an offender may acknowledge his guilt, but may be reluctant to admit his crimes because of his fear of incrimination. These obstacles would not exist in a treatment program that did not heavily emphasize an initial admission of guilt.

Moreover, by initially accepting an offender's denial, offenders will not be automatically terminated from the program for the sole purpose of refusing to admit guilt. In virtually all the cases discussed in Part III above, the offenders were terminated from sex offender treatment because they refused to admit to guilt.[223] Thus, accepting initial denial not only results in removing the offender's fear of incrimination it also results in more offenders successfully completing treatment.[224]

C. Establishing Guidelines for Administering Necessary Polygraphs

In addition to mandatory admissions of guilt, polygraph testing in sex offender treatment also contributes to an offender's fear of incrimination. During a polygraph examination, an offender is often asked very personal and intrusive questions about his sexual behavior that may sometimes lead to the discovery of other crimes.[225] The polygraph test allows the therapist to obtain additional disclosures that the offender is less likely to share, which helps to assess the type of therapy that he requires and whether he is a threat to society.[226] The test also has somewhat of a deterrent effect because offenders know that they will be required to disclose any deviant behavior.[227]

Although polygraphs are useful in psychological treatment, experts argue that a higher level of consistency and standardization is needed for the polygraph to be considered a valid psychological test.[228] Without

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[223] *See supra* section III (discussing Hawai'i case law and other jurisdictions).

[224] *See generally*, Schlank, *supra* note 218 (discussing a treatment study of offenders in complete denial).

[225] During treatment offenders are asked about their sexual behavior, tendencies, and history in order to determine what type of treatment he requires. Coyne interview, *supra* note 10. The polygraph test is also used to determine whether an offender on probation has violated the terms of his probation. *Id.*

[226] *Id.*

[227] Gerry D. Blasingame, *Suggested Clinical Uses of Polygraphy in Community-Based Sexual Offender Treatment Programs*, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT, 37 (1998) (stating that because clients are informed that they will be tested about their honesty in reporting compliance with treatment, clients are somewhat deterred from engaging in deviant behavior).

[228] *Id.* The American Psychological Association (APA) indicated that polygraphy does not meet its standards for education or psychological testing. APA indicated that treatment providers and polygraphers must provide sufficient standardization, validation, and reliability

implementing strict guidelines as to how the test is administered and what protections are given to the offenders, self-incrimination concerns exist. Since the refusal to undergo polygraph testing can lead to termination from treatment, and ultimately, revocation of parole or probation, the State must recognize the offender's right against self-incrimination if it wishes to compel incriminating statements.[229] Thus, administrators of sex offender treatment programs should keep in mind that test results are not always accurate and should use the results in conjunction with other methods of monitoring offenders when determining appropriate treatment.[230] Some suggested guidelines for community-based treatment providers include: granting immunity to participants;[231] using other methods of monitoring offenders in the community in conjunction with the polygraph (i.e. electronic surveillance, client self-reports, drug testing, and probation house calls);[232] recognizing that polygraph results alone are not sufficient evidence to determine facts or to be the basis for termination from treatment;[233] refraining from making threats or legal sanctions based on polygraph results;[234] the cooperation of therapists and polygraphers in developing protocols for interviewing, interpretation, questions, reporting, and use of results;[235] and developing a systematic confidence rating which can be communicated to treatment providers to assist in defining the authority that should be ascribed to a given test result.[236]

The adoption of rigid guidelines justifies the use of polygraph tests. Such guidelines protect the offender from the unfair use of the results and from self-incrimination. By consistently administering the test under the appropriate limitations, the polygraph test can successfully foster appropriate treatment while protecting the interest of society and the offender.

IV. CONCLUSION

Although the Hawai'i courts have not specifically ruled on the issue of whether revocation of parole or probation based on an offender's refusal to answer incriminating question creates a penalty situation, the ICA has stated "[c]ourt-ordered programs that require convicted sex offenders to admit

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data that are empirically based and to define more accurately the degree to which the polygraph results can be relied on in the decision-making process. *Id.*

[229] *See Mace*, 765 F. Supp. at 851-52.

[230] Blasingame, *supra* note 227, at 42.

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] *Id.* This could exacerbate a stress reaction in the polygraph results. *Id.*

[235] *Id.*

[236] *Id.* at 43. The article suggested sixteen guidelines for the use of polygraphs in sex offender treatment. *Id.* at 42-43.

responsibility for the offense of which they were convicted under threat of probation revocation and imprisonment violate" the protection against self-incrimination.[237] The U.S. Supreme Court has spoken on the issue in *Minnesota v. Murphy*, holding that a constitutionally impermissible penalty situation exists when a state asserts that invocation of an offender's right against self-incrimination would lead to revocation of probation or parole.[238] Prior to this decision, courts were split between balancing the offender's constitutional rights against public safety and recognizing and impermissible penalty.[239] Subsequent to the *Murphy* decision, however, courts have consistently applied the Supreme Court's penalty analysis to situations where offenders are required to surrender their right against self-incrimination.[240]

HSOTP is an indispensable program that has significantly facilitated the rehabilitation of sex offenders. Unfortunately, the program creates situations that violate program participants' right against self-incrimination. By exploring alternative methods of treatment, mandating strict guidelines for the use of polygraph testing, and offering immunity to HSOTP participants, the state can accommodate the interests of all involved. Prosecutors are still able to convict repeat offenders on the basis of other evidence not obtained from treatment disclosures; offenders will receive treatment for their condition without an infringement of their rights; and society benefits from the rehabilitation of an increased number of sex offenders because offenders will not be terminated from treatment for failure to admit guilt.

Jamie Tanabe[241]

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[237] State v. Reyes, 93 Hawai'i 321, 329, 2 P.3d 725, 733 (Haw. Ct. App. 2000).

[238] Minnesota v. Murphy, 465 U.S. 420, 435 (1984).

[239] Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (holding that an impermissible penalty situation existed when a defendant was given the maximum sentence for refusing to admit guilt); Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969) (holding that the defendant's Fifth Amendment rights were not infringed when the judge imposed a higher sentence on the ground that, in refusing to admit guilt, the defendant was unwilling to take the first step toward rehabilitation).

[240] *See* State of Montana v. Imlay, 813 P.2d 979 (Mont. 1991) (stating that a majority of federal circuit courts follow the *Thomas* penalty approach); Lile v. McKune, 224 F.3d 1175 (10th Cir. 2000) (applying both the penalty test and the *Turner* four-part test in holding that the offender's Fifth Amendment rights were violated by sex offender treatment program that required him to admit guilt or suffer loss of privileges).

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The Akaka Bill: The Native Hawaiians' Race For Federal Recognition

A man of true honor protects the unwritten word which binds his conscience more scrupulously, if possible, than he does the bond a breach of which subjects him to legal liabilities . . . . On that ground [the United States] can not allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform; and on the same ground, if a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.

–President Grover Cleveland's Message to Congress regarding the United States role in the Overthrow of the Kingdom of Hawai'i, March 18, 1893.[1]

Unlike other Native Americans, Hawaiians have never received the privileges of a political relationship with the United States. Yet Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for Federal recognition. The lack of formal recognition of Native Hawaiians by the Federal Government has resulted in their inability to secure control of lands and natural resources, develop self-governance mechanisms, enjoy eligibility for Federal programs designed to assist Native Americans and other protected groups, and the denial of valuable legal rights to sue for discrimination. This constitutes disparate treatment and must be remedied without delay.

–Hawai'i Advisory Committee to the United States Civil Rights Commission, 1991[2]

I. INTRODUCTION

After reading the above statements, a somewhat obvious question must be asked. Why has it taken the United States more than one hundred years to address the deprivation of the Native Hawaiian peoples' right to self-

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[1] President Grover Cleveland's Message to Congress (Dec. 18, 1893), *at* http://www.hawaii-nation.org/cleveland.html (emphasis added).

[2] HAWAI'I ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST: THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS 43 (1991) [hereinafter HAWAI'I ADVISORY COMMITTEE TO THE UNITED STATES CIVIL RIGHTS COMMISSION](emphasis added). Unfortunately, investigations of the U.S. Civil Rights Commission are only advisory and "it lacks enforcement powers that would enable it to apply specific remedies in individual cases." *Commission Information*, *at* http://www.usccr.gov/cominfo.htm.

determination?[3] In 1893, President Grover Cleveland called for Congress to restore the independence of the Kingdom of Hawai'i. Nearly one hundred years later, the United States Civil Rights Commission, concluded that federal recognition of a Native Hawaiian governing entity was necessary to protect the civil rights of the Native Hawaiian people.[4] Now, ten years after the Civil Rights Commission's recommendation to extend federal recognition to Native Hawaiians, a bill for reconciliation and a process for reorganizing and recognizing a Native Hawaiian governing body has been proposed in Congress.[5] It is uncertain whether a conservative political climate under President George W. Bush and an evenly divided Congress will agree to take

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[3] The Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration) explains that "[i]ndigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 637 (1996) (emphasis added). The Draft Declaration, which is the leading international document on the rights of indigenous peoples, was drafted over an eight-year period by the Working Group on Indigenous Peoples (Working Group), and submitted to the United Nations Commission on Human Rights' Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission). SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS RIGHTS 50-51 & n.139 (1998) (a full copy of the Draft Declaration as agreed upon by the members of the Working Group at its Eleventh Session is reproduced at 205-216). The Sub-Commission approved the document in 1994. *Id.* at 52. In creating the Draft Declaration, the Working Group, for the first time in the history of the UN, received information from indigenous organizations and groups, without requiring that they have non-governmental organization (NGO) consultative status. *Id.*

Rather than fully accept the Draft Declaration, the United States proposes that the right to self-determination is only a right to "*internal* self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state . . . ." Letter from Robert A. Bradtke, Executive Secretary, United States National Security Council, to Kristie A. Kinney, Executive Secretary, United States Dep't of State et. al. 1 (Jan. 18, 2001) (on file with author) [hereinafter National Security Council Letter] (describing the United States position on indigenous peoples and provides guidance to the UN Commission on Human Rights, the Commission's Working Group on the Draft Declaration and the OAS Working Group on the Inter-American Draft Declaration, and to the preparatory meetings to the UN World Conference Against Racism; explains text, which the U.S. can accept in the Draft Declarations being considered in those forums). This letter indicates the U.S. position on January 18, 2001, just days prior to the change in executive administration from President Clinton to President Bush.

[4] HAWAI'I ADVISORY COMMITTEE TO THE UNITED STATES CIVIL RIGHTS COMMISSION, *supra* note 2, at 44. The report recommended that "[t]he Congress should promptly enact legislation enabling Native Hawaiians to develop a political relationship with the Federal Government comparable to that enjoyed by other native peoples in the Nation." *Id.*

[5] Susan Roth, *Native Hawaiian bill ready in Congress*, HONOLULU ADVERTISER, July 6, 2000, *available at* http://www.honoluluadvertiser.com/2000/Jul/06/localnews1.html.

the necessary step to include Native Hawaiians in the federal "self-determination" policy on Native Americans.

From 1778 to the present, the federal policy on Native Americans has been wide and varied throughout different time periods.[6] In 1970, the "self-determination" era was ushered in and continues to the present.[7] Under this regime, the special legal and political relationship between the native nations and the United States is reaffirmed and tribes deal with the federal government in a government-to-government relationship.[8] The United States recognizes native peoples' right to self-determination through federal recognition.[9] Since 1978, twenty-one groups have successfully become federally recognized nations through either procedures under the Bureau of Indian Affairs, Department of Interior, or congressional action.[10] Currently, more than 550 federally recognized Native American nations exist in the contiguous United States and Alaska.[11] Also since the 1970s, under fifty federal statutes, "Native

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[6] In the years following the American Revolution, Indian tribes were treated as sovereign nations and the United States entered into some 380 treaties with those native nations. STAFF OF SENATE COMM. ON INDIAN AFFAIRS, 106th CONG., *Brief History of the Federal-Tribal Relationship, in* SENATE COMMITTEE ON INDIAN AFFAIRS BRIEFING BOOKLET (Jan. 11, 1999), *available at* http://www.senate.gov/~scia/106brfs/selfd.html. Between 1832 and 1870, the federal policy was forced removal and relocation of eastern Indians to lands west of the Mississippi. *Id.* The years spanning 1887-1933 witnessed the abolishment of tribal governments and attempts to assimilate the Indians into American society, causing tribally owned acreage to plummet from 140 million to 50 million. *Id.* The policy again changed in 1934 when the Indian Reorganization Act sought to "rehabilitate" the Indian and encourage sovereign government. *Id.* Nearly twenty years later, however, the policy was "termination," thereby eliminating the special legal and political relationship between tribal governments and the United States and terminating federal benefits and support services. *Id.*

[7] *Id.*

[8] *Id.*

[9] The United States, through federal recognition, acknowledges a right to "internal self-determination" but does not recognize a right of "independence." National Security Council Letter, *supra* note 3, at 1. Federal recognition is often termed "nation-within-a-nation," and offers self-government as a "form of integration within the United States." Anthony Castanha, *The Hawaiian Sovereignty Movement: Roles of and Impacts on Non-Hawaiians*, http://www.hookele.com/non-hawaiians/chapter5.html. "[P]owers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." *Id.* (quoting [MELODY] KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 83-84 (1991)). This model differs significantly from the "independence" model, which "calls for separation of the entire Hawaiian archipelago from the jurisdiction of the United States." Anthony Castanha, *The Hawaiian Sovereignty Movement: Roles of and Impacts on Non-Hawaiians*, http://www.hookele.com/non-hawaiians/chapter7.html; *see also infra* notes 254-77 and accompanying text.

[10] BUREAU OF INDIAN AFFAIRS, *Answers to Frequently Asked Questions*, www.doi.gov/bia/aitoday/q_and_a.html.

[11] *Id.*

Americans" have been considered to include American Indians, Alaska Natives and Native Hawaiians.[12] Within that class, Native Hawaiians are the only group that has not been extended federal recognition.[13]

In 1993, Congress passed the Apology Resolution[14] apologizing for the United States' role in the overthrow of the independent Kingdom of Hawai'i,[15] and calling for reconciliation between the United States and the Native Hawaiian people.[16] On July 20, 2000, pursuant to the Apology Resolution, Hawai'i Senator Daniel Akaka introduced Senate Bill 2899 to the 106th Congress, with hopes of reorganizing a Native Hawaiian government.[17] The legislation, known as the "Akaka Bill," attempts to clarify the official policy of the United States with Native Hawaiian peoples as based on a special trust relationship.[18] It also establishes a process for federal recognition of a Native Hawaiian government.[19] Although the bill was passed by the House,[20] the measure failed in the Senate in the waning days of the session.[21] Passage of

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[12] DEP'T OF INTERIOR & DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 56 (2000) [hereinafter FROM MAUKA TO MAKAI]; see *infra* notes 243-46 and accompanying text discussing the Native American federal legislation in which Native Hawaiians are included. "Native Hawaiian" will be used to refer to all descendants of the aboriginal, indigenous inhabitants of the Hawaiian Islands, without regard to blood quantum.

[13] Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 84 (1991) [hereinafter Trask, *A Native Hawaiian Perspective*].

[14] 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution].

[15] *Id.*

[16] *Id.* at 1513.

[17] S. 2899, 106th Cong. (2000); *see also* Susan Roth, *Native Hawaiian bill ready in Congress*, *supra* note 5.

[18] *Bill to Express the Policy of the United States regarding the United States' Relationship with Native Hawaiians, and for other purposes: Hearings on S. 2899 Before the Senate Comm. on Indian Affairs*, 106th Cong. (2000) [hereinafter *Senate Hearings*] (statement of Sen. Daniel Akaka), *available at* http://www.senate.gov/~scia/2000hrgs/hawaiian_0914/akaka.pdf.

[19] *Id.*

[20] The House version, H.R. 4904, passed with a two-thirds voice vote on September 26, 2000. 146 CONG. REC. H8153 (daily ed. Sept. 26, 2000) (statement of the Speaker).

[21] Susan Roth, *Native Legislation Dies in U.S. Senate*, HONOLULU ADVERTISER, Dec. 14, 2000, *available at* http://www.honoluluadvertiser.com/2000/Dec/14/1214localnews13.html. The bill took a back seat to the Bush-Gore legal challenges to the Florida recount for the presidential election. *Id.* At the end of the session, Hawai'i lawmakers had only two options left, which both required unanimous consent of all 100 senators. *Id.* "The bill had to either pass unanimously on its own, or [it] could be attached to another piece of legislation." *Id.* Without support of Republican senators like Oklahoma's Sen. James Inhofe, the bill could not pass on its own. *Id.* The Hawai'i senators did not attach the measure to the final spending package. *Id.*

a similar bill[22] is widely seen as a viable means to counter equal protection challenges to all programs and laws directly benefiting only Native Hawaiians after the Supreme Court's decision in *Rice v. Cayetano*,[23] striking down a State of Hawai'i election procedure allowing only Native Hawaiians to elect a board of trustees for a state agency created to benefit only Native Hawaiians. Native Hawaiians are now in a race for recognition.

"Federal recognition" is a term used to describe the government-to-government relationship between the federal government and Native American governing bodies in a political relationship with the United States and those Indian tribes "recognized" by the United States.[24] An Indian group is "recognized" if "(1) Congress or the executive created a reservation for the group either by treaty, by statutorily expressed agreement, or by executive order or other valid administrative action; and (2) the United States has some continuing political relationship with the group, such as providing services through [federal agencies]."[25] The case of the Alaska Natives[26] recognition by the federal government illustrates that the designation of "Indian tribe" does not necessitate that the group is ethnically Indian. Rather it is a recognition that they are a native nation, whose "legal position . . . has been generally

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[22] S. 81, 107th Cong. (2001). Senators Akaka and Inouye reintroduced the bill on the first day of legislative activity in 107th session. Susan Roth, *Isle senators revive Hawaiian measure*, HONOLULU ADVERTISER, Jan. 23, 2001, *available at* http://www.honoluluadvertiser.com/2001/Jan/23/123localnews17.html. On April 4, 2001, Akaka and Inouye introduced a modified version. S. 746, 107th Cong. (2001). *See infra* note 135 explaining the main differences between this new bill and the drafts analyzed in this paper. Native Hawaiian leaders are not optimistic about passage in a divided Congress with Republican President George W. Bush in the White House. Yasmin Anwar, *Hawaiians Assess Bill's Fate in 2001*, HONOLULU ADVERTISER, Dec. 14, 2000, *available at* http://www.honoluluadvertiser.com/2000/Dec/14/1214localnews14.html. OHA trustee Rowena Akana is concerned that the Bush administration may give Washington attorney Theodore Olsen (who argued on behalf of Harold "Freddy" Rice and against the state in *Rice v. Cayetano*) a position in the Judiciary Department. Pat Omandam, *Rougher D.C. road lies ahead for Akaka bill*, HONOLULU STAR-BULLETIN, Dec. 14, 2000, *available at* http://www.starbulletin.com/2000/12/14/news/story1.html. This is a "move [Akana] fears could threaten existing native Hawaiian rights and entitlements." *Id.*

[23] 528 U.S. 495 (2000).

[24] *Senate Hearings*, *supra* note 18 (statement of Kevin Gover, Assistant Secretary of Indian Affairs, Dep't of the Interior), *available at* http://www.doi.gov/bia/testimony/S2899tst.html.

[25] *Id.*

[26] Alaska Natives include Eskimos, Aleuts, and Indians. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 401 (1988). Among the Indians are Athapascans, Tlingits, Haidas and Tsmishians, including Metlakahtlans. *Id.* Alaska Natives, although considered Indians under United States policy since at least 1923, *see id.* at 404 & n.59, were not formally recognized until 1971 with the passage of the Alaska Natives Claims Settlement Act, 43 U.S.C.A. § 1601 (1971).

assimilated to that of Indians"[27] and thus, "occupy the same relation to the Federal Government as do the Indians."[28]

In 1978, the Department of Interior ("DOI") established regulations creating a procedure and policy for acknowledging that certain American Indian tribes exist.[29]

> Such acknowledgment of tribal existence by the Department is a prerequisite to the protection, services and benefits from the Federal Government available to Indian tribes. Such acknowledgment also means that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their status as Indian tribes as well as the responsibilities and obligations of such tribes.[30]

The DOI regulations providing for petition to the Secretary of the Interior (Secretary) for federal recognition are available only to those American Indian groups indigenous to the *continental* United States.[31] Thus, although Native Hawaiians are indigenous to an area now constituting part of the United States, they are geographically excluded from the DOI's federal recognition petition procedures because Hawai'i is not part of the continental United

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[27] COHEN, *supra* note 26, at 404.

[28] *Id.*

[29] 25 C.F.R. § 83.2 (2000). This section reads in part: "The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes." *Id.*

[30] *Senate Hearings*, *supra* note 18 (statement of Kevin Gover, Assistant Secretary of Indian Affairs, Dep't of the Interior), *available at* http://www.doi.gov/bia/testimony/S2899tst.html (explaining 25 C.F.R. § 83.2).

> Without [federal] recognition, tribes usually can't receive federal grants to help strengthen their governments or initiate economic development projects . . . participate in federal rehabilitation programs or receive federal health services — which is why Indian tribes so often live in the worst poverty, suffer the greatest health problems and experience the highest infant mortality rates.

John E. Echohawk, *From the Director's Desk*, JUSTICE 1 (Fall 2000). Tribes are also "severely disadvantaged in the legal arena when it comes to winning back traditional lands [and] protecting precious resources." *Id.* Federal recognition means that "the federal government is obligated to protect tribal lands and resources [and] protect the tribe's right to self-government." *Id.* Also with federal recognition, "tribes have the power to define their own membership; structure and operate their tribal governments; regulate domestic relations; settle disputes; manage their property and resources; raise tax revenues; regulate businesses; and conduct relations with other governments." *Id.*

[31] 25 C.F.R. § 83.3 (2000). "This part applies only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department." *Id.* This geographical distinction conferring the benefits of federal recognition to continental natives while discriminating against non-continental natives appears to raise a significant constitutional question.

States.[32] Other criteria used by the DOI reveal that its process for federal recognition would be a difficult bar to overcome for Native Hawaiians.[33]

The Akaka Bill creates an avenue for federal recognition of a Native Hawaiian government parallel to the existing petition process for American Indians, which can better address the unique situation of the Native Hawaiian peoples. The bill would provide the Secretary with statutory authority to promulgate rules and regulations necessary to carry out the intent of the legislation. Federal recognition of a Native Hawaiian governing body would include Native Hawaiians in the federal policy to promote self-governance and would finally achieve parity among those indigenous peoples considered "Native Americans."

Part II of this article provides a basic contextual background of Hawaiian history, legislation and case law leading to the introduction of the bill.[34] Part III analyzes different drafts of the bill, highlighting the significant differences and bases for such amendments. Part IV examines the public controversy in Hawai'i surrounding federal recognition of a Native Hawaiian government.

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[32] Trask, *A Native Hawaiian Perspective*, *supra* note 13, at 84 (stating that "[n]o administrative mechanism exists under the statutes and procedures of the Bureau of Indian Affairs or the Department of the Interior which allows for Federal recognition of a Native Hawaiian sovereign entity.").

[33] "A petitioner must satisfy all of the criteria in paragraphs (a) through (g) of § 83.7 in order for tribal existence to be acknowledged." 25 C.F.R. § 83.6. Native Hawaiians may have difficulty meeting some of § 83.7's mandatory criteria. For example, the petitioner has to have "maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7(c).

[34] A basic historical background is necessary to properly understand the Akaka Bill in context. Non-native opponents, supported by a few part-Hawaiians, assert that there is neither a legal nor a moral basis for reconciliation, reparations or federal recognition. *See Hearings on Federal Recognition Before the Dept. of the Interior and Dept. of Justice* (1999) (statement of Ken Conklin), *at* http://www.doi.gov/nativehawaiians ("There were no 'stolen lands' as a result of the change of government, and no compensation is owed"). *See generally* H. William Burgess, *Aloha for All*, *at* http://www.aloha4all.org (stating a revisionist history asserting that Hawaiians do not possess a right to sovereignty and that the United States did not overthrow a racially Hawaiian Kingdom, therefore no land was taken from Hawaiians and no compensation is owed only to Hawaiians).

Another reason that a historical background is needed is because the majority opinion in *Rice v. Cayetano* did not provide a full account of U.S. colonization in Hawai'i. *See* Sharon Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1771-77 (2000) (detailing the majority's version of Hawaiian history). For example, the Court "[did not] mention U.S. colonialism . . . [n]or did the majority acknowledge specifically the destruction of Hawaiian culture through the banning of Hawaiian language or the current effects of homelands dispossession, including poverty, poor levels of education and health, and high levels of homelessness and incarceration." *Id.* at 1772. The majority "failed . . . also to connect despondency and despair to the loss of national sovereignty, the confiscation of homelands, and the denigration of native culture." *Id.* at 1774. The Akaka Bill represents a recognition of these losses and the start of a process for reconciliation and reparation.

Finally, this note concludes that although valid international claims exist and should be pursued for Native Hawaiians, domestic legislative relief is absolutely necessary at this juncture to protect Native Hawaiians' rights to their trusts and traditional lands and sorely needed federally-funded programs from further constitutional attack.

II. HISTORICAL BACKGROUND: OVER 100 YEARS OF A BROKEN TRUST

The Native Hawaiian peoples are the indigenous peoples[35] of the Hawaiian Islands, who developed a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture and religion."[36] There was an estimated population of up to one million[37] prior to the arrival of Captain James Cook, the first westerner, in 1778.[38] The Hawaiian Islands, with the exception of Kaua'i, were united by King Kamehameha in 1795.[39] The Kingdom of Hawai'i was solidified by 1810.[40] As the nation was settled by American missionaries and later American and European businessmen, the form of government evolved from an absolute to a constitutional monarchy.[41] In particular, Kamehameha III, fearing

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[35] "Indigenous peoples" are generally described as "the descendants of peoples occupying a territory when the colonizers arrived." VENNE, *supra* note 3, at 88. In 1970, Special Rapporteur, Martinez Cobo of Equador studied discrimination against Indigenous Peoples and prepared a working model of identification. Cobo identified indigenous communities as "Peoples and nations [ ] having political organization and a historical continuity with pre-invasion and pre-colonial societies on their territories." *Id.* at 87. Factors evidencing "historical continuity" include:

(a) Occupation of ancestral lands

(b) Common ancestry with the original occupants of these lands

(c) Culture, in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.)

(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language)

Id. at 87-88.

[36] Apology Resolution, *supra* note 14, 107 Stat. at 1510.

[37] Several historians have made various estimates of the native population upon contact, ranging between 300,000 and 1 million. *See* Melody K. MacKenzie, *Historical Background, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 3 & n.2 (Melody MacKenzie ed., 1991) (noting that 300,000 is a conservative estimate). *See generally*, DAVID STANNARD, BEFORE THE HORROR (1989) (demonstrating that the pre-contact population should be estimated between 800,000 and one million).

[38] R.S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, 12-13 (1938).

[39] *Id.* at 47-48.

[40] *Id.* at 50-51.

[41] *Id.* at 156-57.

permanent foreign takeover, followed American missionary advice to westernize the government.[42] Most significantly, in the late 1840s and early 1850s, the traditional land tenure system changed from a communal system, in which the chiefs held the lands in common for the benefit of all, to a wholly privatized system.[43] The significance of privatization today is two-fold. First, although native tenants retained access and gathering rights to these lands, and a common interest in the land, they were able to do so without holding individual title. The practical result was to leave the common native landless and allow for non-native appropriation and concentration of the majority of the land in the hands of a few powerful corporations.[44] Second, the remainder of the crown and government lands, which are known as "Ceded Lands,"[45]

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[42] *Id.* at 157-61.

[43] Kamehameha III divided all the land in three major phases in what is known as the "Mahele." MacKenzie, *Historical Background*, *supra* note 37, at 6. First, he divided the land between himself and 245 other chiefs. *Id.* at 6-9. Next, he divided his lands into crown and government lands. *Id.* Finally, all these lands were subject to the claims of native tenants. *Id.* For numerous reasons, the native tenants only received a total of 28,600 of the total 4 million acres. *Id.* at 9.

[44] Trask, *A Native Hawaiian Perspective*, *supra* note 13, at 79. As of 1991, 72 major landowners, each owning 1,000 acres or more, owned about forty-seven percent of all land. *Id.* When these land owners holdings are combined with the state and federal governments holdings, collectively, they own ninety-five percent of the lands in Hawai'i. *Id.*

[45] The term "Ceded Lands" is actually a misnomer because it implies that there was a consentual cession of lands by the Native Hawaiian people. Black's Law Dictionary defines "cede" as follows: "[t]o yield up; to assign; to grant; to surrender; to withdraw. Generally used to designate transfer of territory from one government to another." BLACK'S LAW DICTIONARY 53 (abridged 6th ed. 1991). The Apology Resolution recognizes that the transfer of title from the Republic of Hawai'i to the United States happened "without the consent of or compensation to the Native Hawaiian people." Apology Resolution, *supra* note 14, 107 Stat. at 1512. There was no cession of land from the Kingdom of Hawai'i to the Republic of Hawai'i, however, and therefore the Republic did not validly hold title to the lands nor could it validly transfer any title to the United States.

> The [Office of Hawaiian Affairs (OHA)] has filed suit against the State of Hawai'i Housing Finance and Development Corporation to prevent sale of Ceded Lands . . . citing clauses in the Apology Resolution. OHA contends that the Apology Resolution indicates that the State of Hawai'i may not have clear title to the Ceded Lands and that the Native Hawaiian people retain a claim to these lands. Circuit Court Judge Dan Heely found merit in the claim and ordered a trial . . . a trial which, in the past three months has not yet been scheduled.

FROM MAUKA TO MAKAI, *supra* note 12, at 54-55 (citing Office of Hawaiian Affairs v. State of Hawai'i Hous. Fin. & Dev. Corp., Civ. 94-420-11 (1994)). For a summary and history of the Ceded Lands Trust, see generally, Melody K. MacKenzie, *The Ceded Lands Trust*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 26-42 (Melody MacKenzie ed., 1991); *see also* FROM MAUKA TO MAKAI, *supra* note 12, at 52-55.

evolved into two public trusts,[46] and are now at the center of native land claims.[47]

Also during the 1840s, the system of government changed upon the advice of American missionaries during the 1840s from an absolute to a constitutional monarchy.[48] Additionally, during this period, the Kingdom increasingly entered into international agreements with many foreign nations,[49] including executing four treaties with the United States.[50]

By 1887, King David Kalakaua succumbed to foreign pressure and reluctantly signed what is known as the Bayonet Constitution,[51] which rendered the King a political puppet.[52] The new constitution placed executive powers in a cabinet, appointed by the King, but accountable to the legislature.[53] The House of Nobles, once comprised of Hawaiian chiefs,[54]

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[46] The public trust created under the Hawaiian Homes Commission Act is discussed *infra* notes 79-88 and accompanying text. The public trust set up under §5(f) of the Admission Act is discussed *infra* notes 89-93 and accompanying text.

[47] *See generally* Melody K. MacKenzie, *The Ceded Lands Trust*, 4 HAW. B.J. 6 (2000) (describing a suit by the Office of Hawaiian Affairs for determination of revenue generated from Ceded Lands owed to OHA, and a second suit to preclude the State of Hawai'i from selling, alienating or otherwise transferring Ceded Lands).

[48] KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, *supra* note 38, at 156-57, 167. The 1840 Constitution established a governmental structure, including a two-body legislative council, with a house of nobles and house of representatives chosen by the people, and a judicial system, including a supreme court. MacKenzie, *Historical Background*, *supra* note 37, at 6.

[49] By 1893, the Kingdom of Hawai'i was party to twenty-two international treaties and conventions. Trask, *A Native Hawaiian Perspective*, *supra* note 13, at 80. In 1843, France and Great Britain signed a joint declaration recognizing the Kingdom's independence. Jennifer M.L. Chock, *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, 463 (1995). The Kingdom also executed treaties with Sweden-Norway, the Netherlands, Italy, Spain, Switzerland, Russia, Austria-Hungary, Portugal, Denmark and Japan, while Belgium also promised its support to Hawai'i's continued independence. *Id.* at 464.

[50] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 102 & n. 41 (1998) (describing the four agreements with the United States).

[51] Sugar planter discontent led to the formation of a volunteer company of rifles estimated to number 500 armed men who participated in the escalated coercion of the King into signing the new document. NATIVE HAWAIIANS STUDY COMMISSION, VOL. II CLAIMS OF CONSCIENCE: A DISSENTING STUDY OF THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 43 (1983) [hereinafter NATIVE HAWAIIAN STUDY COMMISSION, DISSENTING REPORT] (This volume, submitted to the Senate Committee on Energy and Natural Resources and House Committee on Interior and Insular Affairs, presents the minority view of the Native Hawaiians Study Commission created pursuant to section 203, of Pub. L. 96-565, Title III.) Thus, it has come to be known as the "Bayonet Constitution." *Id.*

[52] MacKenzie, *Historical Background*, *supra* note 37, at 11 (referring to the King as a "ceremonial figure").

[53] *Id.*

[54] KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, *supra* note 38, at 169.

became an elected body.[55] The franchise was extended to American and European males owning sufficient property, regardless of citizenship.[56] This property requirement alone disenfranchised most natives.[57] Many Hawaiians demanded their voting rights be restored.[58] The voice of the Native Hawaiian peoples was heard by the new monarch, Queen Lili'uokalani, who attempted to promulgate a new constitution that would restore native suffrage[59] and return more power to the throne.[60]

Aware of the prospects for restored native political rights, the Committee of Safety was formed, "represent[ing] the American and European sugar planters, descendants of missionaries, and financiers"[61] seeking annexation to the United States.[62] With the aid of U.S. Minister John L. Stevens, who authorized landing U.S. Marines, the Committee of Safety overthrew the Queen on January 17, 1893.[63] The Queen, "to avoid any collision of armed forces, and perhaps the loss of life . . . under protest and impelled by [the U.S. military] force, yield[ed] [her] authority until such time as the Government of the United States, shall upon the facts being presented to it, undo the action of its representatives."[64] President Cleveland referred to the overthrow as an "act of war,"[65] acknowledged that with the participation of the U.S. Minister "the government of a peaceful and friendly people was overthrown," and called for the restoration of the Hawaiian government.[66] However, Congress

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[55] MacKenzie, *Historical Background*, *supra* note 37, at 11.

[56] *Id.* "The Bayonnet Constitution . . . gave the missionary/businessmen residing in Hawaii, who had not become naturalized citizens but remained resident aliens, the right to vote." MICHAEL DOUGHERTY, TO STEAL A KINGDOM: PROBING HAWAIIAN HISTORY 162 (1992).

[57] *Id.* at 161-62.

[58] *Id.* at 162.

[59] MacKenzie, *Historical Background*, *supra* note 37, at 11.

[60] R.S. KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893, 586 (1967) [hereinafter KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893].

[61] Apology Resolution, *supra* note 14, 107 Stat. at 1510; *see also*, KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893, *supra* note 60, at 587 (noting the memberships' citizenship as American, German or naturalized of American or German parentage).

[62] MacKenzie, *Historical Background*, *supra* note 37, at 11.

[63] Apology Resolution, *supra* note 14, 107 Stat. at 1510.

[64] *Id.* at 1511.

[65] *Id.* A Provisional Government established by the Committee of Safety immediately sent a delegation to Congress to seek a treaty of annexation with the aid of a supportive President Benjamin Harrison. NATIVE HAWAIIANS STUDY COMMISSION, DISSENTING REPORT, *supra* note 51, at 68. The treaty was negotiated and sent to the Senate. *Id.* However an election occurred in the meantime and Grover Cleveland, who had reservations about annexation, became President, and the treaty was withdrawn. *Id.* at 68-69.

[66] Apology Resolution, *supra* note 14, 107 Stat. at 1511; *see also* President Grover Cleveland's Message to Congress, *available at* http://www.hawaii-nation.org/cleveland.htm. President Cleveland based his appeal to Congress on the report of Special Commissioner James Blount, a Georgia Congressman. NATIVE HAWAIIANS STUDY COMMISSION, DISSENTING

did not take corrective action. In the meantime, the Provisional Government formed by the Committee of Safety,[67] proclaimed itself the Republic of Hawai'i[68] and sought annexation to the United States.

Despite its existing treaty obligations, the United States pursued annexation of Hawai'i. The Senate attempted, but failed, on two occasions to ratify an annexation treaty, which required a two-thirds vote, between the United States and the Republic of Hawai'i.[69] "The arguments of anti-expansionists were constitutional, historical, moral and racial."[70] Nevertheless, pro-annexationists arguing for Hawai'i's strategic military importance[71] successfully pushed through a Joint Resolution of Annexation on July 7, 1898.[72]

The Congress had significant debates about the constitutionality of a joint resolution for accession of territory by the United States. Anti-imperialists argued that acquisition of territory was "legally permissible only under the treaty-making power of the Constitution."[73] They asserted that "a joint resolution could have no binding effect upon people residing outside the jurisdiction within which such a measure was passed; hence, the . . . proposal could not become operative in Hawai'i"[74] because it lay outside the territory of the United States and therefore outside its jurisdictional bounds. This resolution, commonly referred to as the "Newlands Resolution," purported to cede 1.8 million acres to the United States.[75] The Republic ceded sovereignty over the Hawaiian Islands to the United States "without the consent or compensation to the Native Hawaiian people of Hawai'i or their sovereign government."[76] Petitions in opposition reveal that a clear majority of Native

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REPORT, *supra* note 51, at 69. Cleveland had sent Blount to Hawai'i to do a full investigation of the circumstances and American role in the overthrow. *Id.* Blount was able to determine that American "troops . . . were landed, not to protect American lives and property, but to aid in overthrowing the existing government." *Id.* at 71.

[67] Apology Resolution, *supra* note 14, 107 Stat. 1512.

[68] *Id.* at 1512.

[69] *Id.*

[70] MacKenzie, *Historical Background*, *supra* note 37, at 14.

[71] *Id.*

[72] *Id.* at 15.

[73] THOMAS J. OSBORNE, ANNEXATION HAWAI'I: FIGHTING AMERICAN IMPERIALISM 112 (1998).

[74] *Id.*

[75] Apology Resolution, *supra* note 14, 107 Stat. at 1512. "Federal holdings of 254,418.10 acres of emerged and submerged lands in the Northwestern Hawaiian Islands which . . . were not part of Ka Mahele were not included by Congress when estimating the Ceded Lands acreage in the Apology Resolution." FROM MAUKA TO MAKAI, *supra* note 12, at 54. Thus, according to an 1899 report by J.F. Brown, Agent of Public Lands for the Republic of Hawai'i, submitted to United States Senate, the total amount of lands ceded to the United States was approximately 2,005,818.1 acres. *Id.* at 53.

[76] Apology Resolution, *supra* note 14, 107 Stat. at 1512.

Hawaiians in 1898 resisted annexation and sought to reinstate their queen and lawful government.[77]

Despite the protest of the Native Hawaiian peoples, between 1900 and 1959, Hawai'i was administered as a territory of the United States.[78] By 1919, the pure Hawaiian population had plummeted to about 22,500 people as a result of poverty, disease, and political powerlessness. In 1921, Congress created a public trust under the Hawaiian Homes Commission Act[79] ("HHCA" or "Hawaiian Home Lands") consisting of approximately 200,000 acres for the express purpose of creating homesteading opportunities for "native Hawaiians," who were defined under the HHCA by fifty-percent or more blood quantum.[80] The HHCA was a compromise between a desire to rehabilitate the Native Hawaiians by returning them to a traditional agrarian and fishing lifestyle and an effort to continue sugar and ranch leases threatened by homesteading.[81] Ex-Secretary of the Interior Franklin K. Lane, testifying before the House Committee on the Territories, characterized the relationship between the Federal government and the native Hawaiians as one of guardian to ward,[82] indicating an expression of trust obligations.[83] The federal government's action to "rehabilitate" Native Hawaiians was consistent with the "General Allotment Act and Indian Assimilation" policy between 1887 and 1933 when the United States "parceled out tribal lands to individual Indians, [and] encouraged small scale agriculture on lands often unsuited to such ends . . . ."[84] Also consistent with the change in federal policy towards

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[77] Two petitions of 1897-1898 collectively reveal that 38,269 of approximately 40,000 Native Hawaiians alive at the time opposed annexation. Pat Omandam, *Hawaiians prepare for anniversary of annexation*, HONOLULU STAR-BULLETIN, Aug. 6, 1998, http://www.starbulletin.com/98/08/06/news/story1.html. The population in the Islands in 1898 totaled 90,000. *Id.*

[78] MacKenzie, *Historical Background*, *supra* note 37, at 15.

[79] Act of July 9, 1921, c 42, 42 Stat. 108. [hereinafter HHCA]

[80] Alan Murakami, *The Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 43 (Melody MacKenzie ed., 1991).

[81] *Id.* at 45.

> Since the reign of King Kalakaua, large sugar interests . . . enjoyed the use of 26,000 acres of prime agricultural lands . . . then under lease from the territory. . . . [T]hese lands would become available for general homesteading once the leases expired. In all, government leases to some 200,000 acres of public land were due to expire between 1917 and 1921.

Id. Rather than lose these prime crop lands to homesteading, 200,000 acres of the most undesirable land was set aside for Native Hawaiian homesteading. *Id.* at 47.

[82] *Id.* at 48, n.66 (citing H.R. REP. NO. 839, 66th Cong., 2d Sess. 4 (1920)).

[83] *See infra* section II.A.

[84] SENATE COMMITTEE ON INDIAN AFFAIRS BRIEFING BOOKLET, *supra* note 6.

"termination" between 1953 and 1969, the United States terminated its administration of the Hawaiian Homelands program in 1959.[85]

Upon Statehood, as a compact with the United States, the administration of the Hawaiian Home Lands program was passed to the State of Hawai'i.[86] Mismanagement has plagued this public trust[87] and has been the subject of much litigation as native Hawaiians attempt to sue for breach of trust.[88]

In 1959, Congress passed the Admission Act[89] conferring statehood upon Hawai'i. Section 5(f) of the Act mandated that the State administer the Ceded Lands Trust, in part for the "betterment of the conditions of native Hawaiians."[90] The State's mismanagement[91] of these lands has gone unchecked. The Admission Act provides that the:

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[85] *Id.*

[86] An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 5(f), 73 Stat. 4, 5-6 [hereinafter Admission Act].

[87] *See* Trask, *A Native Hawaiian Perspective*, *supra* note 13, at 82-83. *See generally* HAWAII ADVISORY COMMITTEE TO THE UNITED STATES CIVIL RIGHTS COMMISSION, *supra* note 2; Susan C. Faludi, *Broken Promise: Hawaiians Wait in Vain for Their Land*, WALL STREET JOURNAL, Sept. 9, 1991, A1.

[88] Native Hawaiians have only a limited right to sue for breach of trust. Redress is limited to claims arising after 1989 and plaintiffs are prevented from receiving land or money because it must be surrendered back to the Department of Hawaiian Homelands. Trask, *A Native Hawaiian Perspective*, *supra* note 13, at 83. *See generally*, Mia Y. Teruya, *The Native Hawaiian Trusts Judicial Relief Act: The First Step in an Attempt to Provide Relief*, 14 U. HAW. L. REV. 889 (1992); Eric K. Yamamoto, Moses Haia, & Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1 (1994).

[89] Admission Act, *supra* note 86.

[90] MacKenzie, *The Ceded Lands Trust*, *supra* note 45, at 30. Besides being used "for the betterment of the conditions of native Hawaiians," there are four other purposes for which Ceded Lands may be used, which include public education, farm and home ownership, public improvements and other public uses. Admission Act, *supra* note 86, § 5(f).

[91] Failure to complete a full inventory of ceded lands has caused the State to be unable to distinguish between ceded and non-ceded, thereby mixing proceeds from the two categories of land, which are supposed to be managed in separate funds. MacKenzie, *The Ceded Lands Trust*, *supra* note 45, at 31-32.

> In 1997 the Hawai'i State Legislature authorized an appropriation of $1 million each for the Department of Land and Natural Resources (DLNR) and the Office of Hawaiian Affairs to conduct a Ceded Lands inventory. No agreement could be reached between DLNR and OHA on how to conduct the inventory and the funds lapsed. In the 2000 session of the Hawai'i State Legislature S.B. 2108 authorized a new appropriation for the inventory to be conducted. Statements received in the reconciliation meetings suggested that the Federal Government combine efforts with the DLNR and OHA and conduct an inventory of the Ceded Lands under the management of various Federal agencies.

FROM MAUKA TO MAKAI, *supra* note 12, at 55. A similar conclusion was reached by the Hawai'i Advisory Committee to the United States Civil Rights Commission in 1991. HAWAII ADVISORY COMMITTEE TO THE UNITED STATES CIVIL RIGHTS COMMISSION, *supra* note 2, at 45-46.

> lands, proceeds, and income shall be managed and disposed of for one or more of the trust purposes in such a manner as the constitution and laws of said state may provide and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.[92]

The United States has never exercised its right to sue.[93]

In 1978, the State through a constitutional convention and agreement by the state's voters,[94] established the Office of Hawaiian Affairs ("OHA"), a state agency with the mission of bettering the conditions of native Hawaiians and Hawaiians.[95] The office, governed by nine elected trustees, was created to implement section 5(f) of the Admissions Act as it relates to Native Hawaiians, by enabling it to hold title to real and personal property, which shall be held in trust for Native Hawaiians. State statutes call for the distribution of twenty percent of revenues generated from Ceded Lands to be distributed to OHA,[96] which may be used only for the fifty-percent blood class of beneficiaries.[97]

In 1993, through a joint resolution, Congress apologized to Native Hawaiians for the United States' role in the Overthrow one hundred years earlier.[98] The Apology Resolution made five significant findings. First, the

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[92] Admission Act, *supra* note 86, § 5(f).

[93] The Hawai'i Advisory Committee to the United States Civil Rights Commission recommended in 1991 that the "Congress should enact legislation explicitly granting beneficiaries the right to sue in Federal court for breaches of trust under the Hawaii Admission Act and the Hawaiian Homes Commission Act." HAWAII ADVISORY COMMITTEE TO THE UNITED STATES CIVIL RIGHTS COMMISSION, *supra* note 2, at 45. Such legislation is not yet forthcoming.

[94] Jon M. Van Dyke, *Can the Native Hawaiian People Elect Their Own Leaders?*, PREVIEW OF UNITED STATES SUPREME COURT CASES (Sept. 13, 1999), at 37.

[95] MacKenzie, *Historical Background*, *supra* note 37, at 19. The OHA amendment names two beneficiaries of the OHA trust: "native Hawaiians" as defined in the HHCA - Native Hawaiians with fifty percent or more Hawaiian blood and "Hawaiians" - those with less than fifty percent blood. *Id.*; *see also* HAW. CONST. art. XII, § 5.

[96] HAW. REV. STAT. § 10-13.5 (1985). In 1997, the Hawai'i Legislature passed Act 329 which provides OHA 20% of the revenues from the Ceded Lands Trust up to a maximum of $15.1 million a year. FROM MAUKA TO MAKAI, *supra* note 12, at 54 (citing 1997 Haw. Sess. Laws 329).

[97] MacKenzie, *The Ceded Lands Trust*, *supra* note 45, at 33.

[98] Apology Resolution, *supra* note 14, 107 Stat. at 1510. This 1993 resolution of Congress should be compared with the 1983 report of the Native Hawaiians Study Commission ("Commission"), issued pursuant to Pub. L. 96-565, Title III. NATIVE HAWAIIANS STUDY COMMISSION, VOL. I REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983) [hereinafter NATIVE HAWAIIANS STUDY COMMISSION, VOL. I]. Among other findings concerning the social and economic needs of Native Hawaiians, the Commission's majority report made several findings concerning the United States role and legal responsibility for the 1893 Overthrow, which have since been corrected by the Apology Resolution. For example,

"United States Minister . . . extended diplomatic recognition to the Provisional Government that was formed by the conspirators . . . in violation of treaties between the two nations and of international law."[99] Second, that "the Republic of Hawai'i ceded 1.8 million acres of Kingdom lands "without the consent or compensation to the Native Hawaiian people . . . or their sovereign government."[100] Third, that the "Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."[101] Fourth, that Native Hawaiians suffered a "deprivation of the rights . . . to self-determination."[102] Finally, that the United States should "support reconciliation efforts between the United States and the Native Hawaiian people."[103] For six years, the federal government took no further action, despite repeated efforts of Native Hawaiians to initiate reconciliation.[104]

Finally, in December 1999, at the urging of Hawaiian Senator Akaka, the Department of Interior ("DOI") and Department of Justice ("DOJ") convened joint consultation hearings with the Native Hawaiiian community in Hawai'i to start the reconciliation process pursuant to the Apology Resolution.[105] In October 2000, the Departments released a report recommending that,

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the Commission's majority concluded that "Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty." *Id.* at 27. A three-member minority of the Commission produced a formal dissent to the majority report. NATIVE HAWAIIANS STUDY COMMISSION, DISSENTING REPORT, *supra* note 51, at iv, vii. The dissenters believed that the majority's study was "inaccurate and fatally-flawed both in fact and in spirit." *Id.* at iv. The minority expressed concerns with "the historical methodology and objectivity of the analysis used," "the dearth of primary sources and heavy reliance on a single secondary source," "the selective and often misleading presentation of the background of events and forces leading to the overthrow of the Kingdom of Hawai'i," and "a fundamentally flawed legal analysis of the consequences of the overthrow . . . and the damages suffered by Native Hawaiians as a result." *Id.* at ix-x.

[99] Apology Resolution, *supra* note 14, 107 Stat. at 1510-1511. The Constitution declares that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, § 2.

[100] Apology Resolution, *supra* note 14, 107 Stat. at 1512.

[101] *Id.*

[102] *Id.* at 1513.

[103] *Id.*

[104] Various groups, including OHA, Ka Lahui Hawai'i and the Hawaiian Kingdom, have proposed at least five different pieces of legislation to address federal recognition, but none of them were introduced in Congress. Christine Donnelly, *The Hawaiian Roundtable: Holo I Mua*, HONOLULU STAR-BULLETIN, Mar. 20, 2000, *available at* http://www.starbulletin.com/2000/03/20/special/transcript.html. (statement of Mililani Trask). "There's several initiatives that have come from the Hawaiian community for consensus building, [a] strategic process to take it all the way through the Congress . . . ." *Id.*

[105] FROM MAUKA TO MAKAI, *supra* note 12, at i.

"Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body."[106] The Akaka Bill is an initial step in a process of reconciliation, within the confines of U.S. law.[107] However, the driving impetus of the Akaka Bill and its hastened introduction to Congress is less about addressing historical wrongs than it is an effort to protect existing beneficial programs[108] after the U.S. Supreme Court's decision in *Rice v. Cayetano*.[109]

In February 2000, the Court in *Rice* dealt a blow to Native Hawaiian claims in its 5-2-2 ruling that the State of Hawai'i's Hawaiian ancestry-only electorate qualification for OHA was unconstitutional under the Fifteenth Amendment to the United States Constitution.[110] The State argued that under *Morton v. Mancari*[111] the OHA voting scheme was rationally tied to the furtherance of native self-government.[112] The Court rejected this defense because OHA is a state agency, not a federally recognized quasi-sovereign entity.[113]

As the validity of the State's voting restriction was the only question before the Court,[114] it did not need to rule specifically on the status of Native

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[106] *Id.* at 17. The Report made five specific recommendations with: (1) federal recognition; (2) creation of an Office of Native Hawaiian Issues at the Interior; (3) assignment of the Office of Tribal Justice to address Native Hawaiian issues; (4) creation of a Native Hawaiian Advisory Commission to consult with the Interior regarding land management, resource, and cultural issues affecting Native Hawaiians; and (5) the Executive Branch, Congress, the State and the Native Hawaiian people must develop an appropriate process to ensure true reconciliation. *Id.* at 17-20.

[107] The DOI and DOJ's report states that:

> [t]he United States Government is committed to continuing the reconciliation process and resolving these long-standing political issues within the framework of Federal law. However, it is important to understand that the Federal Government does not support and the United States Constitution does not permit the secession of any state that has been admitted to the Union.

Id. at 51.

[108] *See infra* section IV.A.2.

[109] Rice v. Cayetano, 528 U.S. 495 (2000).

[110] *Id.* at 524. The Fifteenth Amendment provides that "[t]he 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.

[111] Morton v. Mancari, 417 U.S. 535 (1974).

[112] *Rice*, 528 U.S. at 518.

[113] *Id.* at 520.

[114] *Rice*, 528 U.S. at 521-22. The Court recognized what many Hawaiian sovereignty advocates have asserted—that OHA as a state agency cannot serve as a native government. The OHA cannot be said to constitute Hawaiian self-governance. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 29 (1999). Professor Trask explains that sovereignty leaders fear that the state legislature, OHA and other state agencies,

Hawaiians, characterizing it as "difficult terrain."[115] The Court determined that even if Congress had treated native Hawaiians as it does Indian tribes, and delegated that authority to the State, Congress may not authorize a State to create a race-based voting scheme because it violates the Fifteenth Amendment.[116] The majority did not foreclose the possibility that Congress, as compared to a state, can treat Native Hawaiians in the same manner as other Native Americans.[117] Although, the majority took the underlying trust as constitutional since the validity of the voting requirement was the only issue,[118] the concurrence, denied the existence of a trust for Native Hawaiians.[119] The Akaka Bill is a response to the *Rice* decision to clarify the federal relationship with Native Hawaiians.[120]

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such as the Department of Hawaiian Homelands will settle sovereignty claims for money rather than land. *Id.* She maintains that "Democrats created OHA to prevent, rather than fulfill, native self-determination." Haunani-Kay Trask, *Sovereignty Stolen by U.S. Must Be Restored*, HONOLULU ADVERTISER, Oct. 1, 2000, *available at* http://www.honoluluadvertiser.com/2000/Oct/01/101opinion15.html.

[115] *Rice*, 528 U.S. at 519; Robert J. Deichert, *The Fifteenth Amendment at a Crossroads*, 32 CONN. L. REV. 1075, 1100-03 (2000).

[116] *Rice*, 528 U.S. at 522. Under federal law native nations may restrict the right to vote on matters effecting internal affairs to non-natives. "Each tribe . . . determines which of its members are eligible to vote in its elections." BUREAU OF INDIAN AFFAIRS, *supra* note 10.

[117] Justice Kennedy reasoned that:

> [i]f Hawai'i's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat native Hawaiians as it does the Indian tribes.

Rice, 528 U.S. at 518. *Cf. id.* at 528 (Stevens, J., dissenting). Justice Stevens takes issue with the majority's holding as:

> rest[ing] largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.

Id.

[118] *Id.* at 524.

[119] *Id.* at 525. See *infra* notes 228-32 and accompanying text for a discussion of *Barrett v. State of Hawai'i*, a pending case challenging the underlying OHA trust.

[120] Congressman Neil Abercrombie, D-Hawai'i, characterized the bill as a "cure" to *Rice* and a "federal mechanism that overcomes the *Rice vs. Cayetano* decision." 146 CONG. REC. H8151 (daily ed. Sept. 26, 2000) (statement of Rep. Abercrombie).

The Akaka Bill is an effort to conform reconciliation with Native Hawaiians into the parameters of federal Native American law and the United States Constitution, as interpreted by a conservative Supreme Court. Justice Kennedy summed up his majority opinion as follows:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.[121]

The current Supreme Court interprets the Constitution to have little room for government to make distinctions where there is any hint of race regardless of its purpose.[122] Justice Thomas, reasons that even "benign prejudice" is "just as noxious as discrimination inspired by malicious prejudice."[123] As the ultraconservative Justice Scalia asserts, concurring in *Adarand Constructors, Inc. v. Pena*[124] to strike down a race-based affirmative action program, "[i]n the eyes of government, we are just one race here. It is American."[125] With this assimilationist ideology it is difficult to address historical wrongs, such as the loss of nationhood and the deprivation of the Native Hawaiians' right to self-determination, caused by the United States.

Federal law, nevertheless, provides a narrow exception under the Indian Commerce Clause for "Indian tribes," which allows the federal government to deal specially with the Native Americans residing in states and recognize their right to self-governance.[126] To attain the legal status of a sovereign entity a native group must first be federally recognized by the United States as such. The *Rice* "decision should not stand as an obstacle to the Federal Government's ongoing efforts to work with the Native Hawaiian community in furtherance of 'reconciliation' under the Apology Resolution."[127] Indeed, it "highlights the importance of legislation to provide a statutory basis for a

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[121] *Rice*, 528 U.S. at 524.

[122] "To the current court, all that matters is whether race is involved. Scrutinizing the context of racial identities, racial histories, and racial dynamics is irrelevant." Chris K. Iijima, *Race Over* Rice*: Binary Analytical Boxes And A 21st Century Endorsement of 19th Century Imperialism In* Rice v. Cayetano, 53 RUTGERS L. REV. 91 (2000).

[123] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

[124] *Id.* at 239 (Scalia, J., concurring).

[125] *Id.*

[126] *See infra* notes 293-303 and accompanying text.

[127] FROM MAUKA TO MAKAI, *supra* note 12, at 51-52.

government-to-government relationship with Native Hawaiians as an indigenous, aboriginal people."[128]

The Akaka Bill's purpose is three-fold in response to the *Rice* decision. First, its purpose is to clarify the political status of Native Hawaiians with the United States.[129] Second, it sets up a process to create a Native Hawaiian governing body which will be federally recognized.[130] Finally, it seeks to protect more than one hundred government-funded programs for Native Hawaiians from constitutional challenges.[131] The next section is devoted to a section-by-section analysis of the bill.

III. ANALYSIS OF THE LEGISLATION

Less than a month after the *Rice* decision, Hawai'i's Congressional delegation formed a Task Force on Native Hawaiian Issues ("Task Force") chaired by Senator Akaka, with the immediate goal of introducing legislation to clarify that a special relationship exists between Native Hawaiians and the federal government. In its conceptual stage, the bill was only meant to restate that such a relationship exists.[132] The Task Force envisioned that a legislative measure for actual federal recognition would be a secondary step, requiring further legislation. The Task Force created five different working groups representing a cross-section of the community and interested parties, including representatives of the Native Hawaiian community, state officials, federal officials, Native American community leaders and constitutional scholars, and Congressional members and caucuses.[133] Through the input of these working groups, the Akaka Bill went through many changes from the time the first draft was circulated in May 2000.[134] This section will analyze the bill's

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[128] *Id.* at 52. "In passing such legislation, Congress would set forth its view that Congress has the authority over Indian Affairs to enact legislation for the benefit of Native Hawaiians as an indigenous, aboriginal people." *Id.*

[129] 146 CONG. REC. S7393 (daily ed. July 20, 2000) (statement of Sen. Daniel Akaka).

[130] *Id.*

[131] *Id.*

[132] Roth, *Native Hawaiian Bill Ready in Congress*, *supra* note 5.

[133] *Senate Hearings*, *supra* note 18 (statement of Sen. Daniel Akaka), *available at* http://www.senate.gov/~scia/2000hrgs/hawaiian_0914/akaka.pdf. Independence advocates were disappointed that the working groups were made up primarily of people who favor federal recognition rather than independence. *Native Hawaiian Bill Planned*, HONOLULU ADVERTISER, May 13, 2000, at A2.

[134] Although productive Native Hawaiian input was received through the Native Hawaiian working group, there were not government-sponsored public hearings prior to the congressional hearings. These hearings did not begin in Hawai'i until August 28, 2000, more than a month after the bill was introduced on July 20. Pat Omandam, *Clinton Officials Say They Back Akaka Bill*, Aug. 28, 2000, *available at* http://www.starbulletin.com/2000/08/28/news/story1.html.

evolution through three drafts,[135] highlighting the significant aspects and points of controversy and analyzing the substantive changes that have occurred to address the unique needs and circumstances of the Native Hawaiian peoples.

A. A Special Trust Relationship Exists Between the United States and Native Hawaiians

All three drafts of the Akaka Bill express Congress' clear intention to clarify the United States' relationship with Native Hawaiians as one that is based on a "trust" relationship. Although in May 2000, Draft I only stated the existence of a trust relationship, by July 2000 Draft II clarified the basis for such a relationship. Draft II begins by stating that "the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States," and that, "Native Hawaiians . . . are indigenous, native people . . . ."[136] In particular, proponents want to remove any doubt that the "special trust relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States."[137] The significance of "aboriginal, indigenous, native" status was clarified in Draft III by stating that the status is "unique"[138] because Native Hawaiians were "once [a] sovereign nation with whom the United States has a political and legal relationship."[139] The bill references the Apology Resolution and incorporates its recognition

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[135] Draft I refers to the initial draft proposed by the Congressional delegation. Discussion Draft of May 1, 2000 (on file with author). Draft II refers to the bill as it was introduced to Congress as S. 2899 on July 20, 2000, *available at* http://thomas.loc.gov. Draft III refers to the draft passed by the House and Senate committees, *available at* http://thomas.loc.gov. A modified version of this bill was introduced on April 6, 2001 after this comment was accepted for publication. *See supra* note 22. The new senate bill 746 differs from the drafts analyzed in this article in three main ways. First, Section 7 of Drafts II and III discussed *infra* in section II.E. providing for the reorganization of a Native Hawaiian governing entity was completely removed. *Native bill modified by Akaka, Inouye*, HONOLULU ADVERTISER, Apr. 8, 2001, *available at* http://www.honoluluadvertiser.com/article/2001/Apr/08/ln/ln12a.html. Senator Akaka has said this reflects "the consensus in [the Hawai'i] delegation that the reorganization process must be determined by the Native Hawaiian community." Second, the new bill provides that it does not authorize gaming under the authority of the Indian Gaming Regulatory Act. *Id.* Finally, it clarifies that the bill's language does not create eligibility for programs administered by the Bureau of Indian Affairs. *Id.*

[136] Draft II, § 1.

[137] *Id.*

[138] Draft III, § 1.

[139] *Id.*

of the United States' role in the Overthrow of the once sovereign Hawaiian nation,[140] which created the important "political and legal relationship."

The importance of having express "trust" language is grounded in Federal Indian laws' basic tenet that the United States owes legally enforceable fiduciary duties and has moral obligations that have arisen from the historical course of dealing between the federal government and Native Americans who reside in states.[141] Native Americans have "invoked the trust doctrine to force the government to properly manage tribal trust funds; consider Indian interests when allocating water rights; clean up pollution on reservations; protect Indian lands against trespassers and infringing development; prevent improper conveyance of Indian lands; and compensate for resource mismanagement."[142] All too often, however, the United States has invoked the trust doctrine to the detriment of Native Americans in some circumstances and failed to meet its duties in other instances, causing some Native Hawaiians to advocate against inclusion in Federal Indian policy through the Akaka Bill.[143]

Even a cursory view of United States Supreme Court precedent validates the paternalistic view of the federal government toward the native nations and the trust relationship as being one of ward to guardian.[144] For example, in 1831 in *Cherokee Nation v. Georgia*,[145] the Court concluded that tribes were "domestic dependent nations,"[146] "in a state of pupilage."[147] Reiterating this paternalism in 1886, the Court reasoned that, "[f]rom [the Indians'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised,

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[140] *Id.*

[141] For a general discussion of the origins, scope and responsibilities under the trust doctrine, see GILBERT L. HALL, DUTY OF PROTECTION: THE FEDERAL-INDIAN TRUST RELATIONSHIP (2 ed. 1981); *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1495-1508 (1994) (explaining the origins and modern role of the trust doctrine).

[142] Wood, *supra* note 141, at 1471.

[143] *See infra* section IV.B.

[144] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). ("[The Indians] relation to the United States resembles that of a ward to his guardian."); *see also* Mark Savage, *The Great Secret About Federal Indian Law — Two Hundred Years in Violation of the Constitution — And the Opinion the Supreme Court Should Have Written to Reveal It*, 20 N.Y.U. REV. L. & SOC. CHANGE 343 (1993). Savage argues that the Supreme Court has falsely cited the Constitution for Congress' "plenary power" over Native American nations. *Id.* at 344. He cites deliberations of the Federal Convention of 1787 to reveal the Framers' rejection of such plenary power, electing instead to limit federal power to the regulation of commerce between the United States and the tribes. *Id.*

[145] 30 U.S. 1 (1831).

[146] *Id.* at 17.

[147] *Id.*

there arises the duty of protection, and with it the power."[148] Later, in *United States v. Sandoval*,[149] the Court upheld an exercise of federal power in Indian territory on precedent attributing to the United States as a "superior and civilized nation with the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders."[150] Although the history of genocide[151] and injustice suffered by Native Americans is not a legacy that Native Hawaiians want to inherit, classifying the relationship between the United States and Native Hawaiians as a "trust," and hence a political one, will likely bolster the constitutionality of the bill, and consequently protect other acts and programs benefiting Native Hawaiians.[152] In this sense it is positive to assert the "trust" language, especially because the federal government's official stance regarding the existence of a trust relationship with Native Hawaiians has wavered over the years,[153] thus requiring a clear statement. Although Congress has extended to

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[148] United States v. Kagama, 118 U.S. 375, 384 (1886).

[149] 231 U.S. 28 (1913).

[150] *Id.* at 46.

[151] *See* Wood, *supra* note 141, at 1473 n. 4 (citing Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 78 (1993); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 713 (1986) (noting that "[s]cholars appropriately use the terms 'genocide' and 'Indian Holocaust' to describe the government's treatment of native peoples during most of this country's history.")). *See generally* DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD (1992) (an historical account of death, disease and destruction of native peoples of the Americas using demographic, geographical and anthropological research).

[152] The Native Hawaiian Working Group expressed concern with the interpretation of "trust" language as interpreted by the Supreme Court as "an indication that the feds have a superior position" and recommended that "political relationship instead of trust relationship or political status" be used. Letter from Corbett Kalama, Native Hawaiian Working Group Member, to Native Hawaiian Working Group Members 5 (May 25, 2000) (on file with author)[hereinafter Native Hawaiian Working Group Comments]. "We don't want to be grouped with Native Americans[;] Native Hawaiians should stand as being unique." *Id.*

[153] FROM MAUKA TO MAKAI, *supra* note 12, at 39-40 (recounting the Departments of Interior and Justice's varying opinions from 1979 to 2000); *see also* Trask, *A Native Hawaiian Perspective*, *supra* note 13, 86-87. In 1979, Deputy Solicitor of the U.S. Department of the Interior Federick Ferguson stated the Department's position was "that the role of the United States under section 5(f) [of the Admissions Act] is essentially that of a trustee." FROM MAUKA TO MAKAI, *supra* note 12, at 39. A January 1993 Interior opinion by Solicitor Thomas Sansonetti overruled the Department's prior position that the United States was a trustee under the HHCA. *Id.* The Sansonetti opinion was withdrawn in November of the same year. *Id.* In 2000, the Solicitor General in the United States' Amicus Curiae Brief in *Rice* "took the clear position that the United States has a trust responsibility to Native Hawaiians." *Id.* It is also important for Congress to make a clear statement of a trust responsibility because the 1983 report of the Native Hawaiians Study Commission prepared for Congress found otherwise. *See* NATIVE HAWAIIANS STUDY COMMISSION, VOL. I, *supra* note 98.

Native Hawaiians many of the same programs and services as are made available for other Native Americans, for over twenty years the policy towards Native Hawaiians has been limited to piecemeal legislation. A change in this policy needs to occur and truly include Native Hawaiians in the federal policy on recognized native nations.[154]

B. Who is a "Native Hawaiian"?

One of the major points of debate has been defining who is "Native Hawaiian" under the bill. Draft I used the definition—"any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that constitutes the State of Hawai'i"[155] — as has been the trend in all federal legislation since 1974.[156] In contrast, Draft II made a marked change in this area by defining "Native Hawaiian" as

> the indigenous, native people of Hawai'i who are the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawai'i on January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawai'i.[157]

The change does not affect who is considered a Native Hawaiian under federal law. It appears, however, to respond to the *Rice* Court's negative treatment of the OHA electorate definition of "Hawaiian" using 1778 when the only people that lived in Hawai'i were racially Native Hawaiian.[158] Draft

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[154] Trask, *Sovereignty Stolen by U.S. Must Be Restored*, *supra* note 114.

[155] Draft I, § 3. It is interesting to note that the Native Hawaiian Working Group's comment that the term "kanaka maoli" should be used in the bill does not appear in either of the other two drafts. Native Hawaiian Working Group Comments, *supra* note 152, at 5. "Kanaka maoli" is a Hawaiian word that literally means the "true" or "real people," MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY, REVISED AND ENLARGED EDITION 127, 240 (1986), as is often the case with the term used by indigenous groups to refer to themselves. The Group noted that the term has "a more meaningful identity to the people of the Kingdom of Hawai'i." Native Hawaiian Working Group Comments, *supra* note 152, at 5. Unfortunately, thus far under U.S. law "kanaka maoli" has no legal weight or meaning. Inclusion of this term may be better addressed in the process when the organic documents of a Native Hawaiian governing body are adopted and the Native Hawaiian people will have the power to better define their membership.

[156] FROM MAUKA TO MAKAI, *supra* note 12, at 56.

[157] Draft II, § 2.

[158] The definition of "Hawaiian" struck down in *Rice* as impermissibly based on race was "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." *Rice*, 528 U.S. at 509 (citing HAW. REV. STAT. § 10-2 (1993)). The year 1778 was the first western contact, and thus the first time non-Hawaiian races existed

II attempted to tie the definition to the time of the Overthrow of the Kingdom in 1893. This is clearly an attempt to lessen the focus on race and focus on the political relationship triggering trust duties. Draft III made yet another significant amendment recommended by the Department of Justice ("DOJ") in an effort to tie the definition to existing trust responsibilities and protect the bill from constitutional challenges.[159]

The DOJ submitted that Native Hawaiians eligible to participate in the interim government should be either those eligible for Hawaiian homesteads under the HHCA, which requires a fifty percent blood quantum, or lineal descendants of those people.[160] Draft III represents a combination of the definition from Draft II and the DOJ proposal. The DOJ additionally opined that once the government is formed then the term "Native Hawaiian" shall have the meaning given such term in the organic governing documents of the Native Hawaiian government.[161] Thus, one option to shelter the bill from future constitutional challenge[162] would be to limit the initial membership to Native Hawaiians of fifty-percent or more blood quantum and then leaving it to them to redefine the qualifications for membership in their organic documents. Ultimately, who is "Native Hawaiian" is a decision best resolved by Native Hawaiians. Nevertheless, in light of the federal government's usual insistence on requiring a minimum blood quantum when approving tribal membership rolls,[163] if a similar bill passes, defining "Native Hawaiian" will

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in Hawai'i. The Court said that "[a]ncestry can be a proxy for race" and that it was that proxy in that particular case. *Id.* at 514.

[159] *Divided Views Mark Hearing on Akaka Bill*, HONOLULU ADVERTISER, Aug. 29, 2000, *available at* http://www.honoluluadvertiser.com/2000/Aug/29/829localnews12.html. ("Jacqueline Agtuca, acting director of the Department of Justice's Office of Tribal Justice, said the bill is more likely to stand up to constitutional challenges if the interim governing body is made up of Native Hawaiians already recognized by Congress as having a trust relationship with the United States.").

[160] *Senate Hearings*, *supra* note 18 (statement of Jacqueline Agtuca, Acting Director, Office of Tribal Justice, United States Dep't of Justice), *available at* http://www.senate.gov/~scia/2000hrgs/hawaiian_0914/agtuca.pdf

[161] *Id.*

[162] The bill does contain a severability clause that would allow the remainder of any future act to continue in force in the event that one section is invalidated. Draft III, § 12.

[163] *See Rice*, 528 U.S. at 526-27 (Breyer, J., concurring). Justice Breyer opined that a definition such as "Hawaiian" "including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian" *id.* at 526, "goes well beyond any reasonable limit." *Id.* at 527. He determined that the definition "is not like any actual membership classification created by any actual tribe." *Id.* Justice Breyer provided the example of the Alaska Native Claims Settlement Act, which defines "Native" as "a person of one-fourth degree or more Alaska Indian" or one "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is regarded as Native by any village or group." *Id.* at 562 (citing 43 U.S.C. § 1602(b)) (ellipses omitted). The latter classification he acknowledged as one "more

undoubtedly continue to be a serious point of contention.

C. United States Policy and Purpose

The next section is an effort to address equal protection violations against Native Hawaiians by including them in current federal policy that all Native Americans have a right to self-governance and a government-to-government relationship with the United States. It also responds to any questions left open after *Rice* regarding Native Hawaiians' political relationship with the federal government. Thus, Section 3 of Drafts II and III has two aims. First, it reiterates that the policy of the United States regarding Native Hawaiians is one based on a political relationship. Second, it expresses that its purpose in enacting this legislation is to create a process for federal recognition of a Native Hawaiian governing body.[164]

The United States policy regarding Native Hawaiians is based on a "political and legal relationship"[165] and on Congress' "authority under the Constitution to enact legislation to address the conditions of Native Hawaiians."[166] This section further states that "the United States has a special trust relationship to promote the welfare of Native Hawaiians."[167] It cites the HHCA, the Admissions Act and "more than 150 other Federal laws addressing the conditions of Native Hawaiians,"[168] as evidence of the exercise of its authority in the Native Hawaiian arena. It further recognizes that Native Hawaiians have "an inherent right to autonomy in their internal affairs; an inherent right to self-determination and self-governance; the right to reorganize a Native Hawaiian government; and the right to become economically self-sufficient."[169] Finally, the bill states that "the United States

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likely to reflect real group membership than any blood quantum requirement." *Id.* He noted several tribal constitutions, some which define their membership as those on a tribal roll, when approved, and their "lineal descendants" or "their children," while others require three-eighths or one-fourth blood. *Id.* at 526-27.

[164] Draft I only expressed the policy, but did not address the federal recognition purpose.

[165] Draft II, § 3(1); Draft III, § 3(a)(1).

[166] Draft II, § 3(3); Draft III, § 3(a)(3).

[167] Draft II, § 3(2); Draft III, § 3(a)(2).

[168] Draft II, § 3(3)(A)-(C); Draft III, § 3(a)(3)(A)-(C).

[169] Draft III, § 3(a)(4)(A)-(D); *see also* Draft II, § 3(4)(A)-(C). Draft III adds the right to economic self-sufficiency. This would be consistent with the Draft Declaration on the Rights of Indigenous Peoples, which recognizes "[i]ndigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their *economic*, social and cultural development." Van Dyke et. al., *supra* note 3, at 637-38 (emphasis added).

shall continue to engage in a process of reconciliation and political relations with the Native Hawaiian people."[170]

The second aim of this section, as added in Draft III, expresses that Congress' purpose is to create "a process for the reorganization of a Native Hawaiian government and for the recognition by the United States of the Native Hawaiian government for purposes of continuing a government-to-government relationship."[171] The decision to push for creation of a Native Hawaiian governing entity and a process for federal recognition of that entity in one piece of legislation was an important step achieved by the Working Groups. They recognized that the days of the Clinton Administration were drawing to a close and with it the window of political opportunity.[172]

D. Creation of Federal Offices and Task Force to Address Native Hawaiian Issues

Sections 4, 5, and 6 of Drafts II and III create federal offices and a task force to address Native Hawaiian issues. Section 4 establishes an office within the Office of the Secretary of the Department of the Interior to "effectuate and coordinate the special trust relationship between the Native Hawaiian people and the United States through the Secretary (of the Interior), and all other Federal agencies,"[173] in the interim between passage of the legislation and when federal recognition is actually extended. Upon recognition, the office would coordinate with the Native Hawaiian Governing Body.[174] Draft II referred to this office as the "Office of Special Trustee for Native Hawaiian Affairs" while Draft III changed the title to the "United States Office for Native Hawaiian Affairs," ("USONHA").[175] Its role, however, remains the same. The significance of this section is that Hawaiian affairs do not become the jurisdiction of the Bureau of Indian Affairs and its plagued history of mismanagement.[176]

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[170] Draft II, § 3(5); Draft III, § 3(a)(5).

[171] Draft III, § 3(b).

[172] Both the Department of Interior and Office of Tribal Justice in the Department of Justice have taken a supportive stance. *See generally* FROM MAUKA TO MAKAI, *supra* note 12; *see also* Pat Omandam, *U.S. Urges Reconciliation Steps*, HONOLULU STAR-BULLETIN, Aug. 23, 2000, *available at* http://www.starbulletin.com/2000/08/23/news/story1.html; Omandam, *Clinton Officials Say They Back Akaka Bill*, *supra* note 134.

[173] Draft II, § 4(a), (b)(1); Draft III, § 4(a), (b)(1).

[174] Draft II, § 4(b)(2); Draft III, § 4(b)(2).

[175] Draft II, § 4(a); Draft III, § 4 (a).

[176] In 1989, a Special Committee on Investigations appointed by the U.S. Senate Select Committee on Indian Affairs issued a report on the BIA's management of tribal lands, summarizing findings from extensive hearings. . . . The Special Committee leveled stinging criticism at the Department of Interior for poor management of oil resources and

Section 5 mandates that the Attorney General shall designate an official within the Department of Justice to assist the USONHA in the implementation and protection of Native Hawaiians rights and upon recognition, to aide the Native Hawaiian Governing Body.[177] Section 6 establishes an interagency task force composed of officials designated by the President from the USONHA, the Executive Office of the President, and "each Federal agency that establishes or implements policies that affect Native Hawaiians or whose actions may significantly or uniquely impact on Native Hawaiian resources, rights, or lands . . . ."[178] The Interior and Justice Departments shall serve as the lead agencies for the Task Force, whose primary responsibilities will be to coordinate and develop policy among the different agencies with oversight on Native Hawaiian issues.[179] The focus of these policies should be determined in consultation with the Native Hawaiian people, and upon recognition of the Native Hawaiian government, with that body.[180] These offices and task forces will provide much needed collaboration at the federal level among agencies responsible for administering federal programs.

E. Creation of a Native Hawaiian Governing Body and Extension of Federal Recognition

The heart of the bill lies in Section 7 of Drafts II and III, which establishes a process for federal recognition. The process includes development of a roll, organization of an interim governing council and Native Hawaiian government, and finally extension of federal recognition.

The first step towards federal recognition is the preparation of a roll for the purpose of organizing a Native Hawaiian Interim Governing Council. The roll shall include adult "Native Hawaiians," as defined in Section 2, who wish to become citizens of a Native Hawaiian government.[181] A Commission consisting of nine Native Hawaiian members with expertise in certification of

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other minerals on reservations. It concluded that 'in every area it touches, the BIA is plagued by mismanagement.'"

Wood, *supra* note 141, at 1479 n.33 (citations omitted).

[177] Draft II, § 5; Draft III, § 5.

[178] Draft II, § 6(a), (b)(1)-(3); Draft III, § 6(a), (b)(1)-(3).

[179] Draft II, § 6(c), (e); Draft III, § 6(c), (e).

[180] Draft II, § 6(e)(2); Draft III, § 6(e)(2).

[181] Draft II, § 7(a)(1); Draft III, § 7(a)(1). The DOJ's testimony indicates that consent to the process is important. Only those Native Hawaiians who are eligible under § 2(7)(A) and who consent should be listed on the roll. *Senate Hearings*, *supra* note 18, (Statement of Jacqueline Agtuca, Acting Director, Office of Tribal Justice, U.S. Dep't of Justice) (the roll should include the names of "the adult members of the Native Hawaiian community who *wish* to become members of a Native Hawaiian governing body."). Thus, the full-independence advocates cannot be compelled to enroll.

Native Hawaiian ancestry shall be established for the purpose of certifying the roll.[182] This Commission is an important component because experts in the field are better equipped to certify ancestry than the Secretary. Additionally, the more Native Hawaiian involvement in the process, the better the process will reflect true reconciliation.

Draft II and Draft III differ significantly at this point as to the process for publication of the roll. Draft II required submission to the Secretary to "certify that the roll is consistent with applicable Federal law by publishing the roll in the Federal Register."[183] Draft III departs from Secretary oversight. This draft places the responsibility of certification and publication with the Commission, rather than the Secretary.[184] Draft III also removed a lengthy process of petitioning the Secretary for removal and additions of names to the roll, conducting hearings and providing for judicial review in the United States District Court for the District of Hawai'i.[185] This change likely resulted from public testimony desiring to minimize the role of the Secretary in the process in an effort to increase native self-determination.[186] The effect of publication shall serve as the basis for eligibility of adult members to participate in all referenda and elections associated with the organization of a Native Hawaiian Interim Governing council and the Native Hawaiian government.[187]

Upon publication of the roll, the right of the Native Hawaiian people to organize for their common welfare and to adopt appropriate organic governing documents shall be recognized by the United States.[188] The first step in that process is for the adult members listed on the roll to develop criteria for candidates to serve on the Native Hawaiian Interim Governing Council

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[182] Draft II, § 7(a)(2)(A); Draft III, § 7(a)(2)(A)(i)-(ii). Draft II did not require that the Commissioners be Native Hawaiian, however Draft III states that all Commissioners shall be Native Hawaiian as defined § 2(7)(A). Draft III, § 7(a)(2)(A)(ii).

[183] Draft II, § 7(a)(4).

[184] Draft III, § 7(a)(2)(B).

[185] Draft II, § 7(a)(5)-(9).

[186] Native Hawaiians who attended the reconciliation hearings conducted by the DOI and DOJ expressed a "desire to control their own affairs." Omandam, *U.S. Urges Reconciliation Steps*, *supra* note 172 (quoting John Berry, assistant secretary for policy, management and budget in the Interior Department under Clinton). Similar sentiments were expressed at the joint hearings by the Senate Committee on Indian Affairs and the House Committee on Resources, held in Honolulu, Hawai'i. *See generally*, Curtis Lum, *Hawaiian Community Has Mixed Reaction to Nation-within-a-nation Proposal*, HONOLULU ADVERTISER, Jul. 6, 2000, *available at* http://www.honoluluadvertiser.com/2000/Jul/06/localnews12.html. As an observer at these hearings, the author learned that Native Hawaiians were wary of excessive federal control over the process.

[187] Draft III, § 7(a)(4).

[188] This language does not appear in Draft II, but was added in Draft III, § 7(b).

("NHIGC" or "Council").[189] Upon the request of Native Hawaiians, the USONHA may assist in holding an election for the NHIGC.[190]

The Council has three goals to achieve. First, it must hold a referendum regarding the proposed elements of the organic governing documents; proposed powers, authorities, privileges and immunities of the Native Hawaiian government ("NHG"); and the proposed civil rights of the members of the NHG and all subject to its authority.[191] Second, the Council must develop the organic governing documents for the NHG.[192] Third, it must hold an election for the purpose of ratifying the proposed organic documents.[193] Upon the request of the Council, the USONHA may assist in conducting the election.[194] The NHIGC's authority terminates once the duly elected officers of the NHG take office.[195]

The NHG shall submit the organic documents to the Secretary, who shall certify within ninety days that the documents meet the proscribed requirements.[196] Draft III generally minimizes the role of the Secretary in the process to establish a self-governing entity. Draft III, however, provides that "[i]f the Secretary determines that the organic governing documents . . . are not consistent with applicable Federal law, the Secretary shall resubmit the . . .

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[189] Draft III, § 7(c)(1). Draft II, § 7(b)(1)(A) required the Secretary to call a general meeting, or multiple meetings if necessary, of Native Hawaiians on the roll to nominate candidates for the Council. This lengthy process and added involvement of the Secretary does not appear in Draft III. The process for developing criteria is left to Native Hawaiians.

[190] Draft III, § 7(c)(2). This differs from Draft II, § 7(b)(1)(B) which required that the Secretary be involved in the election. Funding for the election may come from the USONHA and the Administration for Native Americans with the U.S. Department of Health and Human Services. *Id.* § 7(c)(3)(B).

[191] *Id.* § 7(c)(3)(C)(i)(I)-(III).

[192] *Id.* § 7(c)(3)(C)(ii).

[193] *Id.* § 7(c)(3)(D)(i).

[194] *Id.* § 7(c)(3)(D)(ii).

[195] *Id.* § 7(c)(4).

[196] *Id.* § 7(d)(1)(A), (C). The Secretary shall certify that the documents:

(i) were adopted by a majority vote of the adult members listed on the roll . . . ;

(ii) are consistent with applicable Federal law and the special trust relationship . . . ;

(iii) provide for the exercise of those governmental authorities that are recognized by the United States as the powers and authorities that are exercised by other governments representing the indigenous, native people of the United States;

(iv) provide for the protection of civil rights of the citizens of the [NHG] and all persons subject to the authority of the [NHG] . . . ;

(v) provide for the sale, disposition, lease or encumbrance of lands, interests in lands, or other assets of the NHG with the consent of the NHG;

(vi) establish criteria for citizenship in the [NHG]; and

(vii) provide authority for the [NHG] to negotiate with Federal, State, and local governments, and other entities.

Id. § 7(d)(1)(B)(i)-(vii).

documents to the . . . Native Hawaiian government . . . with a justification for each of the . . . findings as to why the provisions are not consistent with such law."[197] The NHG would then have an opportunity to amend the documents to comply with federal law.[198] This scheme demonstrates that ultimately the Secretary retains the power to pass judgment on the documents. Upon the Secretary's certification, federal recognition shall be extended to the NHG as the representative governing body of the Native Hawaiian people.[199] Funding for the recognition process will come from Congress.[200]

Section 7 of Draft II provided for the Secretary, upon petition by the NHG, to issue a charter of incorporation to the NHG.[201] Under that provision, the NHG would have the same status under Federal law when acting in its corporate capacity as Indian tribes that have been issued such a charter under the Indian Reauthorization Act.[202] The charter would authorize the NHG to "exercise the power to purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property, . . . including the power to purchase lands and issue an exchange of interests in corporate property, and such further powers as may be incidental to conduct corporate business."[203] The charter would provide a means to address the Native Hawaiians need for economic development. Draft III makes no mention of incorporation.

F. Reaffirmation of Delegation of Federal Authority to the State of Hawai'i and Negotiations for the Transfer of Lands, Resources and Assets

Section 9 reaffirms "[t]he delegation by the United States of authority to the State of Hawai'i to address the conditions of Native Hawaiians" under the Admission Act.[204] This section also authorizes the United States, upon recognition of the NHG, to enter into an agreement with the NHG and the State of Hawai'i "regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use under existing law."[205] Before a fair settlement could be reached, a full inventory of both the Ceded Lands and the

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[197] *Id.* § 7(d)(1)(D)(i).

[198] *Id.* § 7(d)(1)(D)(ii).

[199] *Id.* § 7(d)(2)(A).

[200] *Id.* § 8. The Congressional Budget Office estimates implementing the bill would cost $5 million over the 2001-2003 period. S. REP. NO. 106-424, at 60 (2000).

[201] *Id.* § 7(e)(1).

[202] *Id.* This section refers to the Indian Reauthorization Act, 25 U.S.C. 477, § 17.

[203] Draft II, § 7(e)(2).

[204] Draft III, § 9(a).

[205] Draft III, § 9(b).

Hawaiian Home Lands trusts and the assets currently held by OHA would be required.[206]

G. Disclaimer: International Claims Not Precluded

As Native Hawaiians pursue international avenues for redressing the United States' violations of international law, the community voiced concerns that the Akaka Bill would preclude their efforts.[207] Draft I did not address these valid concerns, however, Draft II added that, "[n]othing in this Act is intended to serve as a settlement of any claims against the United States."[208] Draft III adds significant language that nothing in the Act is intended to "affect the rights of the Native Hawaiian people under international law."[209] This addition is in direct response to the testimony of groups currently pursuing Native Hawaiian initiatives for full independence under international law.[210]

IV. OPPOSING VIEWPOINTS ON FEDERAL RECOGNITION OF A NATIVE HAWAIIAN GOVERNMENT

The introduction of the Akaka Bill has spawned extensive public reaction. Proponents of the bill argue that it is necessary to protect existing federally-funded programs benefiting Native Hawaiians from Fourteenth Amendment challenges that they are race-based and that federal recognition of a Native Hawaiian governing body is consistent with federal policy to encourage government-to-government relationships with Native Americans. Native Hawaiian advocates for full independence through international avenues oppose the legislation. A vocal minority of mostly non-native opponents allege that the bill amounts to the equivalent of "apartheid" and "racial and ethnic balkanization." This section presents these three main viewpoints and evaluates their arguments.

A. Arguments Supporting Federal Recognition

Supporters of the Akaka Bill overwhelmingly cite the need to protect existing programs benefiting Native Hawaiians as the primary reason to pass the legislation.[211] They assert that the *Rice* Court's rejection of the Hawaiian-

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[206] OHA's cash and investments as of fiscal year 1999 totaled over $360 million. OFFICE OF HAWAIIAN AFFAIRS FISCAL ANNUAL REPORT 7 (1999).

[207] *See infra* section IV.B.

[208] Draft II, § 10.

[209] Draft III, § 10.

[210] *See infra* section IV.B.

[211] Roth, *Native Hawaiian Bill Ready in Congress*, *supra* note 5.

only voting scheme for OHA will be used as precedent for invalidating all laws benefiting only Native Hawaiians.[212] This section analyzes the current attack on state-created Native Hawaiian rights and the potential for challenges to federal rights and programs. Additionally, this section analyzes an equal protection argument for inclusion of Native Hawaiians in the federal policy for self-governance afforded other native Americans.

1. State-created Native Hawaiian rights under attack

After *Rice*, state-created rights benefiting only Native Hawaiians rest on unstable ground. These rights have as their source history and federal law. In particular, the Admission Act created the State of Hawai'i in 1959 and authorized subsequent constitutional provisions and laws to further the management of the public trust it created.[213] Pursuant to Section 5(f) of this Act, the state was instructed that it must hold the lands granted to it by the United States and all income generated from those lands "as a public trust"[214] for five purposes, including "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act."[215] The act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one of the forgoing purposes in such manner as the constitution and laws of said State may provide."[216] Thus, since 1959 the State has created constitutional and statutory laws to manage the lands and moneys generated therefrom. The state did not begin to address bettering the conditions of native Hawaiians beyond the Hawaiian Home Lands program until 1978 when it created, through a constitutional convention and by a popular vote, Article XII of the state constitution.[217]

Under Article XII, Section 4 the State declares that the Ceded Lands "shall be held by the State as a public trust for native Hawaiians and the general public."[218] Article XII, Section 5 established OHA "to hold title to all the real and personal property . . . [to] be held in trust for native Hawaiians and Hawaiians."[219] The board of trustees were to be Native Hawaiian and elected by Native Hawaiians.[220] Much has changed since 1978 as state-created rights of Native Hawaiians are under attack.

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[212] *Id.*
[213] Admission Act, *supra* note 86.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] MacKenzie, *Historical Background*, *supra* note 37, at 19.
[218] HAW. CONST., art. XII, § 4.
[219] HAW. CONST., art. XII, § 5.
[220] HAW. CONST., art. XII, § 5.

The *Rice* decision invalidating the state's Hawaiian-only electorate requirement under the Fifteenth Amendment led to the subsequent case of *Arakaki v. State of Hawai'i*,[221] which rejected the Hawaiian-only trustee qualification for the state agency as impermissive racial discrimination under the Fourteenth Amendment.[222] Additionally, the state Attorney General petitioned for the removal of the sitting trustees citing that they were illegally elected.[223] Rather than be removed, the trustees resigned[224] and the Governor appointed a new interim board, including the first non-native interim trustee.[225]

In addition, two consolidated cases, filed in October 2000, make further Fourteenth Amendment challenges to Native Hawaiian rights under state law. *Carroll v. Nakatani*[226] questions the validity of the disbursement of twenty-percent of revenues from Ceded Lands to OHA for the benefit of only native Hawaiians.[227] *Barrett v. State of Hawai'i*[228] attacks the constitutionality of the entirety of Article XII.[229] Specifically, the plaintiff challenges the creation of

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[221] Arakaki v. State of Hawai'i , Civ. No. 00-00514 HG-BMK (D. Haw. Sept. 19, 2000) (slip op., on file with author).

[222] Yasmin Anwar, *OHA board opened to all races; judge's ruling widely expected*, HONOLULU ADVERTISER, Sept. 20, 2000, *available at* http://www.honoluluadvertiser.com/2000/Sep/20/920localnews1.html.

[223] Pat Omandam, *Some OHA trustees wavering on election plan*, HONOLULU STAR-BULLETIN, Sept. 6, 2000, *available at* http://www.starbulletin.com/2000/09/06/news/story/2.html.

[224] Pat Omandam, *OHA trustees resign*, HONOLULU STAR-BULLETIN, Sept. 8, 2000, *available at* http://www.starbulletin.com/2000/09/08/news/story1.html.

[225] Governor Cayetano named Charles Ota, a local Japanese land developer to the Maui island trustee seat. *OHA trustees-elect*, KA WAI OLA O OHA (Office of Hawaiian Affairs, Honolulu, HI) Dec. 2000, at 1. Ota sought election in the November race and beat out his Hawaiian predecessor and remains as the only non-Hawaiian on the board. David Waite & Tanya Bricking, *Ex-OHA trustees headed back to office*, HONOLULU ADVERTISER, Nov. 8, 2000, *available at* http://www.honoluluadvertiser.com/118ohamain.html. Five of the nine former OHA trustees who chose to resign their seats rather than face being ousted were re-elected. *Id.*

[226] Carroll v. Nakatani, Civ. No. 00-00641 (D. Haw. filed Oct. 2, 2000).

[227] The plaintiff's complaint states that Haw. Rev. Stat. § 10-13.5 (1980), which provides for OHA to receive twenty percent of income generated from Ceded Lands, "operates to invidiously discriminate against [him] solely on the basis of race and deprives him of the equal protection of the laws in violation of the Fourteenth Amendment." Plaintiff's Compl. at 7, 10, Carroll v. Nakatani, Civ. No. 00-00641 (D. Haw. filed Oct. 2, 2000) (on file with author); Yasmin Anwar, *Two Suits Now Claim OHA Discriminatory*, HONOLULU ADVERTISER, Oct. 3, 2000, *available at* http://www.honoluluadvertiser.com/103localnews15.html. There was no doubt that the timing of the *Carroll* case was politically motivated since the plaintiff, John Carroll, timed filing the suit with congressional action on the Akaka Bill and five weeks prior to his Republican challenge to incumbent Democrat Senator Akaka, who introduced the bill for federal recognition, which Carroll publicly opposed. *Id.*

[228] Barrett v. State of Hawai'i, Civ. No. 00-00645 (D. Haw., filed Oct. 3, 2000).

[229] Plaintiff's Compl. at 2, Barrett v. State of Hawai'i, Civ. No. 00-00645 (D. Haw. filed Oct. 3, 2000) (on file with author) [hereinafter *Barrett* Complaint]; Yasmin Anwar, Rice *attorney*

OHA,[230] the Hawaiian Home Lands,[231] and Article XII, Section 7 of the Hawai'i Constitution, protecting Native Hawaiian customary and traditional rights for subsistence, cultural and religious purposes.[232] With *Rice* and

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goes after law creating OHA, HONOLULU ADVERTISER, Oct. 2, 2000, *available at* http://www.honoluluadvertiser.com/102localnews12.html. The *Barrett* case was filed by Harold "Freddy" Rice's attorney, John Goemans. *Id.* This move was forecasted soon after *Rice* was decided, when Goemans declared that potential cases included Hawaiian homesteading and native gathering rights. Christine Donnelly, *Lawyer: Rice's Win Will Mean More Suits*, HONOLULU STAR-BULLETIN, Feb. 24, 2000, *available at* http://www.starbulletin.com/2000/02/24/news/story1.html. OHA, a homesteaders association, an organization representing Native Hawaiian cultural practitioners and four individual practitioners all successfully intervened as defendants in *Barrett*. *See Homesteaders' move challenges* Barrett *suit*, HONOLULU ADVERTISER, Dec. 22, 2000, *available at* http://www.honoluluadvertiser.com/1222localnews25.html; Pat Omandam, *Lawsuit threatens Hawaiian agencies' very existence*, HONOLULU STAR-BULLETIN, Jan. 13, 2001, *available at* http://www.starbulletin.com/2001/01/13/news/story1.html; Motion of 'Ilio'ulaokalani to Intervene as Defendants in *Barrett v. State of Hawai'i*, Civ. No. 00-00645 (D. Haw. filed Nov. 2, 2000) (on file with author).

[230] *See supra* notes 94-97 and accompanying text. A successful challenge to OHA would invalidate the last remaining Hawaiian-only element of the agency—the Hawaiian-only beneficiary requirement.

[231] *See supra* notes 79-88 and accompanying text discussing the creation of Hawaiian Home Lands. The *Barrett* case challenges Article XII, Sections 1 and 2. Section 1 adopted the HHCA as a law of the State, subject to the amendment or repeal by the legislature only with consent of the United States. HAW. CONST., art. XII, § 1. Section 2 accepts the requirement of the Admission Act to administer the HHCA as a compact. HAW. CONST., art. XII, § 2. It further states that "[t]he State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." *Id.* Succeeding on plaintiff's claim of constitutionality of the Hawaiian Home Lands would require the reversal of the Hawai'i Supreme Court's decision in *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327, 640 P. 2d 1161 (1982), which held there to be a trust obligation imposed on the State by the Hawai'i Constitution. *Id.* at 342, 640 P. 2d at 1171. It would also overturn *Naliielua v. State of Hawaii*, 795 F. Supp. 1009 (1990), which held that the Hawaiian Homes Commission Act was not unconstitutional under the Fourteenth Amendment. *Id.* at 1013. Instead, Federal District Judge David Ezra applied principles of federal law applicable to other Native Americans. "This court finds applicable the clear body of law surrounding preference given to American Indians and finds that the United States' commitment to the native people of this state, demonstrated through the Admission Act and the Hawaiian Homes Commission Act, 1920, does not create a suspect classification which offends the constitution." *Id.* at 1013. Judge Ezra will also be hearing the arguments in *Carroll* and *Barrett* at the federal district court level.

[232] *Barrett* Complaint, *supra* note 229, at 4-5. Although the *Barrett* Complaint only appears concerned with Native Hawaiian gathering rights on private property, *see id.* at 10, gathering rights are only one aspect of a broader classification of traditional and customary rights recognized by the State. The State Constitution states that "[t]he State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such

Arakaki as precedent, state-created, state-administered and state-enforced rights[233] of Native Hawaiians are, at best, uncertain. Proponents hope, however, that federal recognition would shift the courts' analysis away from the strict scrutiny equal protection analysis that affirmative action programs have fallen victim to in recent years after *City of Richmond v. Croson*[234] and *Adarand Constructors, Inc. v. Pena*[235] and focus on the unique nature of native political status. Unlike affirmative action programs, which are now reviewed under strict scrutiny, the Fourteenth Amendment analysis for federally recognized tribes is reviewed under a rational basis test under *Morton v.*

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rights." HAW. CONST., art. XII, § 7. The term "ahupua'a" refers to an economically self-sufficient land division and political unit that is often pie shaped running from the mountain tops down ridges, spreading out at the base along the sea shore. MacKenzie, *Historical Background*, *supra* note 37, at 3. Within the boundaries of the ahupua'a, the people had liberal rights to use the resources. *Id.* at 4. The Hawai'i Supreme Court has "consistently recognized that 'the reasonable exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7." State v. Hanapi, 89 Haw. 177, 184, 970 P.2d 485, 492 (1998) (citing Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n, 79 Haw. 425, 442, 903 P. 2d 1246, 1263 (1995), *cert. denied*, 116 S. Ct. 1559 (1996) [hereinafter *PASH*]; Kalipi v. Hawaiian Trust Co., Ltd., 66 Haw. 1, 656 P.2d 745 (1982); Pele Defense Fund v. Paty, 73 Haw. 578, 620, 837 P.2d 1247, 1272 (1992)). *Barrett* essentially challenges the Hawai'i Supreme Court's ruling that "the western concept of exclusivity is not universally applicable in Hawai'i." *PASH*, 79 Haw. at 447, 903 P.2d at 1268. The *PASH* court held, that "the issuance of a Hawaiian land patent confirmed a *limited property interest* as compared with typical land patents governed by western concepts of property." *Id.* (citing United States v. Winans, 198 U.S. 371, 384 (1905) (observing that the United States Congress was competent "to secure to the Indians such a remnant of the great rights they possessed.")). See D. Kapua Sproat, *Backlash Against* PASH: *Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998), for a summary of Native Hawaiian traditional and customary rights, their origins and an analysis of the landmark *PASH* case. Interestingly, the *Barrett* case comes on the heels of a Hawai'i Supreme Court decision reaffirming the state's duty to protect the reasonable exercise of traditional and customary rights of Native Hawaiians. *See* Ka Pa'akai o Ka 'Aina v. State of Hawai'i, Land Use Commision, 7 P. 3d 1068 (2000); *see also* Ken Kobayashi and Hugh Clark, *Native land rights clarified*, HONOLULU ADVERTISER, Sept. 12, 2000, *available at* http://www.honoluluadvertiser.com/912localnews13.html. Thus, the plaintiff in *Barrett* is asking the federal court to rule that a state-recognized property right reserved in land patents issued by the Kingdom of Hawai'i is unconstitutional under the U.S. Constitution.

[233] Although the state created OHA, the federal government created Hawaiian Home Lands and required the state to administer it. Native Hawaiian traditional and customary rights are not state-created in that these rights pre-existed United States and state law, but have been codified in state law. *See generally*, Paul Lucas, *Access Rights*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 211-22 (Melody MacKenzie ed., 1991); Paul Lucas, *Gathering Rights*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 223-28 (Melody MacKenzie ed., 1991).

[234] 488 U.S. 469 (1989) (invalidating a city's quota requirement to award at least thirty percent of the dollar amount of each contract to one or more minority businesses).

[235] 515 U.S. 200 (1995) (striking down a federal program designed to provide highway contracts to disadvantaged business enterprises).

Mancari.[236] Rational basis review steers the scrutiny of the court away from race in preferential programs for Native Americans and focuses on political membership in a federally-recognized tribe.[237] It is still unclear whether any Hawaiian-only aspect of OHA will survive after *Rice* because federal recognition will not automatically cure state-created programs. Nevertheless, upon extension of federal recognition, the role that OHA serves would be incorporated into the activities of the new Native Hawaiian government and all assets held by OHA would be transferred to the NHG, thus allowing for the dissolution of OHA in its current form.[238] Similarly, negotiations between the United States, the State of Hawai'i and the NHG would undoubtedly involve Hawaiian Home Lands and either return administration of the program to the federal government or give control to the NHG. Federal recognition could also strengthen the argument for a trust responsibility with the federal government to protect traditional and customary rights to access and gather natural resources. But, without federal recognition, all state programs are open to further attack. Native Hawaiian rights proponents fear the same fate for federally-funded programs.

2. Federal laws benefiting Native Hawaiians will be challenged next.

Undoubtedly, federal laws benefiting only Native Hawaiians will be challenged next as attorney, John Goemans,[239] pledged to use the favorable *Rice* opinion to dismantle all government programs, state and federal, for native Hawaiians.[240] Goemans has said that potential cases could include fighting housing grants and health and education programs.[241] Congress has enacted over 180 laws relating to Native Hawaiians.[242] Some of the legislation has grouped Native Hawaiians with American Indians and Alaska Natives and other legislation has been passed solely to address the needs of Native

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[236] 417 U.S. 535 (1974) (upholding a BIA employee preference for tribal Indians).

[237] Van Dyke, *The Political Status of the Native Hawaiian People*, *supra* note 50, at 113-14.

[238] Congressman Abercrombie forecasted that the bill would replace what the Supreme Court struck down in *Rice*. 146 CONG. REC. H8150 (daily ed. Sept. 26, 2000) (statement of Rep. Abercrombie). "[W]e need to replace the Office of Hawaiian Affairs with a self-governing entity that can sustain an election process that is restricted to only the Native Hawaiian population." *Id.* at H8151.

[239] *See supra* note 229 & *infra* note 288.

[240] Donnelly, *Lawyer: Rice's Win Will Mean More Suits*, *supra* note 229.

[241] *Id.* In recent years federal monies have totaled over $440 million for Native Hawaiian programs. Pat Omandam, *Hawaiian funding tops $440 million*, HONOLULU STAR-BULLETIN, Mar. 20, 2000, *available at* http://www.starbulletin.com/2000/03/20/special/story3.html. (includes descriptions of legislation and appropriation amounts).

[242] FROM MAUKA TO MAKAI, *supra* note 12, at 56. For a summary of the legislation, see *id.* at 56-57.

Hawaiians.[243] "Some of these legislative actions represent a recognition by Congress of the United States' special responsibility to protect Native Hawaiians' interests, while others make certain Federal programs for Native Americans available to Native Hawaiians."[244] In the Native Hawaiian Health Care Act, Congress declared that "[i]n furtherance of the trust responsibility for the betterment of the conditions of Native Hawaiians, the United States has established a program for the provision of the comprehensive health promotion and disease prevention services to maintain and improve the health status of the Hawaiian people."[245] Other laws that include Native Hawaiians in their scope do so "because they are an indigenous people with whom the United States has recognized a special relationship and because Native Hawaiians experience many of the same challenges that are common to all

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[243] *Id.* at 56. Legislation addressing the special needs of Native Hawaiians number over 100 since 1959 and include:

> the Native Hawaiian Study Commission Act, Pub. L. No. 98-139, 97 Stat. 871 (1983) (establishing the Native Hawaiians Study Commission to study the culture, needs and concerns of Native Hawaiians), Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (authorizing Health and Human Services to contract with organizations that provide drug abuse, prevention, education, treatment and rehabilitation services to Native Hawaiians), Native Hawaiian Health Care Act of 1988, Pub. L. No. 100-579, 102 Stat. 4181 (authorizing programs to improve the health status of Native Hawaiians and provide grants to develop comprehensive healthcare plan to improve Native Hawaiian health), Native Hawaiian Education Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (recognizing that Native Hawaiians are indigenous people and authorizing grants to assist Native Hawaiians in achieving national education goals), and the Assets for Independence Act, Pub. L. No. 105-285, 112 Stat. 2702 (1998) (authorizing Native Hawaiian organizations to conduct demonstration projects to evaluate the effects of savings, micro-enterprise and home ownership on families and communities).

Id. at 57.

[244] *Id.* at 56. Examples of Native American programs being extended to Native Hawaiians include:

> The Native American Programs Act of 1974, Pub. L. No. 93-644 § 801, 88 Stat. 2291, 2324 (1975) (promoting Native Hawaiian, American Indian and Alaska Native economic and social self-sufficiency through financial assistance to agencies serving these groups); Joint Resolution on American Indian Religious Freedom, Pub. L. No. 95-341, 92 Stat. 469 (1978) (recognizing the rights of American Indians, Eskimos, Aleuts and Native Hawaiians to practice their traditional religions); National Science Foundation University Infrastructure Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (reserving a percentage of appropriations for institutions of higher learning that serve Native Americans, including Native Hawaiians); and the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (1998).

Id. at 57.

[245] *Id.* (citing 42 U.S.C. § 11701).

native peoples of the United States."[246] Akaka Bill proponents[247] seek to protect all federal legislation benefiting Native Hawaiians from constitutional attack and argue that federal recognition is needed to continue programs designed to address socio-economic conditions.[248] These laws, proponents assert, should be reviewed under rational basis. Speaking from their experience, Alaska Native representatives describe federal recognition as a legal tool to protect a way of life.[249]

3. Native Hawaiians are denied equal protection of the laws affording other Native Americans a right to self-governance

Yet another argument for federal recognition is based on an equal protection analysis. Essentially, the argument is that Native Hawaiians are native Americans and all native groups are similarly situated and thus, Native Hawaiians should receive equal protection of the laws benefiting other native peoples in the United States like those benefiting American Indians and Alaska Natives.[250] Therefore, in order to treat Native Hawaiians equal to other American natives, the United States must afford Native Hawaiians the same privileges and immunities extended through federal recognition as they do to other native peoples.[251] This argument was buttressed by a 1991 report

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[246] *Id.* at 57.

[247] The Akaka Bill has received support from the State of Hawai'i legislature, Alaska Federation of Natives, National Congress of American Indians and the Japanese American Citizens League. *Id.* at 41-53 (includes resolutions of support from each of these groups).

[248] Native Hawaiians face alarming housing, health, and educational statistics. For a summary, see, S. REP. NO. 106-424, *supra* note 200, at 34-39 (2000); *see also*, FROM MAUKA TO MAKAI, *supra* note 12, at 46-49 (citing OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK 1998 (Mark Eshima, ed., 1998). The U.S. Department of Housing and Urban Development reported in 1995 that Native Hawaiians experience the highest percentage of housing problems in the nation. S. REP. NO. 106-424, *supra* note 200, at 34-35. Overall Native Hawaiians have a death rate that is thirty-four percent higher than the death rate for the United States. *Id.* at 36. In 1996, of all low birth weight babies born to single mothers in the State of Hawai'i, forty-four percent were Native Hawaiians. *Id.* at 38. Native Hawaiians are underrepresented in gifted and talented programs and in institutions of higher education, while being overrepresented in special education programs. *Id.* at 39.

[249] Pat Omandam, *Alaska Natives Praise Federal Recognition*, HONOLULU STAR-BULLETIN, Aug. 29, 2000, *available at* http://www.starbulletin.com/2000/08/29/news/story2.html.

[250] Trask, *A Native Hawaiian Perspective*, *supra* note 13, at 84-85.

[251] *Id.* Trask asserts that Native Hawaiians are left out of the federal policy on native self-determination, which extends a right to self-governance that Native Hawaiians have been denied. *Id.* at 85. Another example is that Hawaiian children do not have the same protection as Alaska natives and American Indians regarding child protective custody. Pat Omandam, *Trask: Hawaiian kids would benefit from recognition bill*, HONOLULU STAR-BULLETIN, Aug. 31, 2000, *available at* http://www.starbulletin.com/2000/08/31/news/story3.html. In order to lessen cultural impact, a federal law requires indigenous children who are removed from their

prepared by the Hawai'i Advisory Committee to the United States Civil Rights Commission, which found that:

> [u]nlike other Native Americans, Hawaiians have never received the privileges of a political relationship with the United States. Yet Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for Federal recognition.
>
> The lack of formal recognition of Native Hawaiians by the Federal Government has resulted in their inability to secure control of lands and natural resources, develop self-governance mechanisms, enjoy eligibility for Federal programs designed to assist Native Americans and other protected groups, and the denial of valuable legal rights to sue for discrimination. *This constitutes disparate treatment and must be remedied without delay.*[252]

As a matter of equal protection of similarly situated native groups, there is a compelling case for federal recognition of Native Hawaiians on par with American Indians and Alaska Natives.[253]

B. Native Hawaiian Independence Advocates Oppose Federal Recognition

Native Hawaiian sovereignty groups advocating for full-independence[254] strongly oppose federal recognition because they interpret it as an impediment to achieving independent status, which they seek under international law.[255] They reject being classified as "American Indians," "'wards' 'in a state of pupilage,'" and being a " 'domestic dependent nation' 'subject to the plenary

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families be placed with host families of the same tribe, while Native Hawaiian children are placed with non-Hawaiian families. *Id.*

[252] HAWAII ADVISORY COMMITTEE TO THE UNITED STATES CIVIL RIGHTS COMMISSION, *supra* note 2, at 43-44 (1991) (emphasis added). Unfortunately, investigations of the United States Civil Rights Commission are only advisory.

[253] *Id.* at 44. Alaska has a similar history as Hawai'i in that the native peoples of Alaska had recognized but unresolved land claims throughout its territorial period and upon statehood. *See* Marilyn J. Ward Ford & Robert Rude, *ANSCA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 TOURO L. REV. 479, 480 (1999). Alaska Natives, comprising different communities both ethnically and non-ethnically Indian aboriginal groups, claimed aboriginal title to virtually all of the new state. *Id.* at 482-86. Wisely, then Secretary of the Interior Stewart Udall, imposed a moratorium on the transfer of title to the State until the native claims were resolved. *Id.* at 482-83. But it was the discovery of oil and desire to construct the Trans-Alaska Pipeline that was the true impetus for legislative resolution of the native claims. *Id.* at 485. The Alaska Native Claims Settlement Act reserved 40 million acres and $962.5 million in exchange for the extinguishment of all land claims. *Id.* at 486.

[254] *See supra* note 9.

[255] *See* Pat Omandam, *Clinton Officials Say They Back Akaka Bill*, *supra* note 134 (discussing concerns of full-independence advocates noting that they are "fearful of permanent wardship").

power of Congress.'"[256] Two avenues for international redress are being pursued by Native Hawaiians. One approach seeks re-enlistment on the United Nations' List of Non-Self-Governing Territories with a subsequent process of de-colonization. Another approach seeks a binding arbitration from the Permanent Court of Arbitration at the Hague. Both approaches deserve discussion.

Some sovereignty groups assert that the Akaka Bill violates international law regarding indigenous peoples[257] because the Native Hawaiian people are not afforded a choice to freely determine their relationship with the United States.[258] In 1946, Hawai'i was placed on the List of Non-Self-Governing Territories based on the illegal overthrow, violation of international treaties and the non-consensual annexation in 1898.[259] The United States, under the United Nations (UN) Charter, had a "sacred trust" relationship to the UN as administering authority to promote de-colonization through an exercise of true self-determination.[260] Under UN General Assembly Resolutions 1514 (1960) and 2200 (1966), "[a]ll peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development."[261] To that end, three options exist, which Native Hawaiians should have been offered under international law to effectuate their right to self-determination: independence, free association and integration.[262] The primary goal for providing these options

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[256] *Federal Hearings on Reconciliation: Hearing Before the Dept. of Interior and Dept. of Justice*, (Dec. 10-11, 1999), *available at* http://www.doi.gov/nativehawaiians. [hereinafter *Federal Hearings on Reconciliation*] (statement of Kekuni Blaisdell, Kanaka Maoli Tribunal Komike).

[257] *See* Van Dyke et. al., *supra* note 3, at 632-40 (detailing international law principles governing the rights of indigenous peoples to self-determination and self-governance, including the ILO Convention No. 169 and the Draft Declaration on the Rights of Indigenous Peoples).

[258] *See* Lum, *supra* note 186 (quoting Kekuni Blaisdell, total independence advocate). "The legislation sets the form of sovereignty, and that's why it violates our inherent sovereignty and right to self-determination. Sovereignty means that we decide, instead of what Akaka has decided." *Id.*

[259] *Federal Hearings on Reconciliation*, *supra* note 256, Exhibit A (statement of Kekuni Blaisdell, Kanaka Maoli Tribunal Komike).

[260] *Id.* at 3.

[261] *Id.* at 2.

[262] *Id.* at 3; "General Assembly Resolution 1514 confirmed the practice establishing the norm of independent statehood for colonial territories .... Under the companion Resolution 1541 and related international practice, self-determination is also considered implemented for a colonial territory through its association or integration with an independent state ...." James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 333 (1994). The most pervasive perspective regarding providing all three options (independence, free association and integration) is "that if the choice adopted is not one of the three options endorsed by the U.N. General Assembly in Resolution 1541, the people of the ... [territory] remain in a nonself-

is that "the result [of a vote] is the outcome of the freely expressed wishes of the people of the territory concerned."[263] The United States circumvented its international duties under UN Charter, Chapter XI, Article 73 in 1959 when it mandated a plebiscite vote absent international supervision, which only afforded two options—immediate statehood or remaining a territory. [264] All United States citizens who resided in the Islands for at least one year were permitted to vote.[265] International practice, however, had "proscribed settler participation in decolonization plebiscites, where settler participation could potentially nullify the indigenous vote."[266] The United States misinformed the UN that the people of Alaska and Hawai'i had attained [a] full measure of self-government as admitted states.[267] Hawai'i was subsequently removed from the List.[268] Native Hawaiians continue to pursue the long process to be re-enlisted.[269]

Other groups advocating for full independence assert that the Kingdom still exists and that Kingdom law, rather than United States law, applies in Hawai'i.[270] Their arguments have fallen on deaf ears in American courts, so they took their claim to the Permanent Court of Arbitration, a respected international body, in the Netherlands.[271] The plaintiff, Lance Larsen, claiming to be a citizen of the Kingdom of Hawai'i, sought injunctive relief from the United States District Court of Hawai'i against the United States and the Kingdom for violating their 1849 Treaty of Commerce, Friendship and Navigation by allowing U.S. law to be imposed in Hawai'i.[272] Through a

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governing status and continue to have a right to self-determination so that they can become self-governing." Van Dyke et. al., *supra* note 3, at 631 (citations omitted).

[263] Anaya, *supra* note 262, at 333.

[264] *Id.* at 334-35 (detailing the inadequacies of the statehood plebiscite); *see also*, José Luis Morín, *The 1959 Statehood "Plebiscite" in Hawai'i*, SELF-DETERMINATION (Kanaka Maoli Tribunal Komike, Honolulu, HI), Apr. 1997, at 13-14.

[265] Anaya, *supra* note 262, at 334-35.

[266] *Id.* at 335.

[267] *Federal Hearings on Reconciliation*, *supra* note 256, at Exhibit A (statement of Kekuni Blaisdell, Kanaka Maoli Tribunal Komike).

[268] *Id.*

[269] *See* Donnelly, *The Hawaiian Roundtable: Holo I Mua*, *supra* note 104 (statement of Mililani Trask). "As recently as two years ago, we got the (treaty) study report now calling for Hawaii to be reinscripted as a colony, which would give us the right to vote for independence. And that was directly the result of the Hawaiian people's efforts in the international arena." *Id.*

[270] Rob Perez, *Kingdom Supporters Take Case to World Body: An International Court Will Hear a Case Involving Hawaiian Kingdom Law*, HONOLULU STAR-BULLETIN, Jan. 3, 2000, *available at* http://www.starbulletin.com/2000/01/03/news/story3.html.

[271] *See Synopsis*: Lance Paul Larsen v. the Hawaiian Kingdom, http://www.alohaquest.com/arbitration/synopsis.htm.

[272] *Id.* Larsen asserts that United States law was invalidly imposed on him and that the Kingdom allowed such imposition. *Id.*

stipulated settlement agreement to dismiss the case without prejudice, the parties submitted all issues to binding arbitration.[273] "The Arbitral Tribunal [was] asked to determine, on the basis of the Hague Conventions IV and V of 18 October 1907, and the rules and principles of international law, whether the rights of the Claimant . . . under international law as a Hawaiian subject [were] . . . violated . . . ."[274] Questions of the existence of the Hawaiian Kingdom as a Nation State, Hawaiian nationality, Hawaiian Domestic law, the validity of American Annexation, International Treaty violations, and International laws of Occupation were raised.[275] On February 5, 2001, the Tribunal held that

> as matter of international law . . . (a) that there is no dispute between the parties capable of submission to arbitration, and (b) that, in any event the Tribunal is precluded from the consideration of the issues raised by the parties by reason of the fact that the United States of America is not a party to the proceedings and has not consented to them.[276]

Understanding that the ruling would only be binding on the two parties and would provide no legal precedent beyond the specific case, the advocates believed that a favorable ruling could have only served to increase international awareness of the situation in Hawai'i.[277] However, the effect the unfavorable opinion might have on how the international legal community will treat Native Hawaiian claims is still unknown.[278]

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[273] *Id.*

[274] *Id.*

[275] *Id.* The three member arbitration tribunal was made up of an international law professor at Essex Court Chambers in London, an Australian professor of the United Nations International Law Commission, and a former solicitor-general of Australia. Pat Omandam, *Hague tribunal ponders the Hawaiian Kingdom*, HONOLULU STAR-BULLETIN, Jan. 2, 2001, *available at* http://www.starbulletin.com/2001/01/02/news/story1.html. Acting Kingdom agents and the plaintiffs attorney presented arguments on December 7-11, 2000. The arbitors first had to decide whether they had jurisdiction to decide the case. *Id.* Arbitors noted that the plaintiff was "asking the tribunal to proceed on the basis of an assumption that the United States presence in Hawaii is illegal." *Id.* See the Aloha Quest website at http://www.alohaquest.com/arbitration for a transcript of the oral hearings before the Permanent Court of Arbitration and the Hawaiian Kingdom's presentation before the court.

[276] Lance Paul Larsen v. Hawaiian Kingdom, at 44 (Perm. Ct. Arb. Feb. 5, 2001), *available at* http://www.alohaquest.com/arbitration.

[277] Perez, *supra* note 270.

[278] Upon the agreement of the Agent for the Hawaiian Kingdom and Larsen, the parties have requested the Arbitral Tribunal to be reconstituted as a Commission of Inquiry pursuant to the Permanent Court of Arbitration ("PCA") Optional Rules for Fact-finding Commission of Inquiry. Letter from David Keanu Sai, Acting Minister of Interior & Agent for the Hawaiian Kingdom, & Ninia Parks, Esq., Attorney for Lance Paul Larsen, to Phyllis Hamilton, Deputy Secretary General, International Bureau of the Permanent Court of Arbitration (Mar. 23, 2001) *available at* http://www.alohaquest.com/arbitration/letter_010323.htm. The PCA Optional

Although Native Hawaiian claims under international law are certainly valid,[279] with the new "Disclaimer" language in Draft III, the Akaka Bill does not preclude these groups to pursue international redress.[280] More importantly, the reality is that the international avenues for redress cannot keep up with domestic courts' invalidation of Native Hawaiian rights on constitutional grounds. Although it may be true that the Joint Resolution of Annexation could never validly extinguish the sovereignty of the unconsenting Kingdom and its laws, it is highly unlikely the U.S. courts will ever reject the validity of American law in Hawai'i. In the meantime, the Hawaiian Home Lands and Ceded Lands trusts, along with the assets currently held by OHA, if not protected now, may be disposed of through sale or transfer. The Akaka Bill and the negotiations for settlement of claims authorized in Section 9[281] could, at least, protect those resources for future generations of Native Hawaiians. Alaska Natives urge that federal recognition has not precluded their participation in the international arena.[282] Rather, it has provided them "a place at the table."[283]

C. Does Federal Recognition Amount to "Apartheid" and "Racial and Ethnic Balkanization"?

Some non-native individuals supported by few Hawaiians assert that "OHA, the HHCA, the sovereignty movement and all federal and state programs that give special privileges or entitlements to Hawaiians . . . should be consigned to the dustbin of history with apartheid, white supremacy, ethnic cleansing and other discredited concepts based on racial discrimination."[284] They claim that no reparations are owed Native Hawaiians and that Hawaiians do not have and never had special rights to ceded lands different from the rights of other

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Rules for creating a fact-finding Commission of Inquiry provides a means to conduct an impartial and independent investigation to establish facts with respect to which there is a difference of opinion between the parties. PERM. CT. OF ARB. OPTIONAL RULES FOR FACT-FINDING COMMISSIONS OF INQUIRY, art. 1, *available at* http://www.pca-cpa.org/inquiryenglish.htm.

[279] *See generally*, Anaya, *supra* note 262; Chock, *supra* note 49.

[280] *See supra* section III.G. Not all independence advocates believe that the Akaka Bill would preclude an independent Hawaiian nation. *See* Lum, *supra* note 186. (statement of Roy Benham, delegate to the Native Hawaiian Constitutional Convention) (stating that "[i]t's a system that the United States says they can do within their system . . . . The way this bill is written, it will not hinder our efforts to go on our own.").

[281] *See supra* section III.F.

[282] Omandam, *Alaska Natives praise federal recogntion*, *supra* note 249.

[283] *Id.*

[284] *Federal Hearings on Reconciliation*, *supra* note 256 (statement of Donna Malia Scaff, Jack H. Scaff, Sandra Puanani Burgess and H. William Burgess).

subjects of the Kingdom or citizens of successor governments.[285] They use alarmist terms, suggesting that the Akaka Bill would create "apartheid,"[286] and "racial and ethnic balkanization."[287] These views are backed by conservative national organizations that are "fighting to strike down any public policy that seeks to redress any wrongs that the United States has committed, or any inequity that exists between the majority population of European Americans and the minority populations of any Peoples of Color or Native Peoples."[288] These views are also supported by some in Congress, such as Representative Curt Weldon of Pennsylvania who introduced a bill called the Native Americans Equal Rights Act on October 19, 2000, seeking to "repeal the Indian preference laws . . . ."[289] In his introduction of House Bill 5523,

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[285] *Federal Hearings on Reconciliation*, *supra* note 256 (statement of Kenneth Conklin).

[286] H. William Burgess, *Federal Recognition Will Result in Legal Apartheid*, HONOLULU ADVERTISER, Oct. 1, 2000, *available at* http://www.honoluluadvertiser.com/2000/Oct/01/101opinion14.html. *But see* Trask, *Sovereignty Stolen by U.S. Must Be Restored*, *supra* note 114 (Native Hawaiian opinion in opposition to Burgess).

[287] Susan Roth, *Hostility against native bill crops up in capital*, HONOLULU ADVERTISER, Oct. 5, 2000, *available at* http://www.honoluluadvertiser.com/2000/Oct/05/105localnews13.html. (quoting Roger Clegg, general counsel of the Center for Equal Opportunity, a conservative think tank, in his guest commentary in the National Review). The bill has also received criticism in the Wall Street Journal ("WSJ"), hoping to influence Republicans. *Id.* The WSJ article suggests that the Founders would not have considered Native Hawaiians to be like Indian tribes, which are "separate sovereigns worthy of separate treatment." *A Bright Line on Race*, THE WALL STREET JOURNAL, Oct. 2, 2000, at A34. Furthermore it proposes that if Native Hawaiians can be accorded the special status of an Indian tribe, "so too could African-Americans or Bosnian-Americans, a path fraught with peril and partiality." *Id.*

[288] Kalawai'a Moore, Rice, *Merely a Tool of Ultra Conservative Movements*, HONOLULU ADVERTISER, Oct. 17, 1999, at B1, B4. One of these organizations is the Campaign for a Color-Blind America ("CCBA"), which is a national legal defense foundation that supports anti-affirmative action causes. Christine Donnelly, *A Look at the Lawyers*, HONOLULU STAR-BULLETIN, Feb. 23, 2000, *available at* http://www.starbulletin.com/2000/02/23/news/story3.html. While Rice's attorney before the Supreme Court, Theodore Olson, took the case pro-bono, the CCBA helped with other costs. *Id.* Another of Rice's attorneys, John Goemans, conceded that "[w]ithout the support of the Campaign for a Color-Blind America we would not have been able to pursue the appeal (of the *Rice* Case) to the [N]inth Circuit. . . . CCBA's help with the briefs and their contacts throughout the legal community were invaluable." Moore, *supra*, at B4. Other support of Rice's claim, in the form of amicus curiae briefs, came from the Pacific Legal Foundation, Brief of Amici Curiae Pacific Legal Foundation, Rice v. Cayetano, 528 U.S. 495 (2000), 1999 WL 332717; Campaign For A Color-Blind America, Americans Against Discrimination and Preferences and the United States Justice Foundation, Brief of Amicus Curiae Campaign For A Color-Blind America, Americans Against Discrimination and Preferences and the United States Justice Foundation, Rice v. Cayetano, 528 U.S. 495 (2000), 1999 WL 374577; Center for Equal Opportunity and the New York Civil Rights Coalition, Brief of Amicus Curiae Center for Equal Opportunity and the New York Civil Rights Coalition, Rice v. Cayetano, 528 U.S. 495 (2000), 1999 WL 345639.

[289] H.R. 5523, 106th Cong. (2000). This bill did not pass in the 106th Congress.

Representative Weldon extensively discussed *Rice* and asserted that "the Supreme Court of the United States has called the constitutionality of Indian preference laws into serious question" and the precedent in *Mancari*.[290]

Assuming the Akaka Bill is enacted, it will undoubtedly be challenged.[291] Goemans asserts that federal recognition of Native Hawaiians would be unconstitutional because of the *Rice* case. He argues that the *Rice* decision "explicitly says that Native Hawaiians are a racial group, not a political designation and not a tribe, so all related federal or state legislation is presumed to be unconstitutional."[292] Opponents claim that because Native Hawaiians are not "Indians" and are not organized in a "tribe," Congress does not have power to federally recognize a Native Hawaiian nation.[293] Nevertheless, the bill should be upheld as constitutionally grounded in Congress' power under the Indian Commerce Clause.[294]

Congress' constitutional authority to address the conditions of native peoples is now well established.[295] "It has been held to encompass not only

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[290] Introduction of the Native American Equal Rights Act of 2000 by Rep. Curt Weldon, *available at* http://206.117.228.69/subsection/introduction_of_the_native_ameri.html. The Representative also maintains that "what motivated the Congress to pass the Indian preference laws was not racism, but rather political favoritism." *Id.*

[291] *See* Anwar, *Two Suits Now Claim OHA Discriminatory*, *supra* note 227. "Those challenging the constitutionality of OHA say . . . that if the federal recognition legislation does pass, it also will be challenged." *Id.*

[292] Susan Roth, *Lobbyists may affect Hawaiian bill's fate*, HONOLULU ADVERTISER, Sept. 18, 2000, *available at* http://www.honoluluadvertiser.com/2000/Sep/18/918localnews14.html.

[293] *See* Omandam, *Clinton officials say they back Akaka bill*, *supra* note 134. Outspoken anti-Native Hawaiian rights advocate Kenneth Conklin maintains that "[o]ne of the most troubling aspects of the Akaka bill is its attempt to create an Indian tribe where none currently exists . . . . It would be the first time in history when Congress recognizes a currently non-existent political entity and then puts in place a procedure to populate it." *Id.* (quoting Kenneth Conklin who believes race-based programs are unconstitutional and opposes the Akaka bill because he says it will divide the people of Hawai'i along racial lines). Conklin fails to acknowledge that the reason why there is no Native Hawaiian political entity in existence is as a result of the United States aid in the overthrow of the Kingdom of Hawai'i. Trask, *Sovereignty By U.S. Must Be Restored*, *supra* note 114.

> Because of the overthrow and annexation, Hawaiians have been denied self-determination. The United States government, in collusion with annexationists, was responsible for that denial. Today the United States and its agent, the state of Hawai'i, is still responsible.
>
> Therefore the United States must repair the damage to Hawaiians of the theft of our nationhood.

Id.

[294] This clause provides: "The Congress shall have Power . . . To regulate Commerce with . . . the Indian Tribes." U.S. CONST. art. I, §8, cl. 3. *See* Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 428-30 (1995) (explaining the doctrine of Indian sovereignty).

[295] S. REP. NO. 106-424, *supra* note 200, at 21.

the native people within the original territory of the thirteen states but also lands that have been subsequently acquired."[296] Although historical relations vary from group to group, general principles that apply include dispossession of their lands, relocation to other lands set aside for their benefit, and recognition of their subsistence rights to hunt, fish, and gather under treaties and laws.[297] The terms "aborigines," "Indians" or "natives" have become synonymous.[298] Thus, the terms "Indian" and "tribe," as used by the Framers of the Constitution, were descriptive of the native people who occupied and possessed the lands that later became the United States, not a limitation on the authority of Congress.[299] All original inhabitants of America are a class of people known as "Native Americans" and this class includes American Indians, Alaska Natives and Native Hawaiians.[300] For more than two centuries, "Congress has retained the power to promote the welfare of all native American peoples, and to foster the ever-evolving means and methods of native American self-governance."[301] Thus, federal recognition of a Native Hawaiian government would be consistent with federal policy and the Constitution. Even where nontribal natives are in the process of attaining more formal federal recognition, the Supreme Court has held that it was appropriate for the federal government to establish a separate program for nontribal natives.[302] The unique place for Native American political status was understood for years prior to the passage of the Fourteenth and Fifteenth Amendments,[303] both of which were designed to address pervasive racial

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[296] *Id.* (citing United States v. Sandoval, 231 U.S. 28 (1913)).

[297] S. REP. NO. 106-424, *supra* note 200, at 21-22.

[298] *Id.* at 5.

[299] *Id.* at 22.

[300] *Id.* at 23.

[301] *Id.*

[302] Van Dyke, *The Political Status of the Native Hawaiian People*, *supra* note 50, at 116-17 (citation omitted). Professor Van Dyke discusses *United States v. John*, 437 U.S. 634, 653-54. *See id.* He notes that Justice Blackmun's opinion, upholding a unique federal criminal jurisdiction over a remnant group of Indians without continuous federal supervision, took into account that the "Department of Interior anticipated that a more formal legal entity, a tribe for the purposes of federal Indian law, soon would exist." *Id.* at 117 & n.141. It appears a similar argument could be made for Native Hawaiians.

[303] These amendments were passed in 1868 and 1870, respectively. Professor Chris Iijima analyzes how the usual notions of equal protection under Fourteenth Amendment are different as applied to indigenous peoples and explains that the kind of discrimination suffered by racial minorities "differ fundamentally from those of Hawaiians with respect to the harms they continue to suffer due to the loss of their homeland." Iijima, *supra* note 122, 117. "[T]he 'badge of inferiority' for racial and ethnic minorities is their forcible exclusion from institutions of the larger polity whereas for indigenous peoples, it is forcible inclusion. *Id.* at 117, n.136 (citing WILL KYMLICKA, MULTICULTURAL CITIZENSHIP 59-60(1996)). Professor Iijima recognizes that "[n]ot all people in Hawai'i have an equal claim to the immense harm caused

discrimination. Thus, preserving native status and promoting native self-government must be evaluated with an eye towards addressing the dispossession of a once sovereign people, not as an act of racism against others.[304] "Redress for the loss of independence, however, is entirely different from the original notion of affirmative action."[305] "Both traditional affirmative action rationales providing more opportunities for those historically denied access and the basic arguments against them – "reverse" racial preferences – are inapposite when dealing with redressing harms suffered by colonization and the loss of sovereignty."[306]

VI. CONCLUSION

The Overthrow and Annexation of the Hawaiian Islands without the consent of the Native Hawaiian people occurred over 100 years ago. The injustices suffered by Native Hawaiians have been many in that span of time. The United States has recognized its role in the Overthrow and has called for reconciliation. Federal recognition of a Native Hawaiian government is the next logical step towards reconciliation. The creation of a Native Hawaiian government will give the Native Hawaiian people a "seat at the table" to

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by the dispossession of Hawai'i by the United States — it is a claim only of the indigenous Hawaiian people." *Id.* at 119. In evaluating the application of the Fifteenth Amendment in *Rice*, Professor Iijima also notes that the Court in *Rice* ignored the proper context of the Fifteenth Amendment. *Id.* at 108-10. He explains that the Fifteenth Amendment, while enacted to ensure emancipated slaves the right to vote, " 'lest they be denied the civil and political capacity to protect their new freedom' " was "premised on the necessity for newly empowered African American former slaves to guard against the reinstitution of subordination." *Id.* (citing *Rice*, 2000 U.S. LEXIS at *30). Nevertheless, "[e]quality of participation in the thus democratic process was hardly a mathematical abstraction, but rather a means to help ensure against unjust domination of one group by another." *Id.* at 110.

[304] In *Rice*, "the majority fails to understand that race can be a marker, a category that entails recognition and respect of a people whose history has been one of demeaning subordination, while race can simultaneously be used as a marker by a dominant group in order to subjugate another." *Id.* at 110. Justice Stevens keenly recognized in his dissent that:

> [t]he voting laws held invalid under the Fifteenth Amendment in all the cases cited by the majority were fairly and properly viewed through a specialized lens – a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.
>
> That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies . . . . Cases . . . that "strike down these voting systems . . . designed to exclude one racial class . . . from voting," have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Rice, 528 U.S. at 540 (Stevens, J., dissenting) (citations omitted).

[305] Iijima, *supra* note 122, at 115.

[306] *Id.*

negotiate land claims and reparations long overdue. Although federal recognition represents the highest legal status native nations can achieve under current U.S. law, the Akaka Bill should not be considered an ending point for native self-determination. It is only a step in the right direction. Nevertheless, it is a step that Native Hawaiians can only take with the backing of key federal officials.

Passage of a bill for federal recognition will require the honest backing of Hawai'i's congressional delegation,[307] persuasion of their Republican colleagues, and support by the executive branch. Unfortunately, the favorable backing received by the DOI and DOJ under former President Clinton may well be lost with conservative Bush appointees.[308] Without federal recognition, the worst-case-scenario for Native Hawaiians will play out when the progeny of *Rice* make their way to a conservative Supreme Court. Despite the grave consequences of losing millions of dollars in assets and the right to continue traditional cultural practices, the most immediate fall-out may be suffered by 6,000 native Hawaiian families[309] who face uncertainty about the status of their homestead lots if the claims in *Barrett* are validated by the courts. Who, then, will be the victims of "racial and ethnic balkanization" in their own homeland? - certainly not the opponents of Native Hawaiian sovereignty. The new millenium should be the point in history where we understand that such an unjust result does not come from being color-blind to race under the guise of equality. Justice Scalia would prefer us to believe that there is a single "American" race. But denying the reality that a multitude of

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[307] Professor Haunani-Kay Trask comments that when lobbying congressional leaders from other states in an effort to introduce a similar bill, Native Hawaiians "received encouraging support but always were told that such legislation would have to be introduced by the head of Hawai'i's delegation, Sen. Daniel Inouye. And year after year, Inouye declined to introduce such a bill." Trask, *Sovereignty Stolen By U.S. Must Be Restored*, *supra* note 114.

[308] In addition to the DOI and DOJ's joint report supporting reconciliation, FROM MAUKA TO MAKAI, *supra* note 12, and their favorable testimony before Congress regarding the Akaka Bill, the United States Solicitor General under the Clinton Administration, Seth Waxman, submitted an amicus brief in support of the State and Native Hawaiians in *Rice*. *See* Brief of Amici Curiae the United States of America, Rice v. Cayetano, 528 U.S. 495 (2000), 1999 WL 569475. These positive stances are not expected from Bush appointees. Kina'u Boyd Kamali'i, chairwoman of the 1980 Native Hawaiian Study Commission, remembers the difficulty of getting the Reagan Administration to seriously act on Hawaiian issues. Pat Omandam, *Keeping A Wary Eye on Washington*, HONOLULU STAR-BULLETIN, Mar. 20, 2000, *available at* http://www.starbulletin.com/2000/03/20/special/story4.html. She notes, that "[f]rom [her] own experience, . . . the Republicans have never been in support of the native Hawaiians. They've never come out and supported them on these issues." *Id.*

[309] *See Ruling on Hawaiian homestead claims*, HONOLULU STAR-BULLETIN, June 13, 2000, *available at* http://www.starbulletin.com/2000/06/13/editorial/editorials.html. Six thousand beneficiaries have been awarded lots in the 80 years since Congress passed the HHCA. Approximately another 19,000 names are on the waiting list. *Id.*

races exist with different histories often impacted by the rule of law is precisely what has led to the denial of the Native Hawaiian right to self-determination. Rather, we have arrived here by not addressing historical wrongs and being blind to unequal applications of the law. Thus, to answer the question first posed at the beginning of this article - why has it taken the United States over one hundred years to address the deprivation of the Native Hawaiian peoples' right to self-determination? The answer - the United States Constitution has not been applied equally to the Native Hawaiian peoples. The Akaka Bill is recognition of the deprivation, but in no way does it or should it represent the entire remedy for the Native Hawaiian peoples.

-Le'a Malia Kanehe[310]

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[310] J.D. candidate, December 2001, William S. Richardson School of Law, University of Hawai'i. I must acknowledge those to whom I owe immeasureable gratitude. For life - my parents, grandparents and kupuna, upon whose shoulders I stand. I owe my inspiration to Dr. Haunani-Kay Trask, my mentor in indigenous politics, and Mililani Trask, my mentor in native law. Without the support and encouragement of Jill Nunokawa, Professor Chris Iijima, Carrie Ann Shirota and na haumana kanawai kanaka maoli, I would stand alone in an often lonely place. Thanks also to Professor Jon Van Dyke for his helpful comments. Many of the ideas in this article reflect the collective thinking of fellow law students in Professor Melody MacKenzie's Native Hawaiian Rights Clinic course. This article is dedicated to those for whom I dared enter the field of law - the next generation of Native Hawaiians, especially my nieces, so they may know their history and the law that shaped it.