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SYMPOSIUM: TO WHAT EXTENT SHOULD THE INTERPRETATION AND APPLICATION OF PROVISIONS OF THE U.S. CONSTITUTION BE INFORMED BY RULINGS OF FOREIGN AND INTERNATIONAL TRIBUNALS

CONTRACTS SYMPOSIUM: AMERICAN ASSOCIATION OF LAW SCHOOLS SECTION ON CONTRACTS

RECENT DEVELOPMENTS

CASENOTE

University of Hawai'i Law Review Symposium Comments of Justice Ruth Bader Ginsburg

If I limped on my way to the microphone, it is because my foot fell asleep, but my brain surely did not. This discussion has been thoroughly engaging and I'd like to intervene at some length. But this is not my show, so I will try to be brief.

I agree with you, John [Yoo], to this extent: In one sense, we use foreign decisions, as you said, as an ornament. Foreign decisions do not bind our court. They are ornaments the way a law professor's commentary is. No foreign decision attracts the deference we give to U.S. precedent. But we do look abroad to be enlightened by the fine minds existing on other benches. We read what they write on norms we share. If the writing is persuasive, it may help us in formulating or confirming our own view.

The U.S. Constitution has some provisions that mean today exactly what they meant when the Constitution was drafted at the end of the 18th Century, age requirements for officeholders, for example. But there are others that do not. Take the 14th Amendment, which has my favorite clause in it, the clause that says, "nor shall any state deny to any person within its jurisdiction the equal protection of the laws." That Amendment was ratified in 1868 when half the population of the United States was not part of the political community. Recall that women did not get the vote until 1920. So if I'm a strict originalist, Congress must propose yet another Amendment that will say women have more than the right to vote, because that is all the 19th Amendment gave them. True, I might say the idea of equality is one the founders planted. They planted it originally, not in the Constitution, but in the Declaration of Independence.

Another example of why no one can be a pure textualist. Look in the U.S. Constitution. Where do you find there an equal protection restraint on action by the federal government? You don't. It is not there. The 14th Amendment restricts action by states, not by the federal government. But would it not be untenable to argue, simply because the 5th Amendment contains no equal protection clause, that there is no requirement that our federal government recognize the equal dignity of all persons without regard to race? And why was equal protection not written into the 5th Amendment? Because when our Constitution was new, the founding fathers, who were very wise in many ways, did not stop the infamous practice of slavery. Today, of course, we view the 5th Amendment as implicity incorporating an equality norm.

And if you are a pure textualist, how do you explain the interpretation that my Court currently gives to the 11th Amendment, which simply says: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States

by Citizens of another State . . . ." Certainly the interpretation of the 11th Amendment has gone far and beyond that text.

Some object to references to foreign judgments on the ground that we do not understand foreign courts or their cultures, or even their languages. But courts of the United States in fact deal with foreign law regularly. To take an example in which all would agree that we must look to decisions of other places, consider the Warsaw Convention. It is a treaty we have signed with other nations about the liability of airlines. We look to decisions of the courts of our treaty partners to assist us in determining what terms of the Convention mean.

I do want to point out to John Yoo that the first time I seriously considered the globalization of human rights norms was not in Europe. It was in a city in India called Bangalore in the early 1980s. All the jurists I met there were Asian, with the exception of an Australian and a British barrister. India and, more recently, South Africa have made a concerted effort to look beyond their borders to opinions elsewhere—U.S. decisions, Canadian decisions, EU decisions, for example. I spoke yesterday about the decisions of the Israeli Supreme Court dealing with terrorism, a problem they live with and have lived with every day for years and years. These are not European civil law nations. So let me assure you that we don't attach authoritative significance to foreign decisions or decrease our own responsibility. But we do seek the best information we can get. We look abroad, as we look to the law professors and their commentaries to enlighten us.

And then I just can't resist saying to Professor Baker, we tend to be a little chauvinistic and very proud of our legal tradition in the United States. Louisiana is not the only jurisdiction that has a Roman law base and a common law blend. Quebec is a civil law based system, and jurists in the rest of Canada are trying hard to understand that system. The Anglophiles in Canada are struggling to learn French so that these two traditions can work together. The Canadian Supreme Court, I think, is very interesting to watch in that regard.

May I close by expressing appreciation to all the speakers for a most stimulating panel presentation.

Globalizing Human Rights and Federal Court Jurisdiction: A Reply to Justice Ginsburg

John S. Baker, Jr.*

A few years ago, a diplomat from the European Union ("EU"), who is now the EU's Ambassador to the United Nations, the Honorable John Richardson, told my class that the "logic of history" dictates that eventually Americans will come to realize that the United States must limit its sovereignty and share it with the rest of the world."[1] He made these statements several years prior to European objections to American unilateralism in Iraq. He went on to say that Americans and Europeans should look at combining elements of the United States and EU systems to "find a new system of governance for the world."[2] As articulate, charming and diplomatic as was his presentation, Mr.

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* Dale E. Bennett Professor of Law, Louisiana State University Law Center. This paper was prepared and delivered prior to the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466 (2004).

[1] How do we deal with what has become a basically global economic phenomena? And that is where we get into the other question which is: What form of world governance do we want for a global economy? Sovereignty is about having the ability to achieve your goals and if you live in an interdependent world where on your own you cannot achieve any of your goals and you can only achieve them by acting together with others, an effective sovereignty means sharing your sovereignty in an effective government with others. This thesis is basically what has driven European integration and what is accepted in Europe.

If it's true for Europe, you can apply the same argument *mutatis mutandi* to the global interdependent economy which is what we have now. And the therefore raises the question of world governance:

> I think people in Europe are every bit as unhappy with the functioning of, for example, the United Nations, as Americans are, but then the question becomes how do you make it more effective and the European answer is you have to accept that you need to share some sort of shared sovereignty. And I don't need to tell you what that means—giving up the veto, which is what we have found inside the European Union. We have not yet done it for defense. We haven't done it yet for foreign policy. We will do it eventually because it's in the logic of history. I would believe that even the United States at some stage will come to the same conclusion and then we will be talking about whether certain subjects internationally should be taken by qualified majorities and different types of majorities indifferent types of cases. These are all things which have been experimented with in Europe. I wouldn't say you should take the European example and transplant it here. I am simply saying that there are other ways of doing things. You should look at them and experiment and find the ones that would be right for what we are going to need which is global governance.

John Richardson, Remarks at the Louisiana State University Law Center (Feb. 24, 2000) (on file with the author).

[2] *Id.* I would suggest to you that the European Union ("EU") experience could actually provide ideas to revitalize democracy or, to put it another way, instead of assuming as many of my fellow commission officials might that the EU system should simply be extended to the rest of the world. What perhaps we should do is look at the idiosyncracies of the U.S. system and

Richardson's suggestion that Americans would ever voluntarily share this nation's sovereignty with other countries seemed utterly utopian. Regardless of what the American public would do, it has become apparent during the last year that some members of the U.S. Supreme Court are thinking in terms of a convergence of constitutional systems.[3]

Last Term's opinions by Justice Kennedy in the sodomy case[4] and Justice Ginsburg in the affirmative action cases[5] cited European court cases and international conventions as authority for reaching novel outcomes.[6] Those references to foreign sources of law on two very controversial issues ignited their own controversy.[7] Justice Ginsburg's remarks here and

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the idiosyncracies of the EU system, and see if we can combine elements from them with a large dose of creativity and find a new system of governance for the word in the 21st century.

[3] In addition to the opinions cited in notes 4 and 5, *infra*, and Justice Ginsburg's remarks, consider the following statements by Justices Breyer and O/Connor. In a television interview, Justice Breyer noted the "challenge" of a "world . . . growing together . . . through commerce and through globalization, through the spread of democratic institutions, through immigration into America, is becoming more one world of many different kinds of people." The challenge he perceives is if "and how [our Constitution] fits into the documents of other nations." *This Week with George Stephanopoulos*, (ABC television broadcast, July 6, 2003).

In a speech in Atlanta to the Southern Center for International Studies, Justice O'Connor said: "I suspect . . . that over time we will rely increasingly—or take notice, at least—increasingly on international and foreign courts in examining domestic issues." Lee Anderson, *U.S. Law or Foreign 'Law'?*, CHATTANOOGA TIMES FREE PRESS, Nov. 9, 2003, at F5.

[4] Lawrence v. Texas, 539 U.S. 558 (2003).

[5] Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[6] *Lawrence* overturned Bowers v. Hardwick, 478 U.S. 186 (1986). *Lawrence*, 539 U.S. at 578. *Grutter*, which adopted the diversity rationale from the separate opinion of Justice Powell in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), permits race-conscious admission standards for a period of twenty-five years, Justice Ginsburg's concurring opinion notes that the Court's decision "accords with the international understanding of affirmative action." *Grutter*, 539 U.S. at 342 (Ginsburg, J. concurring).

[7] *See* John Leo, *Creeping Transnationalism*, US NEWS & WORLD REPORT, July 21, 2003, at 58 (discussing the Court's reliance on "international conventions, United Nations documents, and the findings of foreign courts" and noting the problem that exists when a "judge has spotted some important 'emerging world consensus' that requires him to defy the plain meaning of American law"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003) (observing that the current debate regarding resort to comparative constitutional law is actually a debate about the proper role of the judiciary). "[T]he Supreme Court's decisions in *Atkins* and *Lawrence* show that state legislative sovereignty may be overcome, in part, through appealing to comparative constitutionalism." Childress, *supra* note 7, at 217. The writer advises the Court "to use caution when confronted with the option of employing comparative constitutional analysis, lest it run the risk of joining the judicial and legislative functions." *Id.* at 219. He further explained:

> To employ comparative analysis might run the risk of overturning the American legal culture and American constitutionalism. Each legal system is autonomous and is perhaps incapable of transplant. Any transplant would be a rejection of the organic law that is part of that society and culture. The use of comparative law—besides the general observation

elsewhere[8] confirm the reason for the controversy. Justice Ginsburg favors a "dynamic"[9] interpretation of the U.S. Constitution which would bring the U.S. Constitutional decisions more in line with decisions in foreign courts.[10]

I. LOOKING BEYOND OUR BORDERS: TO WHAT PURPOSE?

Justice Ginsburg has entitled her talk "Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication." The Justice says her "message . . . is simply this: We are the losers if we do not both share our experience with and learn from others."[11] The Justice, however, is not simply referring to an intellectual and social exercise. Countless international conferences and exchange programs have long featured American judges and legal scholars who "share our experience and learn from others."[12] It is something else when Supreme Court Justices use foreign sources to deconstruct our constitutional law. Then, the American people are the losers.

Justice Ginsburg "suggest[s] two areas in which . . . we could do better"[13] in our constitutional jurisprudence. "One concerns the dynamism with which we interpret our Constitution, and similarly, our common law. The other involves the extraterritorial application of fundamental rights."[14] Respectfully, I submit these are two ways by which to continue deconstructing the Constitution. The first, already evidenced in the sodomy and affirmative

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that it would not be consonant with American culture, society, and mores—imposes a normative construct of others on American law and thus on the American people.

Id. at 220-21; Symposium, *Has the Supreme Court Gone Too Far?*, 116 COMMENTARY 25, Volume 116, Issue 3 (2003). The editors of COMMENTARY posed questions to various legal scholars regarding developments on the current Court. One question asked whether there was any legitimacy to the Court's rationalizing controversial decisions by resorting to human-rights norms elsewhere in the world. In response, Robert H. Bork stated,

> What the decisions of foreign courts have to do with what the framers and ratifiers of the U.S. Constitution understood themselves to be doing is not explained, and cannot be explained. The result of this trend, if it continues, as seems likely to do, will be a homogenized international constitutional law reflecting the trendy views of liberal elites here and abroad.

Id. at 220.

[8] *See* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003) [Hereinafter, Ginsburg, *Beyond Our Borders*].

[9] *See id.* at 5, 9.

[10] *See id.* at 8-9.

[11] *Id.* at 1.

[12] *Id.*

[13] *Id.* at 5.

[14] *Id.*

action cases, allows Justices to import foreign jurisprudence as justification for the Court's latest judicial inventions. Using foreign law as authority for interpreting the U.S. Constitution presents a different dimension of the familiar debate about the legitimacy of non-textual constitutional interpretation. The particular twist concerns the relation between the law of nations and the Constitution. The Justice's second concern, the "globalization of human rights,"[15] would extend federal court jurisdiction to Executive branch actions abroad.[16] The proposed application of the Bill of Rights (as, of course, interpreted through the "law of nations") outside the Untied States[17] reflects the Justice's view that in "combating international terrorism" we "require trust and cooperation of nations the world over."[18] However well-intentioned, this suggestion portends the limitation of United States sovereignty vis-à-vis other nations.

As one who teaches comparative constitutional law, I promote a comparative perspective. That, of course, is not the issue; rather, the issue concerns the use judges will make of what they learn from other nations. In her prepared remarks, Justice Ginsburg discusses "judicial review for constitutionality, and specifically, why we should both lead and learn from others."[19] Judging from her remarks during a question period, however, it also seems to be a concern that if the Supreme Court does not "lead and learn" from other national courts, then the Supreme Court will become irrelevant in the eyes of those other courts as they continue to shape their own law.

II. THE LAW OF NATIONS: WHAT IS ITS PLACE?

Justice Ginsburg justifies resort to foreign law by reference to the Constitution's connection to the "law of nations." She is correct in observing that "the Framers looked to other systems and to thinkers from other lands for enlightenment, and they understood that the new nation would be bound by 'the Law of Nations,' today called international law."[20] As *The Federalist* state, "[i]t is of high importance to the peace of America, that she observe the

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[15] *See* Transcript of "Comments of Justice Ruth Bader Ginsburg" at University of Hawaii Law Review Symposium, Feb. 12, 2004, at 4-5 (on file with U. HAW. L. REV.) (stating "the first time I really began to think seriously about the globalization of human rights norms was not in Europe. It was in a city in India . . . .")

[16] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 5. "May I suggest two areas in which, as I see it, we could do better. One concerns the dynamism with which we interpret our Constitution, and similarly, our common law. The other involves the extraterritorial application of fundamental rights." *Id.*

[17] *See infra* Part II.

[18] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 10.

[19] *Id.* at 1.

[20] *Id.*

law of nations towards all these Powers."[21] To that end, the Constitution commits matters involving the law of nations to the national government.[22] The federal courts have the task of providing uniformity in the interpretation of the law of nations.[23] As Blackstone wrote, the law of nations has been "adopted in [its] full extent by the common law and is held to be a part of the law of the land."[24] But neither the law of nations nor the common law prevails over the Constitution. The Framers do not leave the definition and punishment of offenses against the law of nations to the common law or even to the generalized "law of nations."[25] The Constitution gives Congress the sovereign's power to define and punish offenses against the law of nations.[26] The Executive prosecutes and the federal courts try those offenses against the law of nations.

It is clear that the law of nations and the common law played an important role in the formation of the Constitution. The current issue concerns the role, if any, that the law of nations or a comparative approach should play in constitutional or common-law interpretation. If incorporated into a treaty ratified by the Senate and/or legislation enacted by the Congress, content drawn from the law of nations becomes the Supreme Law of the Land.[27] In the absence of

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[21] THE FEDERALIST NO. 3, at 10 (John Jay) (The Gideon ed., George Carey & James McClellan eds., Indianapolis, Liberty Fund 2001).

[22] *See id.* at 10-11.

> When once an efficient national government is established, the best men in the country will not only consent to serve, but will also generally be appointed to manage it; . . . Under the national government, treatises, as well as the law of nations, will always be expounded in one sense and executed in the same manner; . . . The wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national government, cannot be too much commended.

Id.

[23] *See id.*

[24] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 67 (1st ed. 1765-69).

[25] *See* THE FEDERALIST No. 42, at 217 (James Madison) (The Gideon ed., George Carey & James McClellan eds., Indianapolis, Liberty Fund 2001).

> The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas, is evidently requisite. Felony is a term of loose signification, even in the common law of England; and of various import in the statute law of that kingdom. But neither the common, nor the statute law of that, or of any other nation, ought to be the standard for the proceedings of this, unless previously made its own by legislative action.

Id.

[26] *See* U.S. CONST., art. I, sec. 8, cl. 10.

[27] Treaties may be either "self-executing" or "non-self-executing." Non-self-executing treaties are those that require implementing legislation. *See* Thomas Buergenthal, *Self-Executing and Non-self-executing Treaties in National and International Law*, 235 R.C.A.D.I. 303, 370 (1992).

either, the law of nations—as with general common law—may under limited circumstances be a source of law resorted to by courts.

Justice Ginsburg rightly cites Chief Justice Marshall's statement that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[28] The statement also means, by implication, that where a conflict between the statute and the law of nations is unavoidable, then the statute prevails. Where the other branches have not acted on the matter, the federal courts should consult the practices of other nations in questions of international law. Thus, in *The Paquete Habana*,[29] which Justice Ginsburg quotes,[30] the Court says:

> *where there is no treaty and no controlling executive or legislative act of judicial decision*, resort must be had to the customs and usages of civilized nation, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[31]

As the italicized language indicates, international law is a source of law where American law has not provided the controlling authority. Thus, international law provides no basis for altering federal legislation, much less the Constitution.

Justice Ginsburg has given to the law of nations a position of authority not afforded even to general common law, into which the law of nations was incorporated. *Swift v. Tyson* held the common law to be part of the "law of the United States."[32] A century later, *Erie v. Thompkins*[33] reversed that decision and repudiated the natural-law view upon which *Swift* was said to rest.[34] Actually, *Swift* had recognized the "law merchant,"—part of the law of nations, made part of the common law by Lord Mansfield—as "law of the United States."[35] According to *Erie* and its progeny, the idea of a general,

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[28] Ginsburg, *Beyond Our Borders*, *supra* note 8, at 3 (*quoting* Justice Marshall in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

[29] 175 U.S. 677 (1900).

[30] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 3.

[31] *The Paquete Habana*, 175 U.S. at 700 (emphasis added).

[32] Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

[33] 304 U.S. 64 (1938).

[34] The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law . . . [b]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it." *Id.* at 79.

[35] *Swift*, 41 U.S. at 19. The law respecting negotiable instrument may be truly declared in the languages of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 882, 887 (1759), to be in a great measure, not the law of a single country only, but of the commercial world. *Non*

federal common law of the United States is unconstitutional.

Neither *Erie* nor *Swift* support the use of the law of nations in the fashion Justice Ginsburg advocates. For *Erie*, all American law must find its basis in the sovereign power of the states or the federal government. *Swift* recognized the law merchant, which is not the product of any sovereign, but also recognizes that it is subject to repeal by state legislatures.[36] Both *Erie* and *Swift* recognize the supremacy of legislation over the common law. On the one hand, there is a presumption in interpretation that, where the Congress uses common-law terms, it intends them to have the meaning those terms had at common law. Congress, on the other hand, may freely depart from the common law meaning by making its intention clear through legislative language.

III. "DYNAMISM" IN CONSTITUTIONAL INTERPRETATION: IS IT DEFENSIBLE?

Justice Ginsburg identifies the comparative approach with "dynamism" in constitutional law, as west against constitutional interpretation that is "frozen in time."[37] The law-of-nations discussion is offered to support dynamism in interpretation.[38] Rather than explain or defend "dynamism," i.e., non-textualism, however, Justice Ginsburg resorts to an *ad hominem* by characterizing originalism as a "frozen in time" view which is equated with Chief Justice Taney's opinion in *Dred Scott v. Sandford*.[39] She quotes Chief Justice Taney's rejection of reference to foreign opinion:

> No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or in this country, should induce the court to give the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.[40]

According to Justice Ginsburg, Taney's view "is a discordant view on recourse to the 'opinions of Mankind.'"[41] Ergo, it is implied, the unwillingness to resort to the "opinions of mankind" puts one in the same intellectual camp that produced the result in *Dred Scott*.

Justice Ginsburg rightly criticizes Taney's distortion of the due process clause—"invok[ing] the majestic Due Process Clause to uphold one individual's right to hold another in bondage."[42] It would have been more accurate,

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erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed ed apud omnes gentes, et omni tempore una eademque lex obtinebit. See id.

[36] *See Swift*, 41 U.S. at 19.

[37] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 5.

[38] *See id.*

[39] *See id.* at 4.

[40] *Id.* (quoting Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 426 (1857)).

[41] *Id.*

[42] *Id.*

however, to state that *Dred Scott invented* substantive due process. Textualists certainly reject the Taney-tainted doctrine of substantive due process, including its offspring, *Roe v. Wade*.[43] Non-textualists, on the other hand, simply view the substantive due process of *Dred Scott* as "bad," but that of *Roe* as "good." But can one legitimately distinguish the two insofar as they invent rights based on the preferences of particular Justices? By the "opinions of mankind" (or, as the Justice prefers, [Human] kind)? If it is legitimate for *Lawrence v. Texas*[44] to resort to foreign court decisions and international conventions in overturning *Bowers v. Hardwick*,[45] would it be legitimate for other Justices to overturn *Roe* on the authority of conflicting decisions from the Federal Constitutional Court of Germany[46] and the American Convention on Human Rights, the San Jose, Costa Rica Tact (1969)? That treaty provides that "[e]very person has the right to have his life respected [and that] [t]his right shall be protected by law and, in general, from the moment of conception."[47]

Chief Justice Taney's opinion in *Dred Scott* is neither textualist nor originalist. His approach to the Constitution differs from the textualism of Chief Justice Marshall and *The Federalist Papers*.[48] As Justice Scalia has written, textualists do not engage in strict construction.[49] As Justice Scalia explains,

> Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better that, I suppose, than a nontextualist. A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all this it fairly means.[50]

Justice Scalia's explanation of textualism—giving words neither a narrow nor a lenient, but a fair, construction—is the same principle of construction

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[43] 410 U.S. 113 (1973).

[44] 539 U.S. 558 (2003).

[45] 478 U.S. 186 (1986).

[46] *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 938-47 (Foundation Press 1999) (excerpting from translated versions of two decisions by the German Constitutional Court basically in conflict with Roe v. Wade).

[47] *See* American Convention on Human Rights, 1969, art. 4, http://www.oas.org/uridico/english/treaties/b-32.htm.

[48] *See* THE FEDERALIST No. 81, at 418 (Alexander Hamilton) (The Gideon ed., George Carey & James McClellan eds., Indianapolis, Liberty Fund 2001) (stating that "there is not a syllable in the plan . . . which *directly* empowers the national courts to construe the laws according to the spirit of the constitution").

[49] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (Princeton Univ. Press 1997).

[50] *Id.*

outlined by Chief Justice Marshall in *McCulloch v. Maryland*.[51] Like Justice Scalia, Chief Justice Marshall's rejection of strict construction[52] does not mean embracing liberal construction. *McCullough* rejects strict construction of the Constitution, championed by Thomas Jefferson, as a corollary to his understanding of the Constitution as a compact among the states, *i.e.*, as though it were still a confederation. Textualism goes hand-in-hand with a constitutional philosophy of original meaning, rather than original intent.[53]

IV. RULES OF CONSTITUTIONAL INTERPRETATION

The textualism and originalism of the Marshall Court are well elaborated by Justice Joseph Story in his *Commentaries on the Constitution*, which includes a chapter entitled "Rules of Interpretation."[54] His *Commentaries* provide an explanation that integrates the decision of the Marshall Court and *The Federalist Papers*.[55] He notes the need for "some uniform rules of interpretation,"[56] which he then draws in large part from foreign jurists.[57]

Story's discussion of the rules of interpretation repudiates any basis for an "evolving" or dynamic Constitution. He writes, "Nothing but the text itself was adopted by the people."[58] Both the "strict" and the "most extended sense" of the words are "within the letter" and "within the intention."[59] But there is clearly a difference between giving words their broadest meaning and departing from their meaning. Thus, Story writes: "[t]he words are not, indeed, to be stretched beyond their fair sense; but within that range, the rule of interpretation must be taken, which best follows out the apparent intention."[60] Later, Story writes:

> [A] rule of equal importance is not to enlarge the construction of any given power beyond the fair scope of its terms, merely because the restriction is inconvenient,

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[51] *See* 17 U.S. (4 Wheat.) 316, 405-16 (1819).

[52] Justice Marshall, in discussing the proper interpretation of the Necessary and Proper Clause, stated that "[a]n interpretation of this clause of the constitution, so strict and literal, would render every law which could be passed by Congress unconstitutional . . . ." *Id.* at 354.

[53] *See* SCALIA, *supra* not 50, at 38 ("What I look for in the constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.")

[54] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 282-325 (Carolina Academic Press 1987) (1833).

[55] *Id.* at v-viii.

[56] *Id.* at 282.

[57] *See id.*; *see also* notes, pgs. 283, 285, 291, 322-25.

[58] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 406, at 310 (3d ed., 1858).

[59] *Id.*

[60] *Id.* (footnote omitted).

> impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment.[61]

Not only can one find no warrant for a "dynamic," "evolving," or "living" Constitution, Story condemns such a notion:

> Temporary delusions, prejudices, excitements, and objects have irresistible influence in mere questions of policy. And the policy of one age may ill suit the wishes or policy of another. The constitution is not to be subject to such fluctuations. It is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever.[62]

Story's explanation of constitutional interpretation was certainly frozen in time. That, however, was distinct from his understanding of the law of nations. Unlike Justice Ginsburg, Justice Story differentiated between the law of nations, which does evolve, and the Constitution's text, which should not. One of the few disagreements Justice Story ever had with his colleague and good friend, Chief Justice John Marshall, was over the status of slavery under the law of nations. In a circuit case, Story had condemned the slave trade as a violation of the "law of nations" and "the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the external maxims of social justice."[63] In *The Antelope*[64] Chief Justice Marshall held that the slave trade was not against the law of nations.[65] Story's interpretation of the law of nations in his ruling on the slave trade did not involve a "dynamic" or "evolving" view of the Constitution, but of the law of nations.

V. GLOBALIZING SUPREME COURT JURISDICTION

Justice Ginsburg's advocacy of "globalizing" the Bill of Rights[66] might mean encouraging other countries to adopt a bill of rights like that of the United States and/or creating an independent judiciary to enforce rights. Although Justice Ginsburg undoubtedly favors such developments, that is not

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[61] *Id.* § 426 at 302.

[62] *Id.* at 303.

[63] *La Jeune Eugenie*, 2 Mason 409, 423, 26 Federal Cases 832, 846 (1822).

[64] 23 U.S. (10 Wheat.) 66 (1825). Although Story never changed his opinion, he acquiesced without dissent in this case.

[65] Later, in *The Amistad*, after Marshall's death, Story, "decid[ing] upon the eternal principles of justice and international law," declared that a group of Negroes who had been unlawfully transported as slaves and who had taken possession of the vessel should be released. 40 U.S. (15 Pet.) 518 (1841).

[66] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 7.

what she means. In her opinion, the second area in which "we could do better" is "[t]he extraterritorial application of fundamental rights."[67] That, of course, would mean extending federal court jurisdiction to where it currently does not exist, namely, to actions of the Executive Branch beyond the borders of the United States. She says:

> [T]he Bill of Rights, few would disagree, is our nation's hallmark and pride. One might assume, therefore, that it guides and controls U.S. officialdom wherever in the world they carry our flag or their credentials. But that is not our current jurisprudence.[68]

The Justice's hope and expectation is:

> That in an encounter between the United States and non-resident aliens . . . the expectation that the position taken in the Restatement (Third) of Foreign Relations would one day accurately describe our law. '[W]herever the United States acts,' the Restatement projects, 'it can only act in accordance with the limitations imposed by the Constitution.'

With human rights increasingly prominent on the world's agenda, that day may come sooner rather than later.[69]

Justice Ginsburg's statements do not distinguish between aliens of enemy and non-enemy countries. This is obviously a timely issue with the Court hearing argument this term on petitions for writs of *habeas corpus* made by foreign nationals captured in Afghanistan and held in military custody at Guantanamo.[70] The Justice may have thought it necessary not to be more specific lest she tread near the particular issue. On the other hand, not only does the Justice express her disagreement with current law on the extraterritorial application of fundamental rights, she connects her prediction of a change in the jurisprudence to the issue of terrorism.

> Recognizing that forecasts are risky, I nonetheless believe we will continue to accord 'a decent Respect to the Opinions of [Human] kind' as a matter of comity and in a spirit of humility. Comity, because projects to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over.[71]

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[67] *See id.* at 5.

[68] *See id.* at 7.

[69] *See id.* at 7-8.

[70] Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) *cert. granted sub nom.* Rasul v. Bush, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-334); Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-334). On April 20, 2004, the U.S. Supreme Court will hear arguments in these two cases.

[71] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 10.

As of this writing, at least, *Johnson v. Eisentrager*[72] is still good law and, therefore, the Bill of Rights and federal habeas jurisdiction do not extend to enemy aliens who are captured and held outside the United States.

In *United States v. Verdugo-Urquidez*,[73] the Court rejected a broad argument similar to that made by Justice Ginsburg. The alien in that case attempted to claim the protection afforded *American citizens* abroad, recognized in *Reid v. Covert*.[74] The Court noted that "[n]ot only are history and case law against respondent, but as pointed out in *Johnson v. Eistrager*, the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries."[75]

It has always been understood that the Constitution operates differently within the United States than it does vis-à-vis other nations. In particular, the President may be able to act with much greater latitude in matters of foreign affairs and defense of the nation outside the country,[76] than within the United States.[77] The structure of the Constitution differentiates between internal and external affairs. In order to ensure the liberty of Americans, the Constitution institutionalizes the doctrine of separation of powers.[78] The competition

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[72] 339 U.S. 763 (1950).

[73] 494 U.S. 259 (1990).

[74] 354 U.S. 1 (1957) (emphasis added). The Court held that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.* at 6.

[75] United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (citation omitted).

[76] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (describing the President's power with respect to foreign affairs).

> [T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable principles of the Constitution.

Id.

[77] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (distinguishing the President's order of seizure of the nation's steel mills, which the Court declared unconstitutional, from an act performed by the President pursuant to his constitutionally-granted military power as Commander-in-Chief).

[78] *See* I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

Id. See THE FEDERALIST No. 47, at 249 (James Madison) (The Gideon ed., George Carey & James McClellan eds., Indianapolis, Liberty Fund 2001). "The accumulation of all powers,

among the three branches protects the liberty of individuals.[79] Externally, in interactions with other nations, the United States requires unity. The President represents the country to other nations in foreign relations and defends the country as Commander-in-Chief. In defending the nation, the Framers put responsibility principally in the President.[80]

Members of Congress have increasingly inserted themselves into foreign and military affairs.[81] The Constitution does give Congress a role limited to declaring war[82] and, most importantly, voting whether or not to fund military operations.[83] In other words, the Constitution gives Congress the power and responsibility to approve overall commitments to foreign ventures. It withholds from Congress, however, any dual role in foreign diplomacy and military operations. There are those in the United States who would like our system to be more like that of the countries in Europe, where the parliaments have more authority in matters of national defense.

VI. CONCLUSION

Justice Ginsburg mentions an article by Chief Justice Rehnquist, in which he noted that the two great original ideas in the Constitution, an independent Executive and an independent Judiciary, have received different treatment abroad.[84] As both Justices observe, other nations have embraced the idea of an independent Judiciary, but not an independent Executive. If *Eisentrager* is narrowed or over-ruled, the United States will become more like other

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legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." *Id.*

[79] *See* THE FEDERALIST No. 51, at 268 (James Madison) (The Gideon ed., George Carey & James McClellan eds., Indianapolis, Liberty Fund 2001).

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives, to resist the encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

Id.

[80] *See* THE FEDERALIST No. 51, at 268 (James Madison) (The Gideon ed., George Carey & James McClellan eds., Indianapolis, Liberty Fund 2001). "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *Id.*

[81] *See* War Powers Resolution, 50 U.S.C. §§ 1541-48 (1973).

[82] U.S. CONST. art. I, § 8, cl. 11. "The Congress shall have the Power To declare War, grant letter of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

[83] U.S. CONST. art. I, § 8, cl. 12. "The Congress shall have the Power To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."

[84] *See* Ginsburg, *Beyond Our Borders*, *supra* note 8, at 4-5.

nations which do not have independent Executives. The check will not come from the legislative branch, but from the judiciary. When Justice Ginsburg says she looks forward to the day when the Bill of Rights applies to U.S. officials wherever in the world they act, it is certainly a reasonable inference that she intends to subject the President's Commander-in-Chief powers, exercised against aliens outside the country, to some degree of judicial review pursuant to the Bill of Rights.

Until now, the Supreme Court has respected the limits on its involvement in foreign and military matters. Justice Ginsburg's hopes and predictions suggest a possible change in the name of globalizing fundamental rights. Although many in Europe and elsewhere think national sovereignty passé, most Americans would agree with the statement in *Verdugo-Urquidez* that "[f]or better or for worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.'"[85] Justice Ginsburg's apparent intention to subject the actions of the Executive against aliens outside the United States to judicial control through the Bill of Rights conflicts with the President's legitimate authority and our national security.

[85] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 275 (1990) (citing Perez v. Brownell, 356 U.S. 44, 57 (1948)).

The Globalized District Court

Judge Nancy Gertner*

In my little courthouse in Boston, the world intrudes, whether I like it or not. It intrudes directly, in cases like *United States v. Nippon Paper Ind. Co.*,[1] a criminal antitrust case brought against a Japanese corporation, involving actions allegedly performed by the company in Japan. And it does so indirectly; when the plaintiff in a case involving a Namibian construction project sought a preliminary injunction based on a decision of the South African Supreme Court which allegedly made it "likely" to succeed on the merits of its claim.

In fact, the world intrudes in my time off the bench as well. After the demise of the Soviet Union, we, the judges of the federal and state courts, became veritable ambassadors for our country. Numbers of judges from all around the world came to visit our courtrooms. We reciprocated by taking government funded trips or missions sponsored by non governmental human rights groups to a variety of regions. I traveled to Turkey, China, and Prague, under the auspices of a number of public and private organizations. At the Central European and Eurasian Law Initiative ("CEELI") Institute in Prague, I, along side European lawyers and scholars, taught judges and lawyers from Eastern Europe and Central Asia courses in judicial independence and human rights law.

Our law schools opened up their doors to foreign legal scholars, or even sent their faculty abroad to help draft new constitutions and statutes. Yale

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* United States District Court Judge for the District of Massachusetts.

[1] 62 F. Supp. 2d 173 (D. Mass. 1999). The antitrust charges were first dismissed by the original trial judge, reinstated by the First Circuit, then tried before me for over six weeks. I noted:

> [w]hile concerns about comity and the exigencies of a criminal prosecution may not have been sufficient to bar the prosecution, they figured prominently in the actual trial. Fundamental issues about language and meaning - which inferences were reasonable and which were not in light of Japanese culture and traditions - permeated the case. In short order, the Court was obliged to address: To what degree does the international nature of the investigation affect the discovery obligations of the United States Government? (Memorandum and Order, May 15, 1998) Which country's law governs the question of the liability of a successor corporation? (Order, May 29, 1998) Should the Court allow the video teleconferencing of a witness from Japan in the middle of the trial when that witness was beyond government process? (Memorandum and Order, July 28, 1998) What procedures should the Court follow when the translator for the defense and the translator for the government disagree on a critical issue (whether the word "Sando" meant agreement, which was illegal, or concurrence, which, arguably, was not)? Should the Court permit the introduction of evidence of price-fixing involving products to be sent to other countries when such activities were not illegal in those countries?

Id. at 178.

Law School, where I teach as an adjunct professor, holds a yearly "Global Constitutionalism" seminar at which the chief justices of the constitutional courts of Europe, Asia, Australia, New Zealand and North America are invited. Likewise, in 1998, four members of the United States Supreme Court visited several European courts with constitutional responsibilities.[2] American constitutional scholarship began to focus on the new phenomenon of "world constitutionalism."[3]

What my colleagues and I found was an ongoing dialogue between constitutional democracies confronting similar issues and grappling with similar problems. More significant was that they were doing so based on a similar set of principles, many of which were derived from our own Constitution and Bill of Rights.

"So what?" some may say. Why should we—American citizens, American judges—care about these trends? Or worse, what do these "foreign sources" have to do with us?

We should care about "foreign sources" and "foreign courts" as a matter of international law and its legitimacy. We should care as a matter of domestic law as well. We should care because in this interconnected globe—where, as I say, the world regularly intrudes - it makes no sense not to.

Let me start with the first concern—international law and legitimacy:[4]

Former Justice Claire Heureux-Dube of the Canadian Supreme Court describes a change in the international legal community from "reception" to "dialogue":

> As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being "givers" of law while others are "receivers."[5]

Personal contacts between judges have increased as the Yale seminar and similar international programs and trips reflect. Advances in technology—notably the internet—foster that communication. Even in countries in the civil law tradition[6] judges are more aware of the opinions of their peers around the

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[2] *See* Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045, 1045 (2000).

[3] *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

[4] I speak here of international law that goes beyond treaty law and customary international law to include precedents in foreign courts. *See* Harold Hongju Koh, *International: Law As Part of Our Law*, 98 AM J. INT'L L. 43, 53 (2004).

[5] Claire L'Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 17 (1998).

[6] Although civil law and common law traditions are converging, as a general matter, civil law judges eschew the citation to precedent because they consider legislative enactments to be the only legitimate source of law. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN

world, whether or not those opinions formally count as precedent. Courts recognize that they are in fact grappling with very similar issues. Human rights issues, in particular, are by their very nature international.[7]

The problem, Justice L'Heureux-Dube notes, is that up until recently, the United States Supreme Court has seen itself predominantly as a "giver" and refused to even consider the relevance of decisions from other legal systems. Should that continue, she predicts, the role of American courts and legal traditions would be bound to diminish. Courts will increasingly see United States jurisprudence as irrelevant and isolated.[8] Our important voice will become marginalized.

The decline of American influence among democratic legal systems should matter to us. We regularly appeal to world opinion with respect to the legitimacy of our acts, our policies, and to seek world condemnation of the acts and policies of our enemies.[9] Our considerable efforts to create and participate in a legal culture involving emerging democracies—the trips, and panels, and conferences—are undermined when we are seen to ignore the work of respected jurists around the world.

This is not simply about the application of the international law to our domestic law, or about treaty enforcement.[10] Rather it involves looking to foreign law for guidance, for ideas or alternatives, analogies and distinctions, to situate our legal traditions in the context of broader world currents.

American judges have the unique privilege—the privilege of interpreting constitutional law—at all levels of the American judicial system.

INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA 29 (2d ed. 1985).

[7] L'Heureux-Dube, *supra* note 5, at 23-5.

[8] *Id.* at 29-30. *See also* Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 27, 114 (2002) (suggesting that the influence of American law is declining for a number of reasons including its failure to engage in comparative reasoning). Sarah Harding cites as an example a decision of the Supreme Court of South Africa, Witwatersrand Local Division, Ferreira v. Levin NO., 1995 (4) BCLR 437 (W) (SA), a case concerning freedom from self-incrimination. While the court examined and quoted numerous Fifth Amendment cases, it emphasized jurisprudence from Canada, Germany, Britain, and the European Court of Human Rights, rather than American precedents. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 415 n.31 (2003).

[9] Koh, *supra* note 4, at 44 ("Even today, for any nation consciously to ignore global standards not only would ensure constant frictions with the rest of the world, but also would diminish that nation's ability to invoke those international rules that served its own national purposes.").

[10] International law is part of our binding domestic law. *Id.* at 44 n.5 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 introductory note (1987) ("From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done.")).

Constitutions invoke broad legal concepts intended to withstand the test of time, concepts which are then applied to specific cases, in my judgment "standards" and not "rules."[11] The interpretation of constitutional standards necessarily involves courts in line drawing—what is cruel and unusual punishment, what does affirmative action entail, what does the equal protection of the law cover. In that regard it makes sense to look to the legal product of other countries which have similar constitutional standards, have engaged in similar normative discussions, and have had to draw similar lines.

This is particularly the case when we deal with legal precedent from countries or international bodies which have used our Constitution as their original model,[12] what has been described as "vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law."[13]

But constitutional interpretation is not the only place in which foreign legal precedent can play a role. In the day to day interpretation of ordinary statutes and regulations, when judges are confronted with new situations not covered by existing rules or precedents, they are obliged to cast about for analogies, to understand how comparable situations were resolved by other courts. For example, when I taught judges from countries in the civil law tradition, I used cases involving the new reproductive technologies—a frozen embryo conceived when the marriage was intact, whose status was unclear now that the marriage dissolved. I would ask, "What regulation covers that situation? What regulation even contemplated such a situation?" I encouraged the judges to look to analogous situations faced by the courts of other countries, whether foreign law had formal precedential value or not. As an American judge, I should follow the same advice.

This is not to say that American courts are "bound" by these precedents, any more than were the judges of the courts I taught, or any more than federal judges would be bound by state court interpretation of state constitutional law. But just as the interpretation of the United States Constitution has been aided

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[11] *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) ("A legal directive is 'rule'—like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts . . . ."). Standards, unlike inflexible rules, "better accommodate a world in which . . . formerly clear boundaries . . . have been relativized or dissolved." *Id.* at 107 (referring to Justice Stevens's concurring opinion in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)).

[12] Koh, *supra* note 4, at 54.

[13] *Id.* (quoting Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV 537, 541 (1988)). *See also* Justice Stephen Breyer, The Supreme Court And The New International Law, Address Before the American Society of International Law, 97th Annual Meeting, Washington, D.C. (Apr. 4, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

by the interpretation of state constitutions,[14] many of which predated the United States Constitution, so too can our work be advanced by consulting the important work of our foreign counterparts.

Consider it this way: So much of the bedrock enterprise of judging involves trying to understand the context in which a decision should be made, to compare or contrast precedent, to adopt or distinguish other situations. In this regard, foreign law serves as an "interpretive tool,"[15] part of the process of "comparative reasoning,"[16] helping courts to analyze and distinguish, and where appropriate, borrow foreign precedents. The idea is not to look to foreign precedents for "solutions," which would effectively eliminate constitutional differences and important national choices, but rather "to learn from foreign experience without assimilating constitutional jurisprudence into a larger transnational conversation about rights and democracy."[17] Justice Ginsburg summed up the concept, during the oral argument in *Gratz v. Bollinger*:[18]

> [W]e're part of a world, and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has, the European Union, South Africa, and they have all approved this kind of, they call it positive discrimination . . . [T]hey have rejected what you recited as the ills that follow from this. Should we shut that from our view at all or should we consider what judges in other places have said on this subject.[19]

Professor Koh has described three kinds of situations in which even our Supreme Court has looked to foreign and international precedents as an aid to constitutional interpretation—"parallel rules," "empirical light," and "community standards" situations.[20] In the situation of parallel rules, American legal rules parallel those of other nations, particularly those with similar legal and social traditions.[21] "Empirical light," derived from Justice Breyer's

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[14] The United States Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 83 (1986) (forbidding a prosecutor from using peremptory challenges to strike jurors on the basis of race) cited the Massachusetts Supreme Judicial Court's decision in *Commonwealth v. Soares*, 377 Mass. 461, *cert. denied*, 444 U.S. 881 (1979), as an example of a court refusing to follow other state court decisions while interpreting its own constitution. This is perhaps the first court to have prohibited the practice.

[15] Harding, *supra* note 8, at 427.

[16] *Id.* at 437.

[17] *Id.* at 427 (citing Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 890 (1999)).

[18] 539 U.S. 244 (2003).

[19] Transcript of Oral Argument at 24, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-516.pdf.

[20] Koh, *supra* note 4, at 45.

[21] *Id.*

decision in *Printz v. United States*,[22] is described as involving situations in which foreign law, though not of precedential value, "may . . . cast an empirical light on the consequences of different solutions to a common legal problem . . . ."[23] "Community standards" involve a constitutional concept which by its own terms refers to a collective measure, such as "cruel and unusual," "due process of law," "unreasonable searches and seizures,"[24] and arguably, standards of civilized states beyond our borders.

The position that American courts should never look to foreign sources of law is plainly intertwined in a fundamentally different philosophy of American constitutional law, than these scholars reflect. It is the "originalist" view of constitutional interpretation that ascribes legitimacy to our constitutional rules only by virtue of the fact that they originated in our constitution. When judges go beyond the four corners of the document, so "originalist" scholars and judges maintain, their interpretation loses its moral force.[25] Reference to foreign precedent to interpret the Constitution is not at all benign; it threatens the Court's mission.

But the Constitution is not a text fixed in stone at the time of its birth. The Fourteenth Amendment, for example would then have forever enshrined constitutional differences between men and women, just at the moment that the Amendment sought to eliminate racial discrimination.[26] The Constitution

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[22] 521 U.S. 898 (1997).

[23] *Id.* at 977 (Breyer, J., dissenting).

[24] Koh, *supra* note 4, at 46. Thus, as Professor Koh notes, in *Trop v. Dulles*, 356 U.S. 86 (1958), the Court held that the Eighth Amendment of the United States Constitution contains an "evolving standard[] of decency that mark[ed] the progress of a maturing society," *id.* at 101, an evolving standard judged not just by national but international standards. Koh, *supra* note 4, at 46.

[25] Harding makes an interesting point. She suggests that the normative position, that "[o]nce the constitutional system is in place, it alone must provide the answer to all formal constitutional queries and issues," translates into an empirical position, "that it indeed does provide all answers." Harding, *supra* note 8, at 442.

> The clear demarcation of what is in and what is out . . . stems from a desire to understand the internal legal system as coherent, and upon this foundation rests the law's authority. It is a rejection of the existence and even the possibility of ambiguity . . . Constitutional interpretation and decisionmaking becomes primarily a process of enforcement, . . . finding and applying the existing coherent body of law rather than making new law; it further presumes a sense of final and conclusive authority.

Id. at 443. *See also* Sullivan, *supra* note 11, at 77.

[26] Professor Akhil Reed Amar writes:

> After the Thirteenth Amendment abolished slavery, Southern states were eligible to count all their blacks for purposes of congressional representation and the electoral college, without any two-fifths discount, even though these states did not yet allow blacks to vote. Unless the Constitution were amended, Southern states would actually have more national clout after Appomattox than they had before secession! To prevent this, section 2 of the Fourteenth Amendment devised a new apportionment formula which put the word "male"

is not a civil code, written in explicit detail, intending to be self enforcing or virtually so, "rules," not "standards."[27]

Indeed, even if one were to look to the Constitution as it was originally drafted, and the intent of the Framers at that moment, one would also be obliged to look at the international norms invoked by them at the time. The young republic sought to situate itself in the traditions of the law of nations, much as the new South African constitutional court has done.[28] Nor would it make sense to hark back only to 18th century precedent, without regard to the evolution of those precedents in the modern world. It would be like "operating a building by examining the blueprints of others on which it was modeled, while ignoring all subsequent progress reports on how well those other buildings actually functioned over time."[29]

Critics further suggest that using foreign sources of law leads to "cherry picking" those precedents that support one point of view, and rejecting those that do not. "Cherry picking," so called, is a problem throughout legal research—whether one is evaluating legislative history, and "cherry picking" the language that supports the interpretation you favor, or choosing legal precedent from the vast body of state and federal decisions. It applies even in civil code countries—choosing which rule to apply in an extensive and complex code, or which exception to invoke.[30] What seems like "cherry picking" to you is mainstream reasoning to me. The fundamental issue is methodological—what are the authorities that we are selecting, and how persuasive are they to an American audience of litigants and scholars.[31]

Finally, critics cite to what Alexander Bickel has described as the "countermajoritarian difficulty."[32] Even though American courts are "countermajoritarian" institutions, at the very least their work reflects the sovereign will of this country. To move beyond our borders, to the judicial decisions of other

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into the Constitution for the first time. In essence, a state that disfranchised any of its adult male citizens would have its congressional apportionment and electoral college allotment proportionately reduced. But no state would pay any price, in Congress or in the electoral college, for disfranchising adult women citizens!

Akhil Reed Amar, *Architecture*, 77 INDIANA L.J. 671, 689 (2002).

[27] *See* Sullivan, *supra* note 11, at 87.

[28] *See* Koh, *supra* note 4, at 44 ("The framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance."). *See also*, Harding, *supra* note 8 at 459.

[29] Koh, *supra* note 4, at 54.

[30] Harding, *supra* note 8, at 428.

[31] Moreover, a host of constitutional scholars, like Koh, have suggested techniques for "comparative reasoning" to address this problem. *See also*, David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 542 nn.11-15 (2001) (describing other legal scholarship in this area).

[32] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

sovereigns, compounds the problem. But that position takes an unduly narrow view of the democratic process even in a globalized world. As Justice Breyer noted:

> [T]he transnational law that is being created is not simply a product of treaty-writers, legislatures, or courts. We in America know full well that in a democracy, law, perhaps most law, is not decreed from on high but bubbles up from the interested publics, affected groups, specialists, legislatures, and others, all interacting through meetings, journal articles, the popular press, legislative hearings, and in many other ways. That is the democratic process in action. Legislation typically comes long after this process has been underway. Judicial decisions, particularly from our Court, work best when they come last, after experience has made the consequences of legislation apparent.[33]

We borrow from foreign law those concepts, those ideas, those alternatives, which "bubbled up" into American legal landscape, which fit our norms and our traditions.

Why have these issues suddenly become relevant at this point in our history? Prior to World War II few countries had constitutions or traditions that could readily translate into an American context.[34] Moreover, technological advances and social interactions have made sharing precedent possible. In a word, borders have become more and more porous not just to economic and social forces, but to the exchange of legal concepts.[35]

Let me end then, where I began. The world continues to intrude in my courtroom, my cases, and my travels. We have been offered up as ambassadors to emerging democracies around the world, struggling with the same legal issues. We have interacted with our counterparts in the democracies of

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[33] Justice Stephen Breyer, The Supreme Court And The New International Law, Address to The American Society of International Law, 97th Annual Meeting, Washington, D.C. (Apr. 4, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html, cited in Koh, *supra* note 4, at 55.

[34] Justice Anthony Kennedy, in a talk before a Federal Judicial Center program on international law, reported that precedent from civil code countries was particularly difficult to translate into the American tradition. Constitutional Courts in such countries would decide issues simply by reference to portions of their codes, without extending discussion of the underlying principles.

[35] Harding notes:

> [L]egal systems reflect the cultures within which they are situated and thus have unique and highly contingent identities. In particular, the organic quality of the common law firmly embeds it in local norms and customs. The interdependency between law and the culture within which it is situated is indeed one of the defining features of the common law, and is crucial to its ongoing vitality. Given the close connection between law and local culture, foreign law seems to have very little place in judicial reasoning.

Harding, *supra* note 8, at 411. At the same time, she adds: "And yet as borders between cultures are porous, should the borders between legal systems not be equally porous." *Id.*

long standing, working with constitutional texts or principles which derived in part from our own.

But the feeling one gets in these encounters is now unmistakable: having bequeathed our Constitution to other democracies and bequeathed our traditions, we now have been surpassed by them.[36] If we mean to lead or even participate in the ongoing international legal dialogue, particularly in human rights, we have to do better. The United States' legal community, in short, like all good parents, has to "learn from [its] children."[37]

[36] Koh, *supra* note 4, at 48. Professor Koh notes the beginning of a different trend in the United States Supreme Court, one more amenable to considering and valuing the work of foreign courts, citing to statements made by Justices Rehnquist, Kennedy, O'Connor, Breyer, Stevens and Ginsburg in speeches and in opinions. *Id.*

[37] United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

The Role of Customary International Law in Federal and State Court Litigation

Jon M. Van Dyke*

I. INTRODUCTION

Now that economic globalization is both a reality and a matter of intense controversy, it is appropriate and useful to examine the process of legal globalization, and how this development affects litigation in the federal and state courts of the United States. U.S. courts embraced international law enthusiastically in the early years of our country, viewing it as an important protection for a small and weak country, as we were then, and they applied international law principles as part of the common law of the United States. But in recent years, some scholars and a few judges have launched a campaign against the use of customary international law in U.S. courts, arguing that it is inappropriate, and even undemocratic, for judges to apply principles of customary international law unless the principles have been affirmatively endorsed by the political branches of our government. The same group, who have characterized themselves as "revisionists" because they seek a major reconsideration and revision of the way international law is used in U.S. courts, also argue that treaties should be presumed to be non-self-executing, thus creating no enforceable rights for individuals until they are implemented by separate legislation.

This article will discuss some of the early and recent U.S. cases utilizing principles of customary international law; examine the attacks on customary international law by those who view it as a threat to the United States, as well as their views on treaties; focus on what is ultimately at stake in this debate; and conclude by explaining why customary international law is an essential part of the international legal system and why U.S. courts have always utilized it as a source of law when applicable to the controversies presented to them.

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* Professor of Law, William S. Richardson School of Law, University of Hawai'i. B.A. Yale University, 1964, J.D. Harvard University, 1967. The author would like to thank Professor Jordan J. Paust for helpful suggestions provided on an earlier draft, the staff of the University of Hawaii Law Review for organizing the lively symposium in February 2004 that provided a forum for this paper, and Justice Ruth Bader Ginsburg for providing the occasion and inspiration for this study.

II. THE ROLE OF INTERNATIONAL LAW IN U.S. COURTS

When the United States emerged from the Revolutionary War as an independent country, our early leaders and judges accepted international law as a source of law that governed our country and our people. The First United States Congress enacted in 1789 the statute that has become known as the Alien Tort Claims Act, or the Alien Tort Statute, which gives aliens the right to bring claims in U.S. courts for torts committed in violation of the law of nations.[1] In 1792, Attorney General Edmund Randolph issued an opinion explaining that: "The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference."[2]

The first decisions handed down by the courts of the United States treated international law with deference and respect. In 1793, the first Chief Justice of the U.S. Supreme Court, John Jay, explained to a grand jury that the laws of the United States included the laws of nations as well as the Constitution, statutes, and treaties of the United States. He went on to say that: "Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us."[3] Chief Justice John Marshall explained in another early case that "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations as understood in this country."[4] The United States was worried about its precarious status in world affairs, particularly in light of the constant European wars of the time and Britain's invasion of the United States in 1812. Chief Justice John Marshall explained forcefully in a difficult 1825 case that: "no principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights."[5] That case was difficult because it involved the slave trade, and Chief Justice Marshall's opinion protected the rights of

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[1] Judiciary Act of 1789, ch. 20, sec. 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350; *see infra* text accompanying notes 72-96).

[2] 1 Op. Att'y Gen. 26, 27 (1792).

[3] Henfield's Case, 11 F.Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360), reprinted in JORDAN J. PAUST, JOAN M. FITZPATRICK, AND JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. (West Group 2000); *see generally* materials published in PAUST, FITZPATRICK & VAN DYKE at 110-35.

[4] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); other cases confirming this principle are listed in PAUST, FITZPATRICK, AND VAN DYKE, *supra* note 3, at 141-42.

[5] The Antelope, 23 U.S. 66, 122 (1825).

the slave traders to their slaves, ruling that although trading in humans is contrary to the law of nature,[6] it cannot be said to be contrary to international law because of the long practice of trading in slaves sanctioned by universal assent[7] and carried on without opposition and without censure for two centuries.[8]

Chief Justice Marshall also turned to international law for his seminal analysis of native rights in the 1832 case of *Worcestor v. Georgia*,[9] where he relied upon the international law scholar Vattel to explain that under the law of nations the relationship between natives and the United States government was comparable to that of the weaker and stronger powers in Europe:

> the settled doctrine of the law of nations is, that a weaker power does not surrender its independence–its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[10]

The basic doctrine of native autonomy in the United States is thus based on an explicit invocation and understanding of international law.

Sixteen years after Chief Justice Marshall's opinion involving slavery in *The Antelope*, the Supreme Court once again examined the international law principles applicable to this topic in *The Amistad*.[11] But this time the Court reached a different result, refusing to return the Africans to Spain, despite a treaty that seemed to support such a result, because the Africans' claims to liberty based on the eternal principles of justice and international law were deemed to override the treaty.[12] In an opinion by Justice Joseph Story, the Court pointed out that Spain had "utterly abolished" the slave trade and made it "a heinous crime."[13] The kidnapped Africans on the ship must thus be viewed "by the laws of Spain itself" as individuals "entitled to their freedom."[14] As "free negroes, the treaty with Spain cannot be obligatory upon them; and the United States are bound to respect their rights as much as those of Spanish subjects."[15] The conflict of rights between the Spanish claimants and the kidnapped Africans therefore "must be decided upon the eternal

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[6] *Id.* at 120.
[7] *Id.* at 122.
[8] *Id.* at 121.
[9] 31 U.S. (6 Pet.) 515 (1832).
[10] *Id.* at 560-61.
[11] 40 U.S. (15 Pet.) 518 (1841).
[12] *Id.* at 595.
[13] *Id.* at 593.
[14] *Id.*
[15] *Id.* at 595.

principles of justice and international law,"[16] especially because "human life and liberty are in issue."[17] "The treaty with Spain never could have intended to take away the equal rights of all foreigners . . . to equal justice; or to deprive such foreigners of the protection given them by other treaties, *or by the general law of nations*."[18] The Court thus concluded "that these negroes ought to be free; and that the Spanish treaty interposes no obstacle to the just assertion of their rights."[19] This important opinion is sometimes viewed as an early example of a court recognizing that a "peremptory norm" or "*jus cogens*" principle of international law will override a contrary treaty provision.[20]

The U.S. Supreme Court issued two long opinions at the end of the nineteenth century that illustrate the approach of U.S. courts toward international law disputes. In *Hilton v. Guyot*,[21] the Court was asked to enforce the judgment of a French court which, according to the defendant, had been obtained fraudulently. The plaintiff contended that the French judgment should be given full credit and conclusive effect, but the defendant argued that it should be set aside or ignored.[22]

The opinion by Justice Horace Gray began by providing the following explanation about how U.S. courts treat international law:

> International law, in its widest and most comprehensive sense,—including not only questions of right between nations, governed by what has been appropriately called the "law of nations," but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation,—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.
>
> The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the

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[16] *Id.*

[17] *Id.* at 596.

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

[19] *Id.*

[20] *See infra* text accompanying notes 53-56. The slave trade was also viewed as violative of evolved customary international law in United States v. Haun, 26 F.Cas. 227 (C.C.S.D. Ala. 1860)(No. 15,329).

[21] 159 U.S. 113 (1895).

[22] *Id.* at 114-22.

> works of jurists and commentators, and from the acts and usages of civilized nations.[23]

The Court then proceeded to engage in an extensive survey of international law treatises on the question whether the courts of one nation need to give full faith to the decisions of the courts of another nation, which was followed by an equally extensive survey of judicial decisions from other countries on this question. These foreign decisions were primarily from European sources, but the Court also referred to a decision from Egypt and several from Latin America. From these many sources, the Court determined that "the rule of reciprocity has worked itself firmly into the structure of international jurisprudence,"[24] and that, in the absence of a reciprocal agreement to give the decisions of each other's courts full faith, the decision of a foreign court is only prima facie evidence which can be challenged by a showing of fraud or prejudice.[25] In summarizing the ruling, Justice Gray explained that "international law is founded upon mutuality and reciprocity,"[26] and that, because French courts would reexamine a U.S. judgment, it is only appropriate for a U.S. court to reexamine a French decision. "If we should hold this judgment to be conclusive, we should allow it an effect to which . . . it would . . . be entitled in hardly any other country in Christendom, except the country in which it was rendered."[27]

Five years later, Justice Gray again wrote for the Court in *The Paquete Habana*,[28] involving two small fishing vessels which were seized in 1898 as prizes of war during the Spanish-American War. President William McKinley had decreed that U.S. naval activities should be conducted consistently with "the law of nations applicable to such cases" and "upon principles in harmony with the present views of nations and sanctioned by their recent practice."[29] Justice Gray again explained that international law is part of U.S. law:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have

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[23] *Id.* at 163 (emphasis added).

[24] *Id.* at 227.

[25] *Id.* at 227-28.

[26] *Id.* at 228.

[27] *Id.*

[28] 175 U.S. 677 (1900).

[29] *Id.* at 712 (quoting President McKinley's decrees of April 22 and 26, 1898).

> made themselves peculiarly well acquainted with the subjects of which they treat.[30]

He then engaged in an extensive survey of treatises, cases, and historical practices which led to the conclusion that:

> by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.[31]

Again, Justice Gray's survey is primarily of European and U.S. scholars, cases, and events, but the Argentine writer Carlos Calvo is included,[32] as is the Japanese scholar Sakue Takahashi.[33]

During the past century, federal and state courts have continued to utilize principles of customary international law and to draw upon ideas from other jurisdictions to decide cases brought before them.[34] Justice Antonin Scalia's dissenting opinion in the 1993 case of *Hartford Fire Insurance Co. v. California*[35] argued that U.S. jurisdictional statutes should be interpreted narrowly to be consistent with "'the law of nations' or customary international law [which] includes limitations on a nation's exercise of its jurisdiction to prescribe."[36] In his dissenting opinion in *Printz v. United States*,[37] Justice

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[30] *Id.* at 700.

[31] *Id.* at 708.

[32] *Id.* at 703-04, 708.

[33] *Id.* at 700 (quoting SAKUE TAKAHASHI, INTERNATIONAL LAW 11, 178, where he explained that Japan had exempted coastal fishing vessels from seizure in its 1894 war with China).

[34] In addition to those cases listed *infra* in note 77, *see, e.g.*, People v. Liebowitz, 140 Misc. 2d 820, 822, 531 N.Y.S.2d 719, 721 (1988) ("Even in the absence of a treaty, it is a court's obligation to enforce recognized principles of international law where questions of right depending on such principles are presented for the court's determination."); Republic of Argentina v. City of New York, 250 N.E.2d 698, 700 (N.Y. Ct. App. 1969) (action in this case is "mandated by the rules of international law. It is settled that . . . all domestic courts must give effect to customary international law."); State v. Pang, 940 P.2d 1293, 1322 (Wash. 1997) ("International law is incorporated into our domestic law."); Peters v. McKay, 238 P.2d 225, 230-31 (Ore. 1951) ("[I]nternational law is part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference, and . . . relevant provisions of the law of nations are legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce them.").

[35] 509 U.S. 764 (1993).

[36] *Id.* at 815 (Scalia, J., dissenting) (*citing* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804), and RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW §§ 401-16 (1987)).

[37] 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting).

Stephen Breyer looked to the federalism experiences in Switzerland, Germany, and the European Union for guidance in addressing whether the federal government could utilize state officials to enforce federal laws. And in the majority opinion in *Atkins v. Virginia*, Justice John Paul Stevens cited to a brief filed by the European Union for the proposition that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."[38]

In the 2002-03 U.S. Supreme Court session, Justice Anthony Kennedy's majority opinion in *Lawrence v. Texas*,[39] referred specifically to decisions of the European Court of Human Rights to support the conclusion that the privacy and liberty rights protected by the U.S. Constitution include the right to private intimate sexual activity with the partner of one's choice. Similarly, Justice Ruth Bader Ginsburg, in her concurring opinion in *Grutter v. University of Michigan*,[40] referred to the International Convention on the Elimination of Racial Discrimination[41] (which the United States has ratified) and the Convention on the Elimination of All Forms of Discrimination Against Women[42] (which the United States has signed but not yet ratified) for guidance on whether affirmative action programs should have a termination point.[43]

During the 2003-04 term, the Supreme Court again examined and utilized international law principles in several key cases. The plurality opinion in *Hamdi v. Rumsfeld*,[44] written by Justice Sandra Day O'Connor, relied upon "a clearly established principle of the law of war" and "our understanding [of] longstanding law-of-war principles" for the conclusion that "detention [of wartime captives] may last no longer than active hostilities."[45] Justice David

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[38] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[39] 539 U.S. 558, 576-77 (2003).

[40] 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

[41] International Convention on the Elimination of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195.

[42] Convention on the Elimination of All Forms of Discrimination Against Women, Annex to G.A. Res. 34/180, 34 U.N. GAOR Res. Supp. (No. 46) 194, U.N. Doc. A/34/46, Art. 4(1)(1979). Justice Ginsburg also cited to these two treaties in the companion case of Gratz v. Bollinger, 539 U.S. 244, 302 (2003), where she explained that: "Contemporary human rights documents draw just this line; they distinguish between policies of oppression and measures designed to accelerate *de facto* equality."

[43] Justice O'Connor also seems to have supported this view in her recent speech to the American Society of International Law, where she explained that acting in accord with international norms may increase the chances of broader alliances. Sandra Day O'Connor, *Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law: Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348, 352 (2002).

[44] Hamdi v. Rumsfeld, __ U.S. __, 124 S. Ct. 2633 (2004).

[45] 124 S. Ct. at 2641. Justice O'Connor found this "clearly established principle" by examining several treaties and one law review article. *See also id.* at 2640, where Justice

Souter's opinion concurring with the result observed that holding Hamdi incommunicado and without a hearing to determine his status "appears to be a violation of the Geneva Convention."[46] In *Republic of Austria v. Altmann,*[47] Justice Stephen Breyer's concurring opinion referred to statutes from the United Kingdom, Singapore, and Australia, a European treaty, and decisions from courts in France, the United Kingdom, and the Netherlands to help resolve whether the standards of a the 1976 Foreign Sovereign Immunities Act[48] should be applied to a dispute that began before the statute was enacted.[49] It cannot be doubted, therefore, that it is appropriate for courts in the United States to examine international law norms and rulings from other jurisdictions for guidance regarding questions presented to them.

III. WHAT EXACTLY IS CUSTOMARY INTERNATIONAL LAW?

The primary sources of international law are treaties (bilateral and multilateral) and "customary international law," which consists of norms that emerge from the actual practices of states undertaken with an understanding that the practice is required by law (*opinio juris sive necessitatis*).[50] The "practices of states" are usually found in actions taken by a country, but sometimes can be discovered in the statements their diplomats or leaders issue or in their votes at international organizations or diplomatic conferences. To become "custom," a practice must have the widespread (but not necessarily universal) support of countries concerned with the issue[51] and must usually

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O'Connor cited *Ex Parte Quirin,* 317 U.S. 1, 28 (1942), for the proposition that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, *by 'universal agreement and practice,'* are 'important incident[s] of war'" (emphasis added). Justice O'Connor's plurality opinion was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.

[46] 124 S. Ct. at 2658. Justice Souter's opinion was joined by Justice Ginsburg.

[47] Republic of Austria v. Altmann, __ U.S. __, 124 S. Ct. 2240 (2004).

[48] Federal Sovereign Immunities Act, 28 U.S.C. sec. 1602 *et seq.*

[49] *Altmann*, 124 S. Ct. at 2259. Justice Breyer's opinion was joined by Justice Souter. In his concurring opinion in *Sosa v. Alvarez-Machain,* __ U.S. __, 124 S. Ct. 2739, 2783 (2004), Justice Breyer cited decisions from the International Criminal Tribunal for the Former Yugoslavia and the Israeli Supreme Court, and materials from the International Law Association and the European Commission to support and explain his views.

[50] *See, e.g.*, North Sea Continental Shelf Cases (Fed. Rep. of Germany v. Denmark; Fed. Rep. of Germany v. Netherlands), 1969 I.C.J. 3, 44, para. 77 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a rule of law requiring it.").

[51] *See, e.g.*, Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, 98 para. 186:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect . . . , with complete consistency . . . . In order to deduce the

have continued for a period of time long enough to signify understanding and acquiescence.[52] Occasionally a regional custom can emerge, if the countries of a certain part of the world order their affairs in a certain manner.

In recent years, it has become accepted that some principles of customary international law are so important that they are called "peremptory norms" or "*jus cogens*" principles of international law and that no nation is permitted to act contrary to these principles.[53] This view was articulated as early as 1867 by Johann Bluntschli, who wrote that "treaties the contents of which violate the generally recognized human right . . . are invalid."[54] The Austrian Professor Alfred Von Verdross developed this notion further in a 1937 article arguing that it would simply be impossible to permit a state to enter into a treaty that would require it to violate its duties under international law.[55] Among the norms now considered to be in the *jus cogens* category are the prohibitions on aggression, genocide, crimes against humanity, slavery, extrajudicial murder, prolonged arbitrary detention, torture, and racial discrimination.[56]

It has been argued that customary international law "is unwritten and relatively amorphous,"[57] that "the determination of customary international law is notoriously difficult,"[58] and that "[t]he determination of what offenses

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existence of customary rules, . . . it [is] sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

[52] In 1871, the U.S. Supreme Court determined that regulations adopted by Great Britain in 1863 and by the United States in 1864 governing the lighting required by merchant vessels had evolved rapidly into obligatory norms of the international law of the sea because they had become "generally accepted as a rule of conduct based on the common consent of civilized communities." The Scotia, 81 U.S. (14 Wall.) 170 (1871).

[53] The Latin words "*jus cogens*" can be translated as "compelling law." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62 (4th ed. 2003). *See, e.g.*, Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331:

A treaty is void if . . . it conflicts with a peremptory norm of general international law . . . . [A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

[54] JOHANN BLUNTSCHLI, MODERN LAW OF NATIONS OF CIVILIZED STATES (1867), reprinted in PAUST, FITZPATRICK, AND VAN DYKE, *supra* note 3, at 51.

[55] Alfred Von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571 (1937).

[56] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

[57] Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 349 (1997).

[58] John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 217 (2003).

violate customary international law . . . is no simple task."[59] But it is also true that many U.S. courts, in many contexts, have identified principles of customary international law and have applied them to resolve disputes.[60]

Customary international law is in its nature an evolving body of principles, and commentators and litigants frequently make broad contentions about its content. But before a principle can be embodied within customary international law, it must have been accepted generally by countries as a binding principle of law, as evidenced by their actions and statements. The Second Circuit's opinion in *Flores v. Southern Peru Copper Corp.*[61] illustrates the difficulty in becoming accepted as such a norm. The court followed the approach used in *Filartiga v. Pena-Irala*[62] to determine whether the plaintiffs' claim presented a violation of customary international law, but also observed that "courts must proceed with extraordinary care and restraint"[63] in identifying offenses that violate customary international law. The court then examined a wide range of international law materials and ruled that the "rights to life and health are insufficiently definite to constitute rules of customary international law"[64] and that the plaintiffs had not established that customary international law prohibits pollution that stays within one nations' borders.[65] Similarly, in *Beanal v. Freeport-McMoran, Inc.*,[66] the Fifth Circuit rejected an Indonesian citizen's claims for damages resulting from environmental degradation and cultural genocide, ruling that the evidence presented described only an "amorphous right . . . devoid of discernable means to define or identify conduct that constitutes a violation of international law."[67]

The U.S. Supreme Court addressed this issue in detail in *Sosa v. Alvarez-Machain*,[68] ruling that claims can be brought under the Alien Tort Claims Act based on "present-day law of nations" if they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized"[69] —offenses against diplomats, violations of safe conduct, and piracy.[70] The Supreme Court thus utilized an approach similar to that utilized in *Flores* and *Beanal*, accepting the proposition that new norms of customary international

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[59] Flores v. South Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003).

[60] *See, e.g.*, cases cited and discussed in text *supra* at notes 3-49 and *infra* at notes 75-77.

[61] 343 F.3d 140 (2d Cir. 2003).

[62] 630 F.2d 876 (2d Cir. 1980).

[63] *Flores*, 343 F.3d at 154.

[64] *Id.* at 160.

[65] *Id.* at 161.

[66] 197 F.3d 161 (5th Cir. 1999).

[67] *Id.* at 168.

[68] _U.S._, 124 S. Ct. 2739 (2004).

[69] 124 S. Ct. at 2761-62; *see also id.* at 2765-66.

[70] *Id.* at 2756, 2759, and 2761.

law can emerge, but explaining that a true international consensus must exist before U.S. courts should recognize causes of action based on such norms. Applying this cautionary approach, the Court ruled that Dr. Alvarez-Machain could not maintain his claim for damages, because "a single detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[71] The fear that applying customary international law principles to disputes in U.S. courts will lead to a boundless expansion of new and indeterminate norms has proved, therefore, to be unfounded.

IV. THE POSITION THAT CUSTOMARY INTERNATIONAL LAW IS NOT APPLICABLE IN U.S. COURTS UNLESS IT HAS BEEN APPROVED BY THE U.S. CONGRESS

The view that customary international law should not be used by U.S. courts without congressional authorization is frequently traced to the 1984 concurrence issued by Judge Robert Bork in *Tel Oren v. Libyan Arab Republic*.[72] This long opinion argued that the Alien Tort Claims Act,[73] which had been enacted by the First Congress in the Judiciary Act of 1789, provided only *jurisdiction* for federal courts to hear claims based on violations of the law of nations, and thus that a separate *cause of action* had to be enacted by Congress before a specific claim based on a specific violation could be brought.

Although Judge Bork's opinion challenged some received traditions and criticized the *Filartiga* analysis, it was not nearly as radical in its attacks on customary international law as those launched subsequently in the law review literature by the revisionist scholars. Judge Bork clearly recognized the existence of customary international law as a legitimate body of law that can by utilized by courts as part of the decisionmaking process.[74] Judge Bork's

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[71] *Id.* at 2769.

[72] 726 F.2d 774, 798-827 (D.C. Cir. 1984) (Bork, J., concurring). Perhaps the first modern article supporting this view was Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

[73] The Alien Tort Claims Act, ch. 20, sec. 9(b), 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350), says that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

[74] *See, e.g.*, 726 F.2d at 807 ("Customary international law may well forbid states from aiding terrorist attacks on neighboring states."); *id.* at 810 ("International law . . . is part of the common law of the United States. This proposition is unexceptionable."); *id.* at 811 ("To say that international law is part of federal common law is to say only that it is nonstatutory and nonconstitutional law to be applied, in appropriate cases, in municipal courts.").

acceptance of the role of customary international law becomes clearer by examining another opinion he wrote two years after *Tel-Oren*, where he explained that "[i]t was assumed by the framers and ratifiers of the Constitution that our obligations under international law would be honored."[75] He ruled in that case that the international law obligation to protect foreign embassies was of sufficient importance that free expression claims under the First Amendment must be modified or restricted in order to fulfill our international law responsibilities.[76]

Judge Bork's view that the Alien Tort Claims Act gave federal courts jurisdiction to adjudicate claims only if plaintiffs could identify a cause of action established through some other statute or source has been rejected repeatedly by other courts,[77] but it has continued to attract a loyal following

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[75] Finzer v. Barry, 798 F.2d 1450, 1456 (D.C. Cir. 1986), *rev'd in part* and *aff'd in part sub nom.* Boos v. Barry, 485 U.S. 312, 322-29 (1988).

[76] *Id.* at 1463.

[77] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 881, 884, 888 (2d Cir. 1980) (ruling that federal courts should interpret customary international law as it has evolved and exists at the time of the case thereby recognizing a claim for injuries resulting from government-sponsored torture based on evolving standards of customary international law); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (ruling that the Alien Tort Claims Act "appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture"); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1474-75 (9th Cir. 1994) (ruling that the Alien Tort Claims Act "creates a cause of action for violations of specific, universal and obligatory international human rights standards"); Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (explaining that a claim under the Alien Tort Claims Act must allege a violation of a "specific, universal, and obligatory" international norm, but "need not, however, cite a portion of a specific treaty or another U.S. statute in order to establish a cause of action"); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (reading the Alien Tort Claims Act "as requiring no more than an allegation of a violation of the law of nations in order to invoke" 28 U.S.C. § 1350); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (allowing claims to be brought for prolonged arbitrary detention, summary executions, and causing disappearances); Paul v. Avril, 812 F. Supp. 207, 212 (S.D. Fla. 1993); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) (ruling that "torture, summary execution, disappearance, and arbitrary detention . . . constitute fully recognized violations of international law"); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 442 n.20 (D.N.J. 1999) (characterizing Judge Bork's concurring opinion in *Tel-Oren* as "highly criticized," explaining that Judge Bork's "reasoning is flawed because it is based on the erroneous assumption that customary international law is non-self-executing," and adding that "it is well-established that [customary] international law is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress"); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370 (E.D. La.1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999); Burnett v. Al Baraka Corp., 274 F. Supp. 2d 86, 99-100 (D.D.C. 2003) (following Judge Edwards's Tel-Oren concurrence and thereby permitting a claim to proceed under the Alien Tort Claims Act against alleged accomplices of the September 11 attacks); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (allowing a claim to go forward against a Canadian company that allegedly committed acts of torture, enslavement, war crimes, and

of "revisionist" scholars and judges. Some of the revisionists argue that allowing courts to identify and utilize principles of customary international law without Congressional authorization interferes with the conduct of foreign affairs delegated to the political branches of government.[78] Some[79] argue that allowing federal courts to engage in this activity is inconsistent with the 1938 decision in *Erie R.R. Co. v. Tompkins*,[80] which held that there is no general federal common law,[81] and hence that federal courts must usually utilize the common law applied by the relevant state courts. Although Professor (and later Judge on the International Court of Justice) Philip C. Jessup explained right after *Erie* that its logic did not apply to principles of international law,[82] and even though the *Erie* opinion has not had any demonstrated impact on actual patterns of federal court use of customary international law during the many decades since it was issued,[83] the contrary view now has its loyal supporters.[84] These commentators argue that *Erie* requires federal courts to look to state courts for applicable common law principles, but they also argue that in the international field it is inappropriate for states to provide the lead, because foreign policy is a federal domain,[85] and therefore that all courts,

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genocide while collaborating with the Sudanese government to ethnically cleanse the civilian population in order to facilitate oil exploration activities). In *Deutsch v. Turner Corp.*, 324 F.3d 692, 718 (9th Cir. 2003), the court ruled that "claims under international law . . . giv[e] rise to federal subject matter jurisdiction under 28 U.S.C. § 1331."

[78] *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801-05 (D.C. Cir. 1984) (Bork, J., concurring); Al Odah v. United States, 321 F.3d 1134, 1147-48 (D.C. Cir. 2003) (Randolph, J., concurring).

[79] *See, e.g.*, Al Odah v. United States, 321 F.3d 1134, 1147-48 (D.C. Cir. 2003) (Randolph, J., concurring).

[80] 304 U.S. 64 (1938).

[81] *Id.* at 79.

[82] Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939); *see also* Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824, 1830-35 (1998).

[83] Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 308-13 (1999).

[84] *See, e.g.*, Bradley and Goldsmith, *Current Illegitimacy*, *supra* note 57, at 336-41.

[85] The traditional view has always been that state courts should follow the lead of federal courts in determining the content of customary international law. *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH L. REV. 1555, 1559 (1984) (concluding that it makes no sense that questions of international law should be treated as questions of state rather than federal law). Although states have a limited role in enacting legislation affecting foreign affairs and foreign commerce, *see, e.g.*, Clark v. Allen, 331 U.S. 503 (1947); Gerling Global Reinsurance Corp. of America v. Low, 240 F.3d 739 (9th Cir. 2001), federal courts strike down state laws that intrude too deeply into sensitive foreign matters. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968) (striking down an Oregon probate law); Deutsch v. Turner Corp., 324 F.3d 692, 709 (9th Cir. 2003) (striking down a California law that allowed World War II slave laborers to bring a claim against the companies that profited from their labor and stating that the Supreme Court has long viewed the foreign affairs power specified in the text of the

federal and state, must look exclusively to the political branches of the federal government to determine whether any specific claim violates the law of nations or customary international law.[86] This view has been rejected by numerous recent decisions,[87] but it has continued to be put forward by its revisionist proponents with a spirited enthusiasm. With the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*,[88] this revisionist position should finally be given its ultimate burial.

The Court in *Sosa* explained that the Alien Tort Claims Act was a jurisdictional statute,[89] but one that provided a forum for claims based on norms defined in sufficient detail and accepted by the world community with the same degree of consensus that the norms protecting diplomats, ensuring safe passage, and prohibiting piracy were accepted in 1789.[90] The Alien Tort Claims Act was passed, the Court said, "on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time," and "the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations."[91]

Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government). *See also* Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282 (2002).

[86] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-53 (1997); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 393-463 (2002). Professor Koh has characterized the Bradley/Goldsmith thesis as "utterly mistaken" and "incoheren[t]." Koh, *supra* note 82, at 1827 and 1838. *See also* Paust, *supra* note 83, at 306 (characterizing the Bradley/Goldsmith thesis as "astonishing," "bizarre," and "unreal").

[87] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) (explaining that "there are enclaves of federal judge-made law which bind the States," including the legal principles governing the nation's relationship with other members of the international community); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986) (ruling that federal common law governed a claim by a foreign government against a former head of state); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997) (ruling that a claim brought by Peruvian citizens alleging harm resulting from the defendant's emissions "raises substantial questions of federal common law by implicating important foreign policy concerns"); Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2000) (recognizing the "federal common law of foreign relations" while ruling that it did not require that every case with foreign policy concerns be decided in federal courts). State court cases using customary international law are cited in PAUST, FITZPATRICK AND VAN DYKE, *supra* note 3, at 389-90, 396. *See also* Henry J. Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.119 (1964) (explaining that in *Sabbatino*, "the Supreme Court has found in the Constitution a mandate to fashion a federal law of foreign relations").

[88] _U.S._, 124 S. Ct. 2739 (2004).

[89] *Id.* 124 S. Ct. at 2754-61.

[90] *Id.* at 2761-65.

[91] *Id.* at 2761.

Although federal courts should be "restrained" in identifying such torts, they are authorized to do so when the requisite international consensus emerges.[92] The Court acknowledged the *Erie* rule denying "the existence of any federal 'general' common law,"[93] but also noted the competence of federal courts "to make judicial rules of decisions of particular importance to foreign relations,"[94] albeit after looking "for legislative guidance" where it can be found.[95] Justice Antonin Scalia restated the revisionist view in his vigorous dissent, but he was able to persuade only Chief Justice Rehnquist and Justice Thomas to join his opinion.[96]

V. SELF-EXECUTING TREATIES

The revisionist scholars have also argued with some fervor that treaties, especially those that are multilateral, should be presumed to be non-self-executing, in order to protect the right of Congress to determine how and to what extent the United States should adhere to its international obligations.[97] If a treaty is non-self-executing, private litigants cannot make claims based on principles found in the treaty, and some of the revisionist scholars argue in addition that the non-self-executing treaty should have no relevance to U.S. law whatsoever, and cannot be used even defensively or to illustrate U.S. views about the content of customary international law.[98] The position that

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[92] *Id.* at 2761-62.

[93] *Id.* at 2762.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 2769-76.

[97] *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) ("Treaties of the United States, though the law of the land, do not generally create rights that are privately enforceable in courts."); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587-95 (2003).

[98] Professor Yoo has written that "the practice of the President and the Senate indicates their belief that in many cases full legislative action is required before a treaty's provision is to be considered the internal law of the United States." *See* Yoo, *Globalism*, *supra* note 97, at 1976. This sentence has led another scholar to characterize Professor Yoo's view of the historical evidence as "support[ing] the position that all, or at least most, treaties do not have the force of law and, therefore, may be ignored by the courts, the citizens, and other state or federal officials who enforce domestic law." Christopher L. Blakesley, *Autumn of the Patriarch: The Pinochet Extradition Debacle and Beyond Human-Rights Clauses Compared to Traditional Derivative Protections Such as Double Criminality*, 91 J. CRIM L. & CRIMINOLOGY 1, 29 (2000).

Language in United States v. Alvarez-Machain, 504 U.S. 655, 667 (1992), appears, however, to support the view that a treaty has the force of law even if it is not self-executing:

treaties should be presumed to be non-self-executing is consistent with a strong "dualist" position, discussed below.[99] Others have characterized this view of the revisionists as "implausible," inconsistent with the language of the Supremacy Clause, and "mistaken."[100]

The traditional view has been that "there should be a strong presumption that a treaty is self-executing unless the contrary is clearly indicated," because if the treaty has been in effect and has not been implemented by legislation "a finding that it is not self-executing in effect puts the United States in default on its international obligations."[101] Many courts have cited non-self-executing treaties as part of the "potpourri"[102] of evidence that courts examine to determine the content of customary international law, and these treaties have also been used indirectly to interpret relevant constitutional and statutory provisions.[103]

VI. WHAT EXACTLY IS THE REVISIONIST POSITION ON CUSTOMARY INTERNATIONAL LAW?

The judges and commentators who would restrict the use of customary international law by U.S. courts do not have an absolutist view on this matter,

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"The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation."

[99] *See infra* notes 113-21 and accompanying text.

[100] *See, e.g.*, Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2156, 2169-73, 2216 (1999). *See also* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999) (submitting that the historical evidence is contrary to that presented in Professor Yoo's articles). For another discussion of the history of the self-executing treaty issue, see JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 67-98 (2d ed. 2003).

[101] LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 215 (3d ed. 1993) (*citing, inter alia*, RESTATEMENT, *supra* note 56, sec. 111, Reporters' Note 5 (1987)).

[102] MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 104 (4th ed. 2003). Examples of this "potpourri" approach can be found, *e.g.*, in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), and Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

[103] One recent example is Justice Ginsburg's citation to the International Convention on the Elimination of All Forms of Racial Discrimination, March 7, 1966, 660 U.N.T.S. 195, for guidance on the question whether affirmative action programs should have a termination point. Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring). The provisions of this treaty were deemed by the Senate as non-self-governing when the Senate gave its advice and consent to the treaty in 1994. *See* 140 Cong. Rec. S7634 (daily ed. June 24, 1994), reprinted in LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, HUMAN RIGHTS 1043-44 (1999). *See generally* materials cited in PAUST, FITZPATRICK & VAN DYKE, *supra* note 3, at 194-95.

and so it is important to try to understand exactly what their position is.[104] Judge Bork wrote in *Tel-Oren* that plaintiffs could bring claims based on three international crimes recognized by Blackstone when the Alien Tort Claims Act was enacted in 1789—violations of safe-conduct, infringement of ambassadorial rights, and piracy[105]—and he also indicated at the end of his opinion that some new matters may have achieved overwhelming international acceptance —such as the protection against government-sponsored torture— and thus that they also might form the basis for a civil claim.[106] Professors Bradley and Goldsmith apparently believe at least that the enactment of the Torture Victim Protection Act[107] provides evidence of Congressional authorization of claims based on government-sponsored torture and extrajudicial murder.[108] In its recent amicus curiae brief filed to support the view that courts should use customary international law norms only after they have been approved by Congress, the Pacific Legal Foundation declined to identify exactly what action would constitute Congressional approval under this approach, but noted "that a prior congressional consent requirement may be satisfied, as a practical matter, if the [Alien Tort Claims Act] is held to permit suits for some *jus cogens* norms, such as torture or piracy, or for some norms of 'the law of nations' as understood *at the time [the Alien Tort Claims Act] was enacted*, since a case can be made that congressional acts or the Constitution already recognize these limited norms as part of United States law."[109]

VII. WHAT IS AT STAKE? MONISM VS. DUALISM?

As explained in the preceding sections, the courts of the United States have always looked to customary international law for guidance in rendering their rulings. But now that the United States is the world's only superpower, it

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[104] As Professor Koh has noted, Bradley and Goldsmith's initial article spends so much time attacking the settled view that customary international law is federal law that it leaves unclear precisely what their alternative might be. Koh, *supra* note 82, at 1827.

[105] *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring) (quoting from 4 W. BLACKSTONE, COMMENTARIES 68, 72, quoted in 1 W.W. CROSSKEY, POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES 459 (1953)).

[106] *Id.* at 819-20 (explaining that *Filartiga*'s facts presented a much more compelling case for finding a cause of action under customary international law than did the *Tel-Oren* facts because "the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is clear and unambiguous in its application to the facts in *Filartiga* . . ., and about which there is universal agreement 'in the modern usage and practice of nations'").

[107] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

[108] Bradley and Goldsmith, *Current Illegitimacy*, *supra* note 57, at 363-68.

[109] Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Petitioner, in Sosa v. Alvarez-Machain, No. 03-339, filed January 2004, at 14-15 n.10 (emphasis in original).

appears to have much less interest in multinational institutions and multilateral solutions to problems, and the revisionist scholars and judges similarly appear to reject any responsibility to adhere to the principles of international law that have achieved widespread international consensus.[110] Professors Bradley and Goldsmith have explained that the principal significance of the debate they have promoted on whether customary international law has the domestic legal status of federal common law "concerns the legitimacy of international human rights litigation in U.S. courts."[111] They express particular concern that U.S. courts might be obliged to enforce certain human rights principles that are broadly accepted by the different communities of the world but are inconsistent with our own traditions and values. Among those frequently mentioned are the principles prohibiting the advocacy of racial violence and the execution of individuals who commit heinous crimes prior to their eighteenth birthday.[112]

Perhaps at the heart of this debate is the ancient conceptual issue of whether the United States utilizes a system of "monism" or "dualism" with regard to international law. In a monist system, international law is part of the larger mix of law, and is thus like the law of real property, torts, contracts, and so on, which courts draw upon as needed to resolve disputes. The civil law countries of continental Europe, for instance, are monist in nature, and it is said to be an "everyday occurrence" in France for a court "to disregard or overrule a provision of national law found to be in conflict with a rule of international law."[113] In a dualist system, international law is an "other," an outside body of principles that a court turns to in only certain limited situations, as appropriate because of the nature of the issue or as explicitly authorized by the political branches. The dualist system views international law as a body of law that deals primarily with states, but with the recent rapid evolution of international law to include also individuals, corporations, nongovernmental organizations, and regional and international organizations as actors within the system,[114] it has become harder to accept the dualist model as accurate.

The British system is sometimes thought of as being dualist, but British scholars and judges have resisted being classified rigidly in one camp or

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[110] *See, e.g.*, Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 Green Bag 2d 365 (1998).

[111] Bradley and Goldsmith, *Current Illegitimacy*, *supra* note 57, at 320.

[112] *See, e.g.*, Goldsmith, *Double Standard*, *supra* note 110, at 367-69.

[113] International Law Association, Report of the Committee on International Law in National Courts 570, 572-77, 582, 587-90 (67th Conf. Helsinki 1996), *reprinted in* PAUST, FITZPATRICK, AND VAN DYKE, *supra* note 3, at 105.

[114] *See* RESTATEMENT, *supra* note 56, sec. 101, which says that international law deals with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.

another.[115] Commentators have also been divided on whether the U.S. system is monist[116] or dualist,[117] because U.S. courts have always tried to interpret U.S. statutes to be consistent with international law,[118] but the revisionist writers are apparently arguing that U.S. courts should be less respectful of international obligations, and are thus arguing for a more extreme dualist position.[119]

One author has argued that explicitly viewing the U.S. legal system as dualist in nature will reinforce the role of the political branches in determining the content of international law, protect the role of the states in adjudicating disputes, and ensure that U.S. courts apply U.S. law to resolve U.S. disputes.[120] He argues that a person facing the death penalty in a state court for

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[115] *See, e.g.*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 43 (4th ed. 1990) (stating that the "dominant principle, normally characterized as the doctrine of incorporation, is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority"). *See also* REBECCA M.M. WALLACE, INTERNATIONAL LAW 32-33 (1986) (discussing the Fitzmaurice compromise). For a glimpse at the confusing nature of this issue, *see* Heathfield v. Chilton, 4 Burrow 2015, 2016, 98 Eng. Rep. 50 (K.B. 1767), where Lord Mansfield asserted that the law of nations was part of the common law of England and could not be altered by an act of Parliament.

[116] The famous statement in *The Paquete Habana*, 175 U.S. 677, 700 (1900), that "[i]nternational law is part of our law" would appear to support a monist perspective.

[117] JANIS, *supra* note 53, at 86 ("Whatever the logical attractions of monism, it is not usually as reliable a guide to practice as dualism. Most states and most courts, including those in the United States, presumptively view national and international legal systems as discrete entities and routinely discuss in a dualist fashion the incorporation of rules from one system to the other.").

[118] *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953).

[119] Or perhaps they are arguing for what O'Connell has called "inverted monism" or "monism in reverse," *i.e.*, the position that "municipal law has primacy over international law in both international and municipal decisions," because "[t]he State is superior to and antecedent to the international community, and remains the only law-making entity." 1 O'CONNELL, INTERNATIONAL LAW 38 (2d 3d. 1970), reprinted in CHRISTOPHER L. BLAKESLEY, EDWIN B. FIRMAGE, RICHARD F. SCOTT, AND SHARON A. WILLIAMS, THE INTERNATIONAL LEGAL SYSTEM 1469 (5th ed. 2001).

[120] A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 48-56 (1995). In support of his position that state courts have not always applied customary international law, *id.* at 13-14, Professor Weisburd relies, inter alia, upon the confusing opinion of the Hawaii Supreme Court in *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 (1973), but the holding of this case is narrow and, on close examination, it does not support his position. The *Marley* defendants, who had engaged in nonviolent disruptive conduct at the office of defense contractor in an effort to protest the Vietnam War, argued that their conduct was justified by the doctrine of necessity, based both on domestic and international law principles, because the conduct of U.S. military forces in Vietnam was allegedly contrary to the principles confirmed in the Nuremberg Tribunals. *Id.* at 473-77, 509 P.2d at 1109-12. Although the dicta in the *Marley* opinion is awkward, its holding was consistent with other courts of the time,

a crime committed at age seventeen should not be able to invoke customary international law, and that the state court should ignore any argument based on an outside source of law because it is not obliged to apply another law-making entity's rules to a matter with which it has an adequate connection.[121]

VIII. CUSTOMARY INTERNATIONAL LAW IS A NECESSARY COMPONENT OF THE INTERNATIONAL LEGAL SYSTEM.

Customary international law is a important element of the international legal system because treaties and the legislative-type enactments of international organizations provide principles governing only a portion of the inter-

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which ruled that persons who interfered with private activities to protest the Vietnam War did not have standing to raise the Nuremberg defense, because they themselves were not put into any position where they were required to violate the Nuremberg principles.

Like the courts in other states, Hawai'i's courts have adhered to and utilized principles of customary international law both before and after the *Marley* opinion. Among the many cases that can be cited to illustrate the reliance on customary international law by Hawai'i's courts are Eto v. Muranaka, 99 Hawai'i 488, 499 n.8, 57 P.3d 413, 424 n.8 (2002) (citing to a State Department summary of the "general principle of international law" applicable in enforcement cases); Roxas v. Marcos, 89 Hawai'i 91, 969 P.2d 1209 (1998) (utilizing customary international law principles to determine that Ferdinand Marcos was not entitled to head-of-state immunity for charges of battery, false imprisonment, and conversion that occurred while he was President of the Philippines); State v. Lorenzo, 77 Hawai'i 219, 220-21, 883 P.2d 641, 642-43 (App. 1994) (quoting customary international law principles codified in the RESTATEMENT, *supra* note 56, to question whether the sovereignty of the United States over Hawai'i should be recognized in light of the illegal use of force during the overthrow of the Kingdom of Hawai'i); Application of Island Airlines, Inc., 47 Haw. 1, 384 P.2d 536 (1963) (Tsukiyama, J., dissenting) ("From the inception of its judicial history, this court has consistently recognized the law of nations governing the international status of the high seas." *Id.* at 130, 384 P.2d at 574. "Firmly recognized and accepted is the principle that international law constitutes a part of the law of the nation and as such must be administered by its judiciary and confirmed to by the executive and legislative branches." *Id.* at 134, 384 P.2d at 576); Territory v. Martin, 19 Haw. 201, 1908 WL 1232, *7 (1908) (Ballou, J., concurring) (explaining that "under the principles of international law" local legislation remained in force after annexation); In re Assessment of Taxes, Commercial Pacific Cable Co., 16 Haw. 396, 1905 WL 1330, *4 (1905) (quoting from standard international law textbooks to support the taxing of property in the territorial sea surrounding the islands); W.C. Peacock & Co. v. Republic of Hawai'i, 12 Haw. 27, 1899 WL 1521 (1899) (explaining that the U.S. Constitution must be construed with reference to recognized principles of international law); Spencer v. McStocker, 11 Haw. 581, 1898 WL 1590 (1898) (looking to principles of international law to determine the nationality of a vessel); Carter v. Mutual Life Ins. Co. of N.Y., 10 Haw. 562, 1896 WL 1689 (1896) (looking to principles of private international law to resolve a divorce issue); Low v. Horner, 10 Haw. 531, 1896 WL 1684, *5 (1896) (looking to principles of private international law to resolve a debt dispute); In the Matter of McCarthy, 5 Haw. 573, 1886 WL 3515 (1886) (looking to principles of international law to determine if a country is entitled to surrender a fugitive to another country in the absence of an extradition treaty).

[121] Weisburd, *supra* note 120, at 49-50.

actions that international actors have with each other, and the expectations that develop from past interactions help make more complete the jurisprudence of the international legal system. Just as the commercial practices between merchants in medieval England provided some predictability and then evolved into a "custom" and then a "common law" enforceable in courts, the interactions among international actors that form a predictable pattern and continue over time evolve into an understanding by all concerned that these patterns are required by law and thus become enforceable in international and national tribunals.

In addition, not only does customary international law play the crucial role of filling in the gaps left by the limited number of treaties and other written sources, but it also frequently serves to provide a sense of equity and justice that is important for the legitimacy of any legal system. Although most commentators stress that customary international law requires some level of "consent" by states, concepts of "natural law" or "innate justice" have always also played an important role in legitimizing the principles that govern state conduct.[122] This "natural law" source for customary international law appears at first glance to be in some tension with the state practice model, but most observers resolve the tension by explaining that the relevant natural law principles are in fact ones that are found and used in all modern legal systems.[123] A rigid consent model is particularly difficult to maintain in the current and increasingly democratic world where many nonstate actors (*i.e.*, international and regional organizations, corporations, nongovernmental organizations, and individuals) participate in the formation of international as well as domestic law. The development of *jus cogens* or peremptory norms is perhaps the most dramatic example of how customary international law provides a normative framework for the international legal system,[124] but

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[122] For a discussion of natural law and its role in legal systems generally, *see* John S. Baker, Jr., *Natural Law and Justice Thomas*, 12 REGENT U. L. REV. 471 (1999-2000). *See also* JANIS, *supra* note 53, at 62 (discussing the role of natural law in the international legal system and explaining that "the basic idea" of natural law "as the words themselves imply, is that there is a law so natural that it is to be found in any community, including the community of states").

[123] *See, e.g.*, JANIS, *supra* note 53, at 61, explaining that:

> much of what passed in the traditional law of nations as natural law looks rather like what we know nowadays as general principles of law. Many of Grotius' laws of nature, for example, were drawn from precedents of Roman law as well as from the "testimony of philosophers, historians, poets; finally also of orators." As with our modern general principles of law, the object of Grotius' exercise of natural law was to find international rules basic or useful, though not clearly consented to by states.

(*quoting* from HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES at 23 (prolegomena sec. 40) (Kelsey trans., 1925)).

[124] *See supra* text accompanying notes 53-56.

references to equity can be found frequently in treaties[125] and the decisions of international tribunals.[126] Some conception of natural law, which has been described as "the use of reason to effect the Good,"[127] inevitably underlies any stable legal system. If a legal system is not "basically just" or if it "violates natural law," then the obligation to obey the rules established by that legal system disappears.[128] Because a sense of justice is essential to the legitimacy of any legal system, principles of customary international law have developed to ensure that the international legal system is viewed as fair to all participants.

The need to fill in the interstices of the principles that emerge from treaties and state practice, and thereby to mold the international legal system into a more complete and valid jurisprudential whole, by searching for additional just and logical principles of customary international law became clear to me at a January 2004 meeting of Korean and Japanese scholars in Atami, Japan, discussing the annexation of Korea by Japan in the early twentieth century. The Korean and Japanese professors all agreed that the annexation was an unfortunate exercise of power politics and imperialism that had caused enormous hardship and suffering to the Koreans. The Koreans argued in addition that the annexation had been "illegal," even by the international law standards governing at the time. The Japanese responded by saying that they could agree that the annexation was illegitimate and unjust but not that it was illegal, because other major powers were engaging in imperialism and annexations during that period.[129] But the Koreans responded by asking how something can be legal if it is unjust, contending that it is impossible to

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[125] *See, e.g.*, United Nations Convention on the Law of the Sea, arts. 74 and 83, Dec. 10, 1982, U.N. A/CONF.62/122, 21 I.L.M. 1261 (1982) (stating that maritime boundaries are to be delimited using equitable principles).

[126] *See, e.g.*, The Diversion of Water from the Meuse (Netherlands v. Belgium), 1937 P.C.I.J., (er. A/B), No. 70, at 76 (opinion of Judge Hudson) ("What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals."); W. MICHAEL REISMAN, NULLITY AND REVISION 559 (1971) ("most of the basic principles of Anglo-American equity have counterparts in most legal systems and are regularly applied in international law, either unconsciously as weighted inferences or unenunciated presumptions, or consciously as 'general principles.'"); JANIS, *supra* note 53, at 67-80.

[127] Baker, *supra* note 122, at 500.

[128] *Id.* at 510-11.

[129] The U.S. acquisitions of territory following the Spanish-American War in 1898 and its annexation of Hawai'i that same year are examples. In 1993, the Congress and President of the United States apologized for the diplomatic and military participation of the United States in the 1893 overthrow of the Kingdom of Hawai'i and characterized this action as illegal and a violation of international law. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

characterize a legal system as valid or authentic if it permits injustices to exist and to remain unpunished.

Professor John S. Baker, Jr., has explained how Justice Clarence Thomas has struggled with a similar concern, trying to reconcile the statement in the Declaration of Independence that all men are created equal with the practice of slavery which continued for almost nine decades after the promulgation of the Declaration.[130] Although slavery was condoned by the applicable legal doctrines of the time,[131] Justice Thomas explained during his confirmation hearings (as summarized later by Professor Baker) that he had "turned to a moral and political philosophy rooted in 'Higher Law'"[132] to find a legal theory that would condemn slavery. Justice Thomas thus aligned himself with the approach used by Justice Story in *The Amistad*, where he relied upon "the eternal principles of justice and international law" to rule that the value of "human liberty" prevailed over the treaty between the United States and Spain.[133]

These conceptual struggles reinforce the inevitable conclusion that the international legal system cannot be seen as something that rests solely on the "consent" of countries or actual examples of state practices. The aspirations of the peoples of the world for a just and equitable global community also inevitably play a role in the development of international law and serve to constrain what countries do and justify as "legal." We cannot now read Chief Justice John Marshall's 1825 opinion in *The Antelope*[134] ruling that slavery did not violate international law without becoming physically uncomfortable and feeling strongly that he reached the wrong conclusion.[135] We can agree to be bound by a legal system only if it reflects our collective views of just and equitable solutions to the conflicts that our world community faces.

IX. CONCLUSION

Was something broken that needed fixing? What have the revisionist scholars and judges been trying to accomplish? Has the debate about

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[130] Baker, *supra* note 122, at 478-80.

[131] *See* In re African-American Slave Descendants Litigation,304 F. Supp. 2d 1027, 1035 (N.D. Ill. 2004) (summarizing the law applicable to slavery until the U.S. Civil War); Dred Scott v. Sandford, 60 U.S. (1 How.) 393 (1856).

[132] Baker, *supra* note 122, at 479.

[133] The Amistad, 40 U.S. (15 Pet.) 518, 595-96 (1841), discussed *supra* at text accompanying notes 11-20.

[134] *See supra* text accompanying notes 5-8.

[135] And our Supreme Court did reach an opposite conclusion sixteen years after *The Antelope* in *The Amistad*, *see supra* text accompanying notes 11-20. *See also* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 440 (D.N.J. 1999) (finding that the use of unpaid, forced labor during World War II violated clearly established norms of customary international law).

customary international law that has been taking place in the law review literature, and to a lesser extent in the courts, been a useful exercise?

Every generation needs to reexamine fundamental principles, and so in that sense this debate has been useful. But it is difficult to understand what the revisionists have hoped to accomplish or how our country or the world would be better off if their views prevailed.

We live in an increasingly interdependent world, and we cannot avoid the views of our neighbors on the planet. If we examine their judicial decisions, we might even learn many useful things, because their life experiences and their solutions to societal conflicts might well help us find the right solutions. And when a widespread consensus emerges on a principle of mutual global concern through the enigmatic but still vital process whereby customary international law develops—a process that will always include the active contribution of the U.S. government and its citizens because of our continuing preeminence as the world's only superpower--then our federal and state courts should adhere to and enforce such a principle when controversies presented to them can be decided through the application of this norm.

Fortunately, that approach still dominates our federal courts, as it should. An overwhelming number of our federal judges still respect and apply customary international law when relevant and appropriate, and the Supreme Court's decision in *Sosa v. Alvarez-Machain*[136] confirmed this traditional view and responded to many of the concerns raised by the revisionists. The *Sosa* decision explicitly concluded that claims can be brought under the Alien Tort Claims Act for violations of specifically-defined norms of customary international law without the need for a separate Congressionally-enacted cause of action. When the issue has come up, courts have also recognized that such claims can be brought under the general federal subject-matter jurisdiction statute, 28 U.S.C. § 1331.[137]

Judges do not automatically assume that treaties are non-self-governing, but resolve that issue by examining the language of the treaty and the intent of the political branches. If a treaty is non-self-governing, it is still part of the law of the land and part of the "potpourri" of materials that are relevant in determining the content of customary international law.

This system has been working fine and we should stick with it.

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[136] Sosa v. Alvarez-Machain, _U.S._, 124 S. Ct. 2739 (2004), discussed *supra* in text accompanying notes 68-71 and 88-96.

[137] *See, e.g.*, Deutsch v. Turner Corp., 324 F.3d 692, 718 (9th Cir. 2003).

Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases

John Yoo*

In the last few years, some Supreme Court Justices have been looking to the decisions of foreign courts for guidance in interpreting the American Constitution. This phenomenon has occurred not only in minor instances, but in several controversial, high-profile cases. *Lawrence v. Texas*,[1] in which the Court struck down a state law that criminalized homosexual sodomy,[2] and *Atkins v. Virginia*,[3] which found unconstitutional the execution of mentally retarded capital defendants,[4] are two of the most prominent decisions discussing foreign precedents. In *Lawrence*, the majority opinion by Justice Kennedy referred to decisions by the European Court of Human Rights to support the conclusion that prohibiting homosexual sodomy was at odds with the current norms of western civilization.[5] In *Atkins*, the majority opinion by Justice Stevens relied on additional evidence from an amicus brief filed by the European Union for the idea that a ban on executing the mentally retarded reflected a broad social consensus.[6] References to foreign decisions have appeared not just in regard to individual rights,[7] but also to structural issues like the proper balance between the state and federal governments.[8]

It is difficult to know how seriously to take this development. One possibility is that Justices may be using foreign constitutional decisions simply as an ornament, merely to illuminate or decorate their opinions. While providing support, these precedents may contribute little analytical value. Under this model, the foreign decisions have no real effect on the actual course of judicial decisionmaking. Even if the foreign decisions had come out entirely differently, the Supreme Court would still have reached the same

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* Professor of Law, University of California at Berkeley School of Law (Boalt Hall).

[1] 539 U.S. 558, 123 S. Ct. 2472 (2003).

[2] *Id.* at ___, 123 S. Ct. at 2484.

[3] 536 U.S. 304 (2002).

[4] *Id.* at 321.

[5] *Lawrence*, 539 U.S. at ___, 123 S. Ct. at 2481 (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (1981) ¶ 52).

[6] *Atkins*, 536 U.S. at 316 n.21.

[7] Other Justices have also referred to international agreements for similar support. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, ___, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) ("The International Convention on the Elimination of All Forms of Racial Discrimination, ratified by the United States in 1994, see State Dept., Treaties in Force 422-423 (June 1996), endorses 'special and concrete measures to ensure the adequate development and protection of certain racial groups . . . .'").

[8] Printz v. United States, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

result by the same reasoning. Foreign precedents provide perhaps only a reservoir of authorities to bolster otherwise sound decisions.

There are, however, two reasons to think that use of foreign decisions goes beyond mere ornamentation. First, several Justices have openly stated their hostility to the use of these decisions. In *Atkins*, for example, Chief Justice Rehnquist declared: "I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."[9] After noting that such an approach had been rejected in earlier Eighth Amendment cases,[10] the Chief Justice argued that "[f]or if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant."[11] Justices Scalia and Thomas have similarly argued that foreign precedents are irrelevant for constitutional interpretation because those decisions interpret other documents.[12]

Second, some academics have urged the U.S. Supreme Court to engage in "dialogue" with their foreign counterparts. Three academic projects are particularly noteworthy: Professor Bruce Ackerman has called for something called "world constitutionalism;"[13] Professors Vicki Jackson and Mark Tushnet have become interested in the possibilities of comparative constitutional analysis:[14] and international law scholar Anne-Marie Slaughter has argued in favor of transnational communication between courts.[15] Although one hopes that the Supreme Court is not excessively guided by the writings of law professors, it appears that academics are attempting to construct an intellectual framework that could justify more extensive use of foreign judicial decisions in the future. This may presage further judicial efforts in the Supreme Court and the lower federal courts to rely, at least in part, upon foreign decisions for support.

This Article makes three observations regarding the Supreme Court's practice of relying upon foreign decisions for support. Part I outlines the separation of powers problems that arise if the use of foreign decisions is more

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[9] *Atkins*, 536 U.S. at 324-25 (Rehnquist, C.J., dissenting).

[10] *Id.* at 325 (citing Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989)).

[11] *Atkins*, 536 U.S. at 325.

[12] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, ___, 123 S. Ct. 2472, 2495 (Scalia, J., dissenting) ("The Court's discussion of these foreign views . . . is therefore meaningless dicta"); Foster v. Florida, 537 U.S. 990, 990 n.* (Thomas, J., concurring in denial of certiorari).

[13] Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

[14] Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583 (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

[15] Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

than merely ornamental. If foreign decisions were to become, in close cases, outcome-determinative, or even triggered some type of deference, they would effectively transfer federal authority to bodies outside the control of the national government. Part II argues that use of foreign decisions undermines the limited theory of judicial review, as set out in *Marbury v. Madison*.[16] Chief Justice Marshall justified the federal courts' power to ignore enacted laws that were inconsistent with the Constitution on the ground that such statutes fell outside the delegation of authority by the people to the government, as expressed in the Constitution.[17] Relying on decisions that interpret a wholly different document runs counter to the notion that judicial review derives from the Court's duty to enforce the Constitution. Part III questions the Court's use of precedents that derive almost exclusively from Europe. I will suggest that Europe does not present the ideal model of constitutionalism for the United States to follow, and that in fact deviation between the United States and Europe may significantly enhance global welfare.

I.

The Supreme Court use of foreign precedents could amount to nothing. Such precedents may amount to no more than mere ornaments; they simply make an opinion look better by adding support for the Court's conclusions, but make no real difference in the outcome. If that is the case, then there is little worth in discussing the practice. Citing foreign precedents would have the same importance as the choice of newspapers that the Court cites, or the specific law reviews that appear in the Court's opinions.

This part, however, assumes that foreign precedents have, or perhaps will have, more importance than mere ornaments. In the two most prominent cases, *Atkins* and *Lawrence*, the Court looked to foreign precedents as part of its analysis of the application of the Eighth Amendment and Due Process. In both situations, doctrine calls upon the Court to measure state action against social norms. In determining whether norms existed against the execution of the mentally retarded or against the criminalization of homosexual sodomy, the Court considered European precedents as indicative of world opinion on the question.[18] Conceivably, when the Court measures social norms in this

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[16] 5 U.S. (1 Cranch) 137 (1803).

[17] *Id.* at 176 ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.").

[18] Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) ("[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."); Lawrence v. Texas, 539 U.S. 558, ___, 123 S. Ct. 2472, 2481 (2003) ("The sweeping references by Chief Justice Burger to the history of Western civilization

manner, the amount of evidence makes some difference. It is possible that in close cases, perhaps, foreign precedents could make a difference in the outcome.

It is also possible that the current nod to foreign law could coalesce into some type of deference. Some scholars, for example, have argued in favor of allowing customary international law to enjoy the status of federal law, a result that some lower courts have approached through their interpretation of the Alien Tort Statute.[19] Other scholars have argued that American courts should defer to the decisions of foreign courts in interpreting treaties.[20] While these arguments have not been terribly precise, one can analogize them to the standards of deference that courts apply to administrative agencies. The strongest form, termed "Chevron" deference, requires courts to defer to agency interpretations of an ambiguous statutory provision if Congress's intent does not clearly dictate otherwise and if the interpretation is a permissible or not unreasonable reading of the provision.[21] As the Supreme Court has described *Chevron*, "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[22] Under a weaker form of deference, termed *Skidmore* deference, agency interpretations do not receive this presumption of reasonableness, but instead possess only the "power to persuade, if lacking power to control,"[23] based "upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements,"[24] and other factors. I have elsewhere criticized offering either type of

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and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.").

[19] Under the "law of nations" clause in the Alien Tort Statute (sometimes less accurately called the Alien Tort Claims Act), customary international law has been given the status of federal common law. *See*, Filartiga v. Pena–Irala, 630 F.2d 876 (2d. Cir. 1980). *See also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INTL L. 587 (2002).

[20] *See, e.g.*, Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CAL. L. REV. 1263 (2002) (responding to John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851 (2001)); Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687 (1998).

[21] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). For a classic exposition of Chevron, see Laurence H. Silberman, *Chevron—the Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821 (1990). For a more modern exposition, see Jonathon T. Molot, *Reexaminging Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239 (2002).

[22] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000). On this point, see John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223.

[23] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[24] *Id.*

deference to foreign law as a problematic delegation of authority outside the federal government to foreign courts.[25] The trend, however, may be in this direction. It is a small step from applying customary international law in federal court, and from deferring to foreign decisions in interpreting treaties, to a situation in which federal courts offer some type of deference to foreign courts in interpreting the scope of individual liberties or structural provisions.

A judicial role of this kind raises significant problems of constitutional text and structure. It would subject the private conduct of American citizens, in a relatively unfiltered form, to the regulatory decisions of foreign or international courts. The Constitution, however, makes no implicit or explicit provision for the transfer of federal power to entities outside of the American governmental system. As I have argued elsewhere, this principle of the conservation of federal power is embodied primarily in the Appointments Clause.[26] While much writing on this clause has focused on the balance of power between the President and Senate in the appointment of federal judges,[27] the Clause also has importance as a mechanism to conserve federal power. In recent decisions, the Supreme Court has rediscovered the Appointments Clause's broader purpose in restricting the exercise of federal power only to those officials who undergo appointment through the processes set out in the Clause.[28] This restriction has the fundamental effect of rendering the use of federal power accountable solely to the people's elected representatives. Reserving the exercise of federal power only to federal appointees prevents the delegation of the authority to interpret U.S. law to international or foreign courts.

The Court's discussion of the Appointments Clause in *Edmond v. United States*[29] and *Printz v. United States*,[30] underscores the basic idea that the Appointments Clause serves the goal of preventing Congress from transferring control over the execution of federal law to officers outside the control of the executive branch. In *Edmond*, the Court observed that the Appointments

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[25] John C. Yoo, *Rejoinder: Treaty Interpretation and the False Sirens of Delegation*, 90 CAL. L. REV. 1305 (2002).

[26] John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT. 87, 96 (1998) ("[T]he Constitution erects limits on the ability of the federal government to transfer or delegate power to entities that are not directly responsible to the American people.").

[27] *See, e.g.*, John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1437 n.4 (2000).

[28] *See, e.g.*, Edmond v. United States, 520 U.S. 651, 663 (1997); Ryder v. United States, 515 U.S. 177, 180-84 (1995); Weiss v. United States, 510 U.S. 163, 169-76 (1994); Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 884 (1991); Buckley v. Valeo, 424 U.S. 1, 135 (1976) (per curiam).

[29] 520 U.S. at 659.

[30] 521 U.S. 898, 922-23 (1997).

Clause "is among the significant structural safeguards of the constitutional scheme."[31] In *Printz*, the Court held that Congress could not delegate the power to enforce the Brady Act to state officials because such delegation would leave federal law enforcement without "meaningful Presidential control"[32] and would undermine the effectiveness of a unitary executive.[33] "That unity would be shattered," according to the Court, "and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[34] *Printz* made clear that the Appointments Clause would be offended not only if Congress sought to transfer federal law enforcement to officers of its own selection, but also if it attempted to delegate that power to officials outside the executive branch and the federal government.[35]

Printz points to the second concern animating the Appointments Clause: the general scope and execution of national power. By requiring that all those who exercise federal authority become officers of the United States, appointed pursuant to Article II, Section 2, the Constitution ensures that the federal government cannot blur the lines of accountability between the people and their officials. As Chief Justice Rehnquist wrote for the Court in *Ryder v. United States*: "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'"[36] *Ryder* reinforces the link that *Buckley v. Valeo* first made clear between the Appointments Clause and the exercise of federal power. In rejecting the idea that Congress could appoint individuals who would not be officers of the United States but could still exercise federal power, the *Buckley* Court observed: "We think [that the Appointments Clause's] fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Clause.]"[37] Individuals appointed by Congress, therefore, did not qualify as officers of the United States and could only perform duties which do not involve enforcement of federal law.

In addition to providing the basis for a centralized appointments process, two other elements of the constitutional structure support the Appointments

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[31] *Edmond*, 520 U.S. at 659.

[32] *Printz*, 521 U.S. at 922.

[33] *Id.*

[34] *Id.* at 923.

[35] *Id.*

[36] Ryder v. United States, 515 U.S. 177, 182 (1995) (quoting Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 878 (1991)).

[37] Buckley v. Valeo, 421 U.S. 1, 126 (1976) (per curiam).

Clause's careful husbanding of federal power. First, Article III vests the federal judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[38] A textual reading of this provision suggests that the federal judicial power—which at its core includes the authority to decide cases or controversies under federal law—cannot be exercised by any other branch of the federal government.[39] This would logically also imply that no part of the Article III authority to decide federal cases and controversies—from which springs the judicial power to interpret the Constitution—can be delegated or transferred outside the United States government as a whole. To be sure, under the Madisonian compromise, Congress could have declined to create any lower federal courts. Furthermore, subject matter jurisdiction restrictions on federal courts entail that a great many federal constitutional issues arise as a first instance by state judges, who are not members of the federal government.[40]

Distortions of the separation of powers doctrine in the domestic sphere are not, however, insurmountable. State judicial decisions can be reviewed on appeal by the Supreme Court. Moreover, even if the broadest theories of congressional jurisdiction-stripping came to life, state judges could still hear federal questions. State courts are still part of the American political system and take an oath to uphold the Constitution. No such distortions of the separation of powers may be remedied where courts offer deference to foreign law or courts. Regardless, therefore, of whether one follows a formalist or func-

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[38] U.S. CONST. art. III, § 1.

[39] *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). Jurisdiction stripping attempts by the legislature, however, may distort this concept. Those who support greater congressional authority to strip the federal courts of jurisdiction include Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1030-32 (1982); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 898 (1984); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362-66 (1953).

[40] The well-pleaded complaint rule precludes almost all defendants in state courts from removing their cases to federal courts. Federal defenses to state law claims made by plaintiffs are therefore adjudicated almost exclusively by state judges. *See*, Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908); 28 U.S.C.A. § 1331 (West, WESTLAW through 2004 Pub. L. 108-217).

tionalist theory[41] of the separation of powers, transferring judicial power wholly outside the Article III courts and the federal government would violate the vesting of all judicial power in the Supreme Court and undermine accountability in government. Members of the electorate could not hold accountable officials who stand completely outside the structure of American government.

Second, the nondelegation doctrine places limits on the ability of the government to transfer power. As the Court has recently clarified, the nondelegation doctrine prohibits Congress from delegating rulemaking authority to another branch unless it has stated intelligible standards to guide administrative discretion.[42] The requirement of standards ensures that the exercise of delegated power can be monitored and controlled, and even reversed when necessary. While the Supreme Court has not invalidated a statute on nondelegation grounds since the New Deal period,[43] it remains an important structural principle that finds its expression in quasi- or sub-constitutional doctrines such as canons of construction and the like.[44] Delegating lawmaking power totally outside the federal government would prevent lower courts, Congress, and the public from monitoring whether the delegated authority was being exercised consistent with legislative standards.[45]

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[41] Functionalism asserts that Congress enjoys substantial flexibility in arranging the order of government, so long as it does not prevent any branch from fulfilling its core constitutional duties. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989) (upholding creation of U.S. Sentencing Commission); Morrison v. Olson, 487 U.S. 654, 691-92 (1988) (allowing independent counsel to be insulated by "good cause" removal requirement from direct presidential control); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (defending functionalism); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). Formalists argue that each exercise of federal power can be categorized and allocated to one of the three branches of government, and that generally the President must have the unrestricted authority to control the execution of federal law. *See* Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating Comptroller General's statutory role in administering budget reductions); INS v. Chadha, 462 U.S. 919 (1983) (invalidating legislative veto); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (defending formalism); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988).

[42] *See, e.g.*, Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001); Clinton v. City of New York, 524 U.S. 417 (1998).

[43] *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[44] *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); Manning, supra note 22.

[45] For recent discussion concerning the nondelegation doctrine, *compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002) *with* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

Providing any type of deference to foreign judicial decisions would cause considerable tension with these constitutional structures. Under the Appointments Clause, anyone who possesses the power to interpret and execute federal law must be an officer of the United States. When the Court applies *Chevron* deference, or even the lower form of *Skidmore* deference, it is providing that deference to officials who are appointed by the President or those responsible to him consistent with the Appointments Clause. Thus, those who make and interpret federal law—whether they are federal judges or federal agency officials—are still ultimately responsible to the American electorate. Foreign judges, however, do not undergo presidential nomination or senatorial consent, even as they exercise significant federal power by influencing the interpretation of a provision of federal law. To the extent a foreign decision was outcome-determinative or triggered some type of deference, it would raise serious problems with the Constitution's conservation of federal authority in federal officers.

Reliance on foreign decisions also creates difficulties for the policies behind the Appointments Clause and the nondelegation doctrine. It seems clear that the concerns that motivate these constitutional structures are rooted in accountability and control. Delegation to federal agency officials seems tolerable, for example, because they are part of an executive branch which the President, Congress, the courts, and the public can monitor and correct if it goes astray. If, for example, an agency to which the Court defers has gone well beyond its statutory mandate in interpreting or enforcing federal law, a number of checks can come into play, including congressional oversight, budgetary cuts, statutory amendment, presidential removal, public criticism and ultimately elections.[46] These mechanisms, however, would not constrain foreign judges. Foreign judges are not responsible to the American political system, nor must they adapt their exercises of interpretive authority to federal constitutional or statutory principles. Indeed, the traditional methods that would come into play to correct an undesired interpretation of the law—appellate review or legislative overrule—would prove unavailable. Reliance on foreign decisions would evade the Constitution's strict centralization of the implementation and interpretation of federal law in officers of the United States who are accountable to the electorate.

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[46] Congressional attempts to shield itself from popular accountability have been struck down. *See* Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) (striking down law that allowed a nine-member Board of Congresspersons to review the decisions of the airport authority).

II.

This Part raises a second concern with substantive, as opposed to ornamental, reliance upon foreign judicial decisions by the Supreme Court. Putting aside issues of delegation or deference, reliance upon sources exogeneous to the American political system in interpreting the Constitution undermines the textual and structural basis for judicial review. It is important to emphasize here the limited nature of this argument. This criticism does not extend to all uses of foreign decisions by the federal courts. Such sources might be relevant to judicial interpretation of other types of federal law, such as treaties, statutes, and perhaps even federal common law. This Part argues, however, that when it comes to the Constitution, federal courts may be limited to materials that derive from the American legal system.

The touchstone of this argument is one regarding the nature of judicial review. Some have argued that judicial review promotes certain functional goals, such as the protection of individual rights or the moderating role of the Court as a check on the other branches.[47] I provide a far more modest explanation of the origins of judicial review. Rather than deriving from any grand role of the judiciary within the constitutional system, judicial review finds its origins in the nature of the Constitution as a document that delegates power from the people to the government, in the supremacy of constitutional law to statutory law, and the duty of every federal officer to obey that higher law over inconsistent actions by the other branches of government.[48]

We can see the structural foundation for judicial review in the nature of the Constitution and its relationship with the officers of the federal government. According to the theory of popular sovereignty prevalent at the time of ratification, the Constitution is a creation of the people of the several states.[49] This understanding of government power represented a rejection of the notion that sovereignty itself lodged in the government or monarch. Necessarily, the government exercises power only because it serves as the agent of the people's will. As James Madison wrote in Federalist 46, "[t]he Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes."[50]

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[47] *See, e.g.*, Jesse H. Choper, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); Terri Jennings Peretti, IN DEFENSE OF A POLITICAL COURT (1999).

[48] *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

[49] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting) (noting that the Constitution was ratified by the consent of the people in individual states and not by the consent of "the people" as a whole).

[50] THE FEDERALIST NO. 46, at 343 (James Madison) (Jacob E. Cooke, ed., 1984).

Madison reminded critics of the proposed constitution that "the ultimate authority, wherever the derivative may be found, resides in the people alone."[51] It follows from this that the government may exercise only that power which the people have delegated to it. A written constitution serves to codify these powers. Any exercise of authority beyond the grant of power in the written Constitution therefore is invalid, because it goes beyond the delegation from the people and undermines popular sovereignty. As Alexander Hamilton expressed it in Federalist 78, "every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[52] This understanding must hold sway, for a written constitution would prove inconsequential if its agents could simply exercise the powers that they saw fit, regardless of the will of the people. As *Marbury* declared, "[t]he distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."[53] In order for the Constitution to successfully establish written limitations on the powers of the branches of government, it must establish a rule of decision that places it above the actions of the organs it creates.

Neither The Federalist nor *Marbury* makes the claim, however, that it is solely the function of the judiciary to decide whether the acts of the other branches of government are unconstitutional, and hence ought not be obeyed. Rather, popular sovereignty theory suggests that each branch has an obligation to refuse to obey government actions that go beyond the Constitution. Otherwise, these agents of the people's delegated power would be complicit in allowing "the deputy" to become "greater than his principal." Indeed, the Oaths Clause suggests as much. It declares that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution[.]"[54] The Oaths Clause makes clear that all officials of both the federal and state governments have a basic obligation not to violate the Constitution. *Marbury* suggested that the Clause might go further by requiring oath-takers to disregard governmental actions of other institutions that conflict with the Constitution.[55] Under this approach, judicial review is not uniquely special. It is merely the manner in which federal judges implement their obligation, while performing their unique function of deciding Article III cases or controversies, to obey the written limits on the delegation of power to the

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[51] *Id.* at 343-44.

[52] THE FEDERALIST NO. 78, at 568 (Alexander Hamilton) (Jacob E. Cooke, ed., 1984).

[53] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803).

[54] U.S. CONST. Art. VI, cl. 3.

[55] *Marbury*, 5 U.S. (1 Cranch) at 180.

government by the people. Similarly, other branches of the government must obey the same obligation to enforce the Constitution while performing their unique responsibilities—whether it is a congressman who votes against legislation that he believes to be unconstitutional, or a president who vetoes unconstitutional legislation.[56]

It is in performing its unique constitutional function to decide Article III cases or controversies that these obligations to the Constitution as the higher law come into play. Judicial review arises from both the separation of powers and the principle that each branch of government is coordinate, independent, and responsible for interpreting and enforcing the Constitution while fulfilling its unique constitutional function. Federal judges must engage in judicial review because of their basic duty to obey the Constitution while performing their job, defined in Article III, to decide cases or controversies. While the federal judiciary enjoys no constitutional authority to force the other branches to adopt its interpretations of the Constitution in the performance of their unique functions, neither can the other branches dictate constitutional meaning to the judiciary when it decides cases or controversies.[57] By its nature, the Constitution's separation of powers creates judicial review.

There has been a great deal of debate over whether the separation of powers should be understood formally or functionally.[58] Without entering this debate, a few general principles, it seems, can be agreed upon. The Constitution makes clear that the three branches are coordinate, in the sense that they are equal to each other. As James Madison wrote in Federalist 49, "[t]he several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[59] Each branch possesses constitutional equality because each exercises grants of

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[56] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 343 ("The President may exercise a power of legal review . . . over acts of Congress and refuse to give them effect insofar as his constitutional authority is concerned."); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 906–09 (1990) (discussing the presidential practice of vetoing legislation on constitutional grounds). *See also*, John O. McGinnis, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993) (addressing the relationship between the Supreme Court and the President).

[57] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

[58] *See generally*, Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997); Laura E. Little, Articles, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47 (2000); William N. Eskridge, Jr., Symposium, *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998).

[59] THE FEDERALIST NO. 49, at 369 (James Madison) (Jacob E. Cooke, ed., 1984).

authority received directly from the people through the Constitution, and none is subordinate to the others. In addition to being coordinate, the branches are in important respects separate. While there are some mixtures of powers, such as in treaties and appointments, each branch clearly executes certain core functions that belong to it alone. Only Congress can enact legislation within the sphere granted to the federal government by Article I, Section 8 and the Reconstruction Amendments; only the President may execute federal laws; and only the Judiciary may decide Article III cases or controversies. This basic structure gives birth to judicial review. In the course of performing its constitutional responsibility to decide cases or controversies, the judiciary must give primacy to the Constitution over other actions of the federal or state governments.[60] This requires federal judges to interpret the Constitution in the course of resolving conflicts that arise between federal or state law and the Constitution. One important implication of this argument is that the judiciary's ability to interpret the Constitution may not be supreme or exclusive. Rather, the power to interpret the Constitution is common to all three branches, arising in different manners as they each perform their different functions.

Rooting the power of judicial review directly in the constitutional text and structure suggests why reliance on foreign decisions creates difficulties. Judicial review operates because the Court, in carrying out its Article III duties, must follow the higher law of the Constitution above any inconsistent federal or state statutes. The Constitution is higher law, as Chief Justice Marshall observed in *Marbury*, because it represents the delegation of power from the people to their government.[61] In interpreting the scope and meaning of that delegation of power to the federal government, the federal courts should have no recourse to foreign decisions. Foreign decisions, after all, interpret a wholly different document from the Constitution. The European Court of Human Rights ("ECHR"), for example, interprets and applies the European Convention of Human Rights of 1953 ("European Convention"), which was created by the member states of the Council of Europe.[62] It is

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[60] *See Marbury*, 5 U.S. (1 Cranch) at 178.

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id.

[61] *Id.* at 176 ("That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.").

[62] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

difficult to see what the member states of the Council of Europe believed to be the scope of an individual right in 1953, no matter how enlightened or progressive, has to do with what the American people delegated to the government in 1788 (the original Constitution), 1791 (the Bill of Rights) or 1865-70 (the reconstruction amendments). The European Convention, and certainly ECHR decisions after 1953 interpreting it, simply do not rest within the four corners of the delegation of power that is the Constitution. They do not even purport to have any relation to the delegation from the American people to its government; rather, the European Convention is an international agreement by which the state parties to that agreement agreed to abide by certain standards of minimum treatment.[63] By relying on foreign sources of law to interpret the Constitution, the Court is undermining the very delegation of authority that gives it the power of judicial review.

More importantly, we should focus on the delegator of the power. The Constitution represents a delegation of power from the American people. The states that are parties to the European convention, no matter how worthy or progressive in their approach to human rights, are not part of the American polity. They certainly were not in 1787 or 1791. If anything, we enjoy our current Constitution precisely because the Americans of the late eighteenth century rejected their relationship with Europe, despite the violent efforts of the British Empire to keep them within its polity.[64] Nor is there any indication that the American people have wanted their delegation of authority to the national government to be construed consistently with the constitutions of foreign nations. I suspect that the notion would have proved laughable if the Framers of 1787, 1791, or 1865-1870 were asked whether ambiguities in their work should be interpreted in line with future European treaties. Certainly the framers of those documents would not have thought any European treaties in existence at that time should provide a model for constitutional rights—indeed, the framework of international human rights that we have today would have been foreign to them.[65]

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[63] The agreement's preamble opens, "The [g]overnments signatory hereto, being members of the Council of Europe." *Id.* at 221.

[64] *See* Larry D. Kramer, *The Supreme Court 200 Term Forward: We The Court*, 115 HARV. L. REV. 4, 73-74 (2001) (stating that "[t]he colonial experience of resisting King and Parliament served as the model from which the Founders constructed their theories, and the Revolution itself, beginning with the Stamp Act protests, provided their blueprint for opposing a government that exceeded its constitutional authority").

[65] How attentive an ear the Court should give to the intent of the Constitution's framers is often disputed. There is little doubt, however, that the Court itself often claims to place at least some importance in the intended design of our framers. *See generally*, Jacobusten Broek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CAL. L. REV. 399, 399 (1939) ("[The Court] has insisted, with almost uninterrupted regularity, that the end and object of constitutional construction is the discovery of the intention of those

Perhaps there is a more subtle argument available to those who would have the Court rely on foreign decisions. While admitting that the Constitution represents a delegation of authority from the people to their government, they might reject the idea that the terms of the delegation should be interpreted according to the original understanding of the drafters and ratifiers. Rather, they might argue that the constitutional text should be interpreted in light of what the American polity believes it should mean today—otherwise known as the living Constitution thesis. Even if this better describes the Court's approach to interpreting the Constitution, it still encounters difficulties in reaching for foreign decisions. There is no indication that the American people today believe that their constitutional rights and delegation of powers should be interpreted in light of foreign judicial decisions. In fact, American attitudes toward international human rights seem to suggest the exact opposite. The United States has entered into relatively few human rights treaties, and those agreements to which it has consented have been ratified only with significant reservations, understandings and declarations.[66] These "RUDs," as they are known, usually contain provisions making clear that the United States considers its federal and state laws to already meet the requirements of a human rights treaty, and that the treaty in any event is non-self-executing.[67] Such a practice negates any idea that international human rights agreements, even those to which the United is a party, should be given domestic effect. Certainly, the argument for judicial deference to international agreements to which the United States is not a party is even weaker. It is difficult to understand why decisions interpreting agreements to which the United States is not even legally a party should have any effect in interpreting the Constitution, when the political branches have effectively made this impossible with regard to international human rights agreements.

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persons who formulated the instrument."); Raoul Berger, *'Original Intention' in Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986) (describing that even judges indisposed to subscribe to "intentionalism" as doing so more out of fear of inaccurate inferences, not the dislike of the notion itself).

[66] Many of the scholars who complain that the United States is loathe to fully enter the international community admit readily a reluctance to do so on the part of American elected officials. *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003); Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775 (2001).

[67] At least three modern treaties to which the United States is a party have been qualified with RUDs: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 85; the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171; and the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

III.

One final concern with the use of foreign decisions involves their source. In general, it appears that the Court's recent turn to foreign judicial decisions in constitutional adjudication involves decisions from only one place: Europe. Perhaps we are too early in the phenomenon and our sample size is too small to make any generalizations—it may be the case that decisions from Asia, Africa, and Latin America will appear over the next few years as well. For now, however, it seems that the Court's use of foreign decisions seems to be a European phenomenon.[68] Rather than asking why this is the case, this part will argue that Europe may not be the appropriate model for American constitutional interpretation.

Europe and the United States share very different political histories. While the United States continues to exist in a Lockean framework, in which government derives from the social contract between the American people, or so it has seemed to some sociologists, Europe has been given to fluctuations of ideological extremes. In the 19th Century, many European nations still supported monarchy as the best system of government—indeed, the great powers intervened after the French Revolution to restore the Bourbons to power. In the 20th Century, monarchy was followed by fascism, socialism, and communism.[69] As history has made clear, the performance of these regimes was not good, to say the least. In particular, fascism and communism, which were seen by some in their day as advanced, modern ideologies, were adopted by regimes that murdered millions of their citizens. One wonders if the Supreme Court of the 1930s or the 1950s should have looked to the decisions of Nazi or Soviet courts for guidance.[70] While the relative stability or gradual change in American political philosophy may have prevented the United States, in the view of some, from adopting progressive social programs or enlightened redistribution policies, it may also have kept the nation from pursuing ideological extremes that have produced disaster for European nations.

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[68] In instances where Supreme Court Justices have indicated a penchant for incorporating foreign law into American courts, it has been European law which is mentioned specifically. *See* Anne-Marie Slaughter, Court to Court, 92 AM. J. INT'L L. 708, 710-11 (1998) (describing interest by Justices O'Connor and Breyer in applying European Community law).

[69] *See* PAUL JOHNSON, MODERN TIMES: THE WORLD FROM THE TWENTIES TO THE NINETIES (2d. ed. 2001).

[70] For analysis discussing both jurisprudence and legal scholarly work during the Nazi era, see H.W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY (1989); MICHAEL STOLLEIS, THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY (Thomas Dunlap trans., 1998). For analysis on the Soviet legal system, see Gordon B. Smith, REFORMING THE RUSSIAN LEGAL SYSTEM 60-61 (1996) (noting that the social order under Bolshevism, as dictated by the Communist Party, was always the principal concern in Soviet courts).

This leads to two objections to using European decisions. First, as just suggested, the American political system should remain several steps removed from European "innovations" because it keeps the nation from falling into extremes of policy. Some attribute this moderation in American politics, in part, to our written Constitution.[71] The separation of powers and federalism make it difficult to enact any sweeping, ideologically-inspired legislation, and the Bill of Rights places some obstacles before government action that might infringe on individual liberties. Appealing to European decisions would evade these structural checks on federal lawmaking, since the Supreme Court's decisions themselves are not subject to the strict restraints of bicameralism, presentment, and federalism that apply to Congress and the President. Second, the modern European experience should lead us to question whether its current phase of development is inevitably superior to the American. It may appear to some today that European constitutional schemes seem to protect individual liberties more effectively, or better balance the tension between government power and rights. It is difficult to determine now, however, whether history will vindicate the choices that Europe has made. It may have appeared to some American observers at the time that fascism and communism were modern, progressive ideologies from which the United States could learn, but history demonstrated their failure. Those ideologies produced tens of millions of deaths from inter-European warfare and from the oppression of domestic populations;[72] not exactly a sterling example to follow.

Not only are their histories different, but the United States and Europe face very different social and political circumstances. This should discourage any transplantation of constitutional values from the latter to the former. Europe has spent the last 60 years turning away from great power conflict and forming itself into a nation-state, one that has solved the problem of German ambition and melded former enemies into a broad economic common market.[73] Military power and conquest have not been the tools for this amazing integration, but supranational institutions, international law, and diplomacy. As Robert Kagan has put it, "Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation."[74] The United States, on the other hand, has chosen to rely more on power than international law, on

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[71] Several authors have discussed the unique impacts that the separation of powers doctrine has on constraining each actor and maintaining policy moderation. *See, e.g.*, DAVID W. BRADY & CRAIG VOLDEN, REVOLVING GRIDLOCK: POLITICS AND POLICY FROM CARTER TO CLINTON (1998); Keith Krehbiel, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING (1998).

[72] JOHNSON, *supra* note 69, at 56-58, 95-97.

[73] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003).

[74] *Id.*

military force as much as on persuasion, and sees a world threatened by terrorist organizations, rogue nations, and the proliferation of weapons of mass destruction.[75] While Europe "is entering a post-historical paradise of peace and relative prosperity, the realization of Immanuel Kant's 'perpetual peace,'" the United States "remains mired in history, exercising power in an anarchic Hobbesian world where international laws and rules are unreliable, and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might."[76] Europeans, in other words, may be unusually reliant upon international law, legal instruments, and legal institutions because these tools have been one of the key mechanisms by which they have promoted integration. If this view of European-American relations is correct, then European judicial decisions may be particularly inappropriate for guidance for American constitutional interpretation, because they take place in an environment of reliance upon law and legal institutions that makes no sense in the American context.

In fact, it may well be the case that the difference between our political systems has both promoted the integration of Europe and permitted the Europeans to attempt a different experiment in political organization.[77] That European nations have been able to put aside their historical animosities and engage in integration may be thanks to an American security guarantee. The North Atlantic Treaty Organization allowed the integration of Europe to proceed without heavy demands for military spending, thanks to the stationing of United States forces to contain the Soviet Union. As Lord Ismay, the first secretary general of NATO, famously quipped, the purpose of the Atlantic alliance was "to keep the Americans in, the Russians out, and the Germans down."[78] That disparity in spending on defense is even starker since the end of the Cold War. In the 1990s, Europeans discussed increasing collective defense expenditures from $150 billion to $180 billion a year while the United States was spending $280 billion a year.[79] Ultimately, the Europeans could

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[75] *Id.* ("[O]n major strategic and international questions today, Americans are from Mars and Europeans are from Venus . . . .").

[76] *Id.*

[77] *Id.* at 59 ("The integration of Europe was not to be based on military deterrence or the balance of power . . . . [T]he end of the Cold War, by removing the danger of the Soviet Union, allowed Europe's new order, and its new idealism, to blossom fully into a grand plan for world order.").

[78] W.R. SMYSER, FROM YALTA TO BERLIN: THE COLD WAR STRUGGLE OVER GERMANY 135 (1st 1999).

[79] Post-Cold War developments may be largely responsible for European opposition to defense spending increases. *See* OFFICE OF TECHNOLOGY ASSESSMENT, GLOBAL ARMS RACE: COMMERCE IN ADVANCED MILITARY TECHNOLOGY AND WEAPONS 63-82 (June 1991), *available at* http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk1/1991/9122/912206.PDF; KAGAN, *supra* note 71, at 22-23 ("Under the best of circumstances, the European role was

not, and there was little political desire to come within shouting distance of the United States, which in the wake of September 11 and the wars in Afghanistan and Iraq plans to spend $400 billion a year on defense.[80]

The large gap in power between the United States and Europe is perhaps even more apparent qualitatively; the United States has become the "indispensible nation" without which Europe could not even handle the internal civil war along its borders in Kosovo. Only the United States has the power to project power globally or to fight more than one large regional war at the same time.[81] Without the United States' willingness to engage in power politics, Europe would not have had the luxury to integrate. If this is correct, then European constitutional values are particularly inappropriate for the United States. They have been developed and enjoyed because their governments enjoy a different tradeoff between national security on the one hand, and individual liberties and economic prosperity on the other. The United States, however, which has greater responsibilities for keeping international peace, and for guaranteeing stability in Europe, faces a different balance between national security demands and constitutional liberties.

One last reason why European precedents should not find an easy home in American constitutional law draws on the lessons of federalism. Federalism makes sense, in part, because it creates a decentralized system of government that allows jurisdictions to offer a diversity of social, economic, and political policies. Similarly, at the international level, states may compete for residents and businesses by offering different mixes of economic and social policies. As in a market, citizens can satisfy their preferences by deciding to live in states that provide the tax, education, welfare or family policies that they agree with. Diversity of policies enhances social welfare by allowing individuals to increase their utility by living in jurisdictions that offer their desired policies. Certainly, there are certain minimum rights and structures that every jurisdiction should recognize, just as in a market certain basic rules must exist in order for a market to function. It is important, however, that before a universal right is recognized, that it really be one that we are sure must be universal, rather than one that is best handled through choice available from diverse jurisdictions. Indeed, diversity of policies will permit experimentation that will make apparent which policies may best work. Just as Justice Brandeis praised federalism because it permitted experimentation

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limited to filling out peacekeeping forces after the United States had, largely on its own, carried out the decisive phases of a military mission and stabilized the situation.").

[80] The Defense budget for FY 2005 will be $401.7 Billion (U.S.). Figures *available at* http://www.gpoaccess.gov/usbudget/fy05/browse.html (last visited March 24, 2004).

[81] KAGAN, *supra* note 73, at 25 ("Not only were [European voters] unwilling to pay to project force beyond Europe, but, after the Cold War, they wold not pay for sufficient force to conduct even minor military actions on their own continent without American help.").

by the state laboratories of democracy,[82] so too international decentralization allows jurisdictions to experiment before committing to a single policy. A convergence of American and European constitutional systems, through the citation of precedents, could reduce the ability of jurisdictions to offer the packages of policies that will enhance global welfare.

IV. CONCLUSION

This essay has sought to identify several problems raised by the Supreme Court's recent use of foreign precedents in interpreting the Constitution. If these citations are no more than simply ornamental, or are no more than friendly suggestions from another jurisdiction, then there is little about which to be concerned. If reliance on foreign precedents represents a more significant trend, however, there are several difficulties that arise. First, if foreign courts are receiving some sort of deference, then they may well be exercising federal authority outside the bounds of our Constitution. Second, reliance on such decisions breaks the relationship between the people and their government as expressed in the Constitution, because foreign courts are interpreting a different document within a different constitutional and political context. Third, to the extent use of these precedents has focused on European decisions, it is unclear whether the United States should seek to coordinate its constitutional solutions to problems with those of Europe, which has suffered from serious political instability over the last two centuries brought about by sometimes extreme political ideologies.

Admittedly, it may well be the case that the Supreme Court's use of foreign precedents is not to be taken seriously, because they would never be outcome determinative. It is too early to tell whether that will be the case. If it is not, however, this Essay may serve as an early caution for those who would accelerate such practices by the federal courts.

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[82] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Remembering the Days of Slavery: Plantations, Contracts and Reparations

Lisa A. Crooms*

Do you remember the days of slav'ry?
And how they beat us
And how they worked us so hard
And how they used us
Till they refuse us
Do you remember the days of slav'ry?
Some of us survive
Showing them that we are still alive
Do you remember the days of slav'ry?
History can recall
History can recall
History can recall the days of slav'ry
Oh slav'ry day.[1]

I teach contracts at Howard University School of Law ("HUSL"). A historically black university chartered by Congress on March 2, 1867, Howard is one of the few remaining tangible reminders of the promise of emancipation and Reconstruction in the U.S.[2] Howard's institutional mission is two-fold: encouraging its faculty to use teaching and research not only "to develop distinguished and compassionate graduates," but also to contribute to "the quest for solutions to human and social problems in the U.S. and throughout the world."[3]

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* (The author would like to thank Gabrielle Cantave for her research assistance, Dr. Brian Meeks of the University of the West Indies - Mona Campus for introducing her to the work of Earl Lovelace, the faculty and staff of the Norman Manley Law School at the University of the West Indies—Mona Campus for hosting her as a Fulbright Scholar in 2003, Professor Hazel Beh and the members of the AALS Contracts Section, and the members of the University of Hawai'i Law Review. This essay is based on remarks made as part of the Contracts Section Panel, *Enriching the Contracts Course*, at the AALS 2004 Annual Meeting in Atlanta Georgia)

[1] *Slavery Days*, Burning Spear, *at www.burning-spear.com.*

[2] 14 U.S.C. 438 (1867).

[3] Howard University, Office of the President *at* http://www.founders.howard.edu/president Reports/Mission.htm. The first prong of the University's mission is to provide educational opportunities to "students of high academic potential with particular emphasis" on "promising Black students." *Id.*

In the tradition of former Dean Charles Hamilton Houston[4], HUSL has turned Howard's mission into a challenge to the law school community. First, HUSL should "engage as an institution in the active pursuit of solutions to domestic and international legal, social, economic and political problems that are of particular concern to minority groups."[5] Second, the faculty should "imbue [HUSL] students with dedication to excellence and commitment to the solutions to those domestic and international legal, social, economic, and political problems."[6] The faculty is expected to use the classroom as a forum for achieving this objective, and "mission connection" is one of the criteria used for the purposes of course evaluation.

During my first three years on the HUSL faculty, I used two casebooks, neither one of which allowed me to make the kind of "mission connection" I wanted without having to assign a lot of additional reading. In preparing for the 1997-98 academic year. I picked up the first edition of Kasteley, Post and Hom's CONTRACTING LAW. Both Deborah Waire Post and Sharon Hom had convinced me that their casebook was particularly well-suited for my course. Rather than be daunted by the sheer size of the book, I accepted its challenge. I would take full advantage of each of the five credit hours I am graciously given to teach Contracts. I would enjoy this privilege while I had it.

Almost from the beginning, I knew neither Deborah nor Sharon had oversold the book. Its mix of cases, legal commentary and interdisciplinary materials allows me to push students to develop a critical eye through which both to learn legal doctrine and to assess the law in terms of our unique institutional mission. The text requires students to synthesize materials across disciplines to formulate frameworks in which the cases gain meaning beyond the specifics of their holdings.[7] It introduces students to the study of contract

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[4] According to Dean Houston, "[a] lawyer's either a social engineer or . . . a parasite on society . . . A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities in bettering conditions of the underprivileged citizens." *http://www.law.howard.edu.*

[5] The commitment to minority group issues is articulated as part of "providing the professional leadership necessary to advocate and defend the rights of all, but particularly African Americans and other minorities." Howard University School of Law Mission Statement, http://www.law.howard.edu. Accordingly, HUSL is fundamentally a HBCU where African Americans are its core, but it is dedicated to serving those in the African Diaspora as well as other people of color throughout the world.

[6] *Id.*

[7] While Howard and HUSL are unique institutions with special institutional missions, the pedagogical value of making these kinds of connections is appreciated beyond our campuses in Washington, D.C. For example, Professor Carol Weisbrod notes that "[o]ne can look at any case in a broader context than the doctrinal one in which it is presented in a law school casebook." Carol Weisbrod, *A Uncertain Trumpet: A Gloss on Kirksey v. Kirksey*, 32 CONN. L. REV. 1699 (2000). *See also* Mary Jo Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

law with a case that directly confronts issues of identity, power, and labor in the Hawaiian plantation system.[8]

II.

Decided in 1877, *Coolidge v. Pua'aiki and Kea* involves two laborers on the Coolidge Plantation who, dissatisfied with their employment, flee.[9] The fugitives are eventually apprehended and tried for breach of contract.[10] Pua'aiki and Kea defended on a number of grounds including the lack of specificity regarding their duties.[11] In dismissing their claims, the court notes Pua'aiki and Kea's contracts "are not unusual or unreasonable in their forms and requirements."[12] "If they wished to confine themselves to any particular kind of labor," the court concludes, "they should have themselves caused it to have been designated in their contract."[13] The doctrinal lesson to be learned is those who willingly and voluntarily enter into enforceable contracts will be held accountable for contract breaches.[14]

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[8] As used in this essay, a plantation is "[a] large landed estate specializing in the production of a staple crop for the world market." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1869-1877 128. Hawaii's plantation contract labor system operated until 1900 when, in accordance with the Organic Act, Hawaii became a U.S. territory and the contract labor system was legally abolished. RONALD TAKAKI, RAISING CANE: THE WORLD OF PLANTATION HAWAII IN STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 132 (1989).

[9] While most contract laborers waited until the end of their contracts to leave the plantation, ha'alele hana (desertion from service) was not uncommon. Between 1890 and 1892, for example, one-third of all arrests (5,706) were for desertion. *Id.* at 147.

[10] The original cases, *King v. Pua'aiki* and *King v. Kea*, were consolidated and reclassified as civil actions. In making this change, the court reasoned "[t]he King is not a proper complainant in such cases. In no respect do they fall within the duties of the public prosecutor. The employer in this case is seeking to enforce this private contract and makes use of the provisions of the law for that purpose. The intitualation should be in this case, *H.J. Coolidge v. Pua'aiki*, as we have made it, by consent, and if a different habit has prevailed, the entering of cases of this nature hereafter should be in accordance with his ruling." AMY KASTELEY, DEBORAH WARE-POST & SHARON K. HOM, CONTRACTING LAW (2d ed.) 14-15. Not until 1911, in *Bailey v. Alabama*, did the U.S. Supreme Court conclude criminal contract breach violated the 13th Amendment of the U.S. Constitution. Bailey v. Alabama, 219 U.S. 219 (1911).

[11] The other defenses challenged Mrs. Coolidge's authority to contractually bind the plantation and her husband in his absence. KASTELEY, POST & HOM, *supra* note 10, at 12.

[12] *Id.* at 14.

[13] *Id.*

[14] This doctrinal lesson is, according to Professor Patricia Williams, a function of the way that "[c]ontract law reduces life to fairy tale." Williams continues,

> The four corners of the agreement become parent. Performance is the equivalent of passive obedience to the parent. Passivity is valued as good contract-socialized behavior; activity is caged in retrospective hypotheses about states of mind at the magic moment of contracting. Individuals are judged by the contract unfolding rather than by the actors

The assumptions upon which the court's chosen narrative is based are revealed with the help of the two notes with which the opinion is bookended. The note that precedes the case, anchored by an excerpt from Sir Henry Maine's ANCIENT LAW, presents a brief overview of the history of contract law in terms of the transition from status to contract. In the note that follows the case, the authors provide students with a primer on reading judicial opinions. Armed with these tools, students should be better able to read the *Coolidge* case critically, not only identifying the stories reflected in the law, but also understanding why these choices are important.

Explaining the connection between stories, background assumptions and choice, the authors note, "[t]he crafting and recrafting of the story of the case can be an important part of [the judicial] process, allowing a judge to examine a variety of issues and arguments from several different perspectives."[15] Seen in this way, the story upon which the *Coolidge* opinion appears to be based is that of prospective employers and employees freely dickering over the terms that will govern their employment relationship. This is the story of free will and dealings between equals. But, as the authors suggest, this is not the only story and is no more "organic" to the judicial process than any other, unless we examine the choices in terms of shared interests and common objectives among elites.

If, however, the elites' interests are not fore grounded, other stories can emerge. One of these counter stories involves little real choice for those Chinese, Japanese, Pacific Islander, Portuguese, Filipino and Korean indentured servants who provided cheap labor for Hawai'i's plantations.[16] They signed standardized contracts, the terms of which captured the rights and duties of the master-servant relationship. While "both Master and Servant" were "compelled . . . to fulfill their contracts,"[17] suits enforcing the servants rights were rare.[18] These contracts merely created the illusion of equal parties,

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acting autonomously. Non-performance is disobedience; disobedience is active; activity becomes evil in contrast to the childlike passivity of contract conformity.

PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 224 (1991).

[15] KASTELEY, POST & HOM, *supra* note 10, at 21.

[16] *Id.* at 7.

[17] *Id.* at 9.

[18] The following passage from a piece published in The Pacific Commercial Advertiser captures the one-sided nature of such contracts in terms of enforcement: It is well known that many are the stripes inflicted and borne because the sufferer is ignorant of the law . . . or if he knows it, knows also that it is next to useless to seek redress." TAKAKI, *supra* note 8, at 140. This despite terms in standard form contracts that declared "[e]very emigrant [to] have all the rights and protection under the law that are given to any Citizen of the Country." RONALD TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAI'I 1835-1920, 32-33 (1983), quoted in KASTELEY, POST & HOM, *supra* note 10, at 9.

bargaining and choice through the liberal use of contractual liberty's language of freedom and voluntariness.

This is part of the context in which Pua'aiki and Kea were situated. As a framework, its value lies in its ability to help students see why it is important to consider why the court in Coolidge ignored the facts of hana-hana[19] and standardized contracts, choosing instead to rely on the fiction of liberty, individual freedom, contract formation and negotiable terms. Perhaps fiction must replace fact because "more facts would have undermined the . . . decision to enforce the contract."[20]

Having demonstrated the power of background assumptions and their role in crafting credible stories, the authors examine how those assumptions may be challenged. One way to achieve this objective is "using surprising or otherwise shocking names or labels in order to illuminate unseen aspects or consequences of the assumption."[21] They go on to note that, "[i]n Hawaii, for example, some people challenged the contract labor system by naming it 'slavery'."[22]

Over the past six years, I have apparently read that passage with little reaction. Whether functioning as hyperbole or analogy, the contract labor-slavery comparison had not been intellectually jarring. Moreover, I had read it in a context where the authors had already referenced the importance of "choice" to the United States and the "hope and inspiration . . . the idea offered . . . in the struggle for the freedom of those who were bought and sold as chattel."[23] Simply put, slavery was already on the table.

But during this, my seventh year of reading that section of the casebook, I was struck by the notion that because slavery was on the table, naming the Hawaiian contract labor system "slavery" raises issues about the role and importance of contract within a plantation system. I began to think that perhaps the presence of contract says as much about its formation and its terms as it does about the absence of contract and the relative status of those who, by

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[19] Hana-hana means "working on the plantation in Hawaii." TAKAKI, *supra* note 8, at 133.

[20] KASTELEY, POST & HOM, *supra* note 10, at 25.

[21] *Id.* at 22.

[22] *Id.* at 23. *But see* TAKAKI, *supra* note 8, at 140 ("[L]ife on a plantation is much like life in a prison.") and 143 ("It reminds me very much of plantation life in Georgia in the old days of slavery.").

[23] KASTELEY, POST & HOM, *supra* note 10, at 5-6.

law and definition, cannot contract.[24] The plantation provides an excellent site to test this supposition of symbiosis.[25]

With Earl Lovelace's novel Salt, one can explore the symbiosis of the presence and the absence of contract to challenge the notion that indenture and slavery are the same. The presence of contract and the terms thereof define the indentures' master-servant relationship in ways that often fail to approximate the reality of that relationship. The absence of contract, however, defines the master-servant relationships of slaves and slave owners. While highlighting the commonalities of slavery and indenture links the oppressed who are collectively devalued vis-à-vis the planters' whiteness and its attendant power,[26] Salt poses the question, "At what cost?" That is, what is the cost of creating a national identity that requires former slaves and their descendants to sublimate what may be legitimate claims for reparations? Is constructing a nation based on a unity in which the particulars of history are rendered exceedingly unimportant worth maintaining plantation-based hierarchy anchored by those former slaves and their descendants who remain uncompensated for hundreds of years of bondage? Are concerns about an alleged politics of division worth denying the moral authority on which the demand for reparations rests?"[27]

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[24] *See, e.g.*, Ariela J. Gross, *Like Master, Like Man: Constructing Whiteness in the Commercial Law of Slavery, 1800-1861*, 18 CARDOZO L. REV. 263 (1996) (analyzing cases involving slaves as the objects of commerce "to understand how the law worked to establish what it meant to be a master . . . and what it meant to be a white man in Southern plantation society.").

[25] The plantation is particularly well-suited to underscore what Sir Henry Maine observes are the "innumerable cases where the old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself by [contract] . . . ." SIR HENRY MAINE, ANCIENT LAW 179 (1864). On the point of enslaved Africans, Maine opined that the "real debate" was about "whether the status of the slave does not belong to bygone institutions and whether the only relation between employer and labourer which commends itself to modern morality be not a relation determined exclusively by contract." *Id.*

[26] Eric Foner describes the post-emancipation plantation system as a "new social pyramid" on which the "planter still stood atop. Slavery was gone, but in the absence of large-scale land distribution, the plantation system endured." FONER, *supra* note 8, at 399.

[27] Trinidad continues to struggle with this issue. The official position of the Trinidadian government is that the "tragic past" of colonization, genocide, slavery and indenture "set the stage for the inevitable clash of cultures between peoples of Africa, Europe, and Asia," and independence marked the transformation of Trinidad "into a tolerant, harmonious, multiethnic and multicultural society in which ever creed and race finds an equal place." Statement of H.E. Mr. Patrick Edwards, U.N. World Conference Against Racism (Aug. 31-Sept.7, 2001) *available at* http://www.un.org/WCAR/statements/trinE.htm. This idyllic picture of harmonious diversity is challenged by those like Khafra Kambon, the leader of Trinidad's 1970's Black Power Movement, who blames politicians that, "in a contest for power . . . focus on [racial and ancestral] differences to strengthen their positions." BBC, Crossing Continents: Trouble in Paradise (May 1, 2002), *available at* http://news.bbc.co.uk/1/hi/programmes/crossing_

III.

A. Emancipation

On the eve of Emancipation in 1834, JoJo has been a slave on the Carabon Plantation in Trinidad for some seventy years. His people have been the property of the Carabons for three hundred years. As a human chattel, they were the means of production, as well as the objects of commercial transaction and ownership between the Carabons and others engaged in the slave trade. Crown land settlement policy made them the condition precedent for Carabon's real property acquisition.[28] As such, they are both the foundation on and the engine with which the Carabons build their power.

JoJo views Emancipation as the time for Carabon and the other planters to make things right with their slaves. This would require not only ending forced labor for the benefit of the planters, but also compensating the slaves for "mashing up" their lives.[29] The reality of Emancipation as gradual[30] and incomplete, however, renders JoJo's expectations unrealistic, further entrenching him and his people in "their secondclassness."[31] JoJo comes to realize "they had brought enslavement to an end, but they had no new policy, no real new vision of how the plantations were to run and how people were to live in freedom."[32]

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continents/1959567.stm. *See also* http://www.imdiversity.com (observing "a distinct political rivalry between Indo and Afro-Trinidadians [is] apparent in the party system" and "[t]he struggle to bring Trinidad into independence was carried out between parties representing Indians versus African Creoles."). *Cf.* TAKAKI, supra note 8, at 142 (noting that planters in Hawaii used "nationalist consciousness among the labourers in order to divide them," which "promoted interethnic tensions that sometimes erupted into fistfights in the fields and riots in the camps."

[28] "[T]he law . . . require that for every forty acres a whiteman have he have to have at least one man in bondage and for every man bondaged a free coloured was entitled to fifteen acres of land." EARL LOVELACE, SALT 168 (1996).

[29] *Id.*

[30] Emancipation meant slavery was replaced by short-lived apprenticeship. Approaching emancipation in steps was thought to be justified

> for the sake of the blacks themselves as subsidiary to their own improvement that the present state of things must for the time being be maintained. It is, because to them the bulk of our fellow subjects in the Colonies, liberty, if suddenly given, and still more, if violently obtained, by men yet unprepared to receive it would be a curse not a blessing, that emancipation must be the work of time . . . .

Id. at 191 (emphasis omitted). *See also* FONER, *supra* note 8, at 132 (describing planters in both the U.S. and the West Indies as "bitterly resist[ing] the creation of a free labor market as implied by emancipation.").

[31] LOVELACE, *supra* note 28, at 188.

[32] *Id.* at 183.

Unlike other former slaves who used Emancipation as a way to sever relations with their former owners, JoJo "refuses to run away and squat a piece of land."[33] Rather, he chooses to remain

> working on Carabon plantation, deciding not to leave and not to dead until they compensate him for the . . . years they had him held in unlawful captivity, doing everything within the power of his outraged anger to keep both Carabon and the work alive, not missing a day of labour, refusing to be part of any strike or any sabotage or any subterfuge that would destroy the prosperity of the plantation.[34]

JoJo uses Emancipation to further entrench himself in the plantation because he has as much a right to the fruits of plantation labor as does Carabon. He also issues a written demand for reparations to the Crown by way of Carabon, in which he declares

> Your Memorialists believe that in the interest of justice, of humanity, of harmonious relations existing in the future between those who have profited from our captivity and those of us who have been captives here, that Your Most Gracious Majesty do grant Your Memorialists relief in the form of land, in the form of amenities and such other means as Your Gracious Majesty might see fit as a form of reparation for wrong done to us . . . .[35]

After reading JoJo's demand for reparations, Carabon asks incredulously, "[y]ou joking with the Queen?," to which JoJo responds, "[y]ou have been

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[33] *Id.* at 45. According to West Indian historian Douglas Hall,

> The movement of the ex-slaves from the estates was not a flight from the horrors of slavery. It was a protest against the inequities of early freedom. It is possible that, had the ex-slaves been allowed to continue in the free use of gardens, houses and grounds and to choose their employers without reference to the accommodation, there would have been very little movement of agricultural labour at all from the communities apparently established on the estate during slavery.

Douglas Hall, *The Flight from the Estates Reconsidered: The British West Indies, 1838-42*, 10 & 11 J. OF CARIBBEAN HIST. 23 (1978) *quoted in* WOODVILLE K. MARSHALL, THE POST-SLAVERY LABOUR PROBLEM REVISITED IN SLAVERY, FREEDOM AND GENDER: THE DYNAMICS OF CARIBBEAN SOCIETY 115-32 (B.L. Moore et al. eds. 2001). Woodville K. Marshall observes that "[o]nly from Trinidad and Dominica do we get reports of extensive squatting . . . . In Trinidad the 'squatting' occurred on the estates' backlands." MARSHALL, *supra* note 33, at 127. This was due, in part, to the fact that Trinidad and Dominica were "fairly large, thinly populated territories." *Id.* at 118. The availability of "large tracts of uncultivated land" allowed former slaves [to abandon] the sugar plantations in large numbers to establish themselves as subsistence-oriented small farmers." FONER, *supra* note 8, at 134. Plantations in the British West Indies "survived only through the massive importation of indentured [servants] from India and China." *Id.*; *but see id.* (regarding the ability of the plantation system to continue to flourish despite emancipation "on smaller islands like Barbados, where whites owned all the land 'and the Negro is unable to get possession of a foot of it.'" *Id.*

[34] LOVELACE, *supra* note 28, at 45.

[35] *Id.* at 182.

granted compensation for the loss of our labour, now we want compensation for the mashing up of our lives."[36] His demand is eventually met with indentured servants intended to satisfy the plantations' post-emancipation labor needs.[37]

With the introduction of Feroze to the Carabon Plantation, JoJo must confront the fact that the Crown, the planters and Carabon apparently would rather contract with laborers from outside the country than face up to the need to make things right with their former slaves.[38] JoJo mistakes Feroze for a squatter, but is quickly set straight when Feroze declares the land to be his own. "Is because of my contract," Feroze assures JoJo, and JoJo responds, "[y]our contract? You have a contract? Who gives you this contract?" Repositioning himself as inquisitor, Feroze asks why JoJo works without a contract. At first, Feroze rationalizes his contract based on his travel from India: "maybe is because you from around here . . . They don't have to pay passage for you. I from India . . . They have to pay plenty money for me to travel." The falseness of that distinction, however, is exposed when JoJo tells Feroze "I from across the sea there. From Africa."

Only then does Feroze become consciously aware that having contracted with Carabon, he has entered a plantation that offers opportunities to some to avoid dealing with the unfinished business of the plantation in its previous iteration—as a place where slaves not only gave Carabon the ability to own land, but also worked without employment contracts and their attendant expectation of payment for labor. JoJo goes on to answer Feroze's unasked question, as to why JoJo remains on the plantation, by stating simply, "[w]hat I doing here is waiting."[39]

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[36] *Id.*

[37] In Trinidad, "there were clear signs of labour shortage before emancipation. Therefore . . . there existed a condition of potential labour shortage which emancipation could aggravate." MARSHALL, *supra* note 33, at 122. This is the context in which Trinidad adopted a fairly aggressive and widespread policy of recruiting indentured servants primarily from Asia who migrated to the island beginning in 1845. "By 1917, when the Indian government halted such migration, there were already 144,000 East Indians in Trinidad." Gupta, *supra* note 27. These indentured servants worked as, what Mario Barrera calls, "buffers" who helped absorb the "shock . . . of economic dislocation." MARIO BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY at 48 (1979). As buffers, they stood between the former slaves and the planter class as the country moved from slavery to emancipation without either abandoning the plantation system or developing a real plan for land redistribution.

[38] I use "apparently" to qualify this statement because, at the end of the novel, the reader discovers that Carabon was willing to accede to JoJo's demands if only JoJo would ask him to. Accordingly, it seems Carabon was less offended by the substance of the request than he was by the manner in which it was made, i.e. as a demand and on behalf of all of Carabon's former slaves.

[39] LOVELACE, *supra* note 28, at 187.

B. Independence

The time that passes between Emancipation and Independence takes its toll on the collective memory of Carabon's unpaid debt. On the eve of Independence, Bango and Miss Myrtle represent the enduring spirit of JoJo and his demand for reparation for Carabon's former slaves. Bango is engaged in the full-time work of being the heart of an embattled community[40] that is now tenuously held together by need and poverty rather than by the Plantation's old ties of blood, expropriated labor, and power.[41] Changes in the plantation economy have made work scarce, rendering Bango's role within that community largely symbolic. He anchors its poorest members. He is the one to whom they turn because they have no one else.[42]

Need is also at work in Bango's role in the larger Cunaripo community. He pulls together and outfits bands of boys who mark special occasions by performing marching drills. They march so others cannot forget JoJo's still unmet demand. But too few remember the specific terms of the demand to appreciate fully the symbolism of marching.[43] For most, Bango and his band march because Bango insists on "dredging up the past that everybody gone past."[44] Few understand that JoJo's original demand is so particular to the Carabons having personally benefited from the expropriated labor of JoJo and his people that it is almost familial in nature. Far too many have bought into the idea that progress on this, the eve of Independence, requires not only clearing the books of all debts thought to be due and owing, but also unifying the country so that the specifics of oppression become irrelevant and messy details. Consequently, Bango is criticized for staying on the plantation long after "the cocoa gone; the sugar ain't have no price."[45] He is ridiculed for

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[40] Early in their relationship, Miss Myrtle resigns herself to having "to share Bango with the [cricket] team and the village . . . . His life was not just his own . . . . Nothing was done without him." *Id.* at 143. But as time passes, she comes to suspect that she and Bango are playing by a different set of rules. She wonders if "all that was keeping the people together was because they couldn't do better. She start to feel that as soon a people head reach above water and they could make a way for theirself they gone." *Id.* at 148.

[41] *Id.* at 148-49. As Bango tells Miss Myrtle, "[w]hat keep people together is not principle but the need. What keep people human is because they don't get a chance to be beast." *Id.*

[42] According to Miss Myrtle, "[m]ore than fifteen times they save up money to start to pay down on a piece of land but some problem always come up that he had to solve with it. Somebody had to bury his father; somebody house burn down, somebody child sick, something." *Id.* at 147.

[43] The memory is fading when Miss Myrtle first meets Bango. As one of her relatives warns her against getting involved with Bango, she ridicules their demand for reparations. She tells Miss Myrtle, "I not sure about it, if is true or something they make up just to explain their laziness and to hide their shame." *Id.* at 139.

[44] *Id.* at 90.

[45] *Id.* at 139.

believing "that somebody owe them something" and for "waiting on Government to give them" land with "no papers and no claim."[46]

Mired in a past forgotten by most, the "badges and incidents"[47] of Bango's continued slavery are juxtaposed with the trappings and privileges of Alford George's acquired freedom. Alford, the son of May and Dixon of the Carabon Plantation ascends to the upper ranks of the National Party. Among the things that distinguish Alford from Bango is the relationship of Alford's people to Carabon and the plantation. Alford's father Dixon is an internal migrant who chose to define his freedom by breaking ties with the planter who owned his people. No longer bound by the particular, family-like ties represented by JoJo/Bango and the Carabons, Dixon sets out to distance himself from the others working the Carabon Plantation. Eventually, he succeeds and his work brings him to Carabon's attention, who, in turn, offers to make Dixon a foreman. Dixon rejects the offered promotion and counters with an offer to move into the foreman's house under the great immortelle tree. Carabon accepts Dixon's offer, subject to the condition that Dixon not cut the trees. Although Dixon agrees to Carabon's terms, he tells him he intends to buy the property in the future. While both Dixon and Carabon know Dixon will never earn enough to buy the land, Carabon plays his part, saying "[y]es, yes, yes. When you ready, just come to me."[48] Through this interaction, Carabon allows Dixon to create the illusion of equality, leading Dixon to cling to "a pretense of a power he didn't have."[49]

The price Dixon pays to maintain the illusion is May, his wife. No more than "a good six months" after moving into the foreman's house, May physically reacts to living under the immortelle tree where "the dampness penetrate[s] her bones."[50] May's declining health is a constant reminder not only of Dixon's powerlessness vis-à-vis Carabon, but also the fragility of his illusion. If Dixon wants to save May's life, then he has three choices. He can breach his contract with Carabon and cut down the tree, he can ask Carabon's permission to cut down the tree, or he can buy the land, end Carabon's control over the tree, and cut it down himself. The first two options are not feasible because of the violence either would do to Dixon's pretence and illusion. If he chooses to breach the contract, then he runs the risk of Carabon enforcing the agreement to seek a remedy Dixon cannot afford to pay. If he chooses instead to ask Carabon's permission, he would have "to give Carabon a power that he, Dixon, was unwilling to concede and expose the very shame he was

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[46] *Id.* at 140.

[47] U.S. CONST., AMEND. XIII.

[48] LOVELACE, *supra* note 28, at 20.

[49] *Id.* at 105.

[50] *Id.* at 21.

seeking to disguise."[51] Dixon recommits to buying the land but his material deprivation leads him to buy bricks and stack them in his yard "to maintain the fiction of a construction that could not advance until he bought the land. And he couldn't buy the land because his money was going to bricks. And he couldn't stop buying bricks because to do so was to suggest that he had abandoned his mission of building his house."[52]

The tree is eventually cut down but only after Alford does what his father cannot, i.e. buys the land. By that time, however, it is too late. May has already died. Building the house his father wants exposes to Alford the limits of Dixon's freedom, which like the house is "so small."[53] He "suddenly one day . . . awoke to find that time had gone; the house completed, the immortelle tree cut down, his mother dead."[54] When all was said and done, both the house and the freedom seemed unworthy of the sacrifices made. Alford also confesses that "[w]ords that had easily slipped off my tongue—African, revolution, reparation, land distribution, decision-making—are now all coated with explosives and I no longer want the explosion."[55] Alford, Dixon and May have all paid a high price for Dixon's freedom, based, as it is, on "the pretence of power."

The path that races towards Alford's political demise is made clear by a life-altering meeting between Bango, Miss Myrtle and Alford.[56] At this meeting, which takes place in the official but abandoned office of the head of the Party,

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[51] *Id.* According to Eric Foner, "[f]reed men in Haiti, the British and Spanish Caribbean and Brazil all saw ownership of land as crucial to establishing their economic independence and their efforts to avoid returning to plantation labor were strenuously resisted by the planter elite and local political authorities." FONER, *supra* note 8, at 104.

[52] LOVELACE, *supra* note 28, at 21.

[53] His father "strech[es] into a new self-importance, careful now about little things, with a sense of ownership, of achievement, at last, telling him over and over again, 'This is your room, that is the kitchen, that is the bedroom,' as if he has not told him all that before." Alford, however, sees "its faults: Where was the guest room, the library? Where would they put little children?" *Id.* at 63.

[54] *Id.*

[55] *Id.* at 130.

[56] Prior to this meeting, Miss Myrtle visits Alford to plead with him not to accept Bango's invitation "to take the salute at the March Past at the Independence Day Parade in Cunaripa and to deliver the Feature Address on that occasion." *Id.* at 133. If, however, Alford declines the invitation, "[i]t will make [Bango] know that it is time for him to stop this marching. If you don't hold up now, he will never stop." *Id.* She continues, "[i]t is not fair for you to encourage him to continue. It not right for him to believe that he is the only man responsible for this community. *Id.* at 162. A sympathetic Alford offers to give Bango and Miss Myrtle land, and Miss Myrtle returns to Bango with the offer. Although Bango is not as happy about the offer as is Miss Myrtle, he agrees to accept it provided that the land is given openly, "[i]n front of everybody. People must know why they giving the land to me. It must be public." *Id.* at 164.

Alford, like his father's house and freedom, feels "small" before Bango. Part of this smallness is attributed to his realization that

> Bango had kept the self that he, Alford, had lost. Bango had crossed the chasm into that past to link up with JoJo, to carry still his sense of violation after the granting of the 'Emancipation' that neither acknowledged his injury nor addressed his loss. And then he felt shame, at himself and his community that had left it to Bango alone to be outraged at the indignity its people continued to live under it was of this shame he spoke.[57]

Alford's eyes are opened further, as Bango challenges him to consider the seriousness of his position as the political representative of the plantation's dispossessed, as well as the freedom passed from Dixon to Alford. Specifically, Bango asks Alford,

> [h]ow can you free people? When every move you make is to get them to accept conditions of unfreedom, when you use power to twist and corrupt what it is to be human, when you ask people to accept shame as triumph and indignity as progress? What is power if power is too weak to take responsibility to uphold what it is to be human?[58]

Alford recognizes that the "power" for which Dixon sacrificed May was not power at all, but rather a post-Emancipation adaptation of the power relations of slavery. Nothing had really changed, despite the efforts of those like Dixon and Alford to convince themselves and others that they were, in fact, free.

Alford eventually sees Bango and Miss Myrtle as victims of a "deliberate plan set down from the beginning to prevent people from working their way out of enslavement."[59] In his eyes, this justifies giving them reparations and distinguished them from others oppressed by the continuation of white supremacy and power. He also understands Bango's insistence that the land be given openly, so that "everybody . . . know . . . we not beggars, we not begging. We just require what is our due."[60] In Alford's words, "I knew why the land had to be given openly with the full knowledge and concurrence of the entire community. What was needed was a new petition that would go this time . . . to the Cabinet of the National Party government of this country of which I was a member."[61] Alford continues,

> I had not failed to see that the Colonial government, Britain, the authorities, however we called them, had had opportunities to make restitution and apology that would restore value and dignity and respect to our community and people.

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[57] *Id.* at 257.
[58] *Id.*
[59] *Id.* at 106.
[60] *Id.* at 187.
[61] *Id.*

> Each time they had backed away, out of fear, out of arrogance. The sadness was that the National Party had done no better. Worse, we had left the problem unattended by not even acknowledging the presence of a problem. We had secured Blackpeople in their secondclassness. Now it was up to me.[62]

Alford is determined to make the case for reparations for Bango, but he is roundly criticized by those within the National Party who see Bango as only one of the many people to whom something might be owed. According to Alford's critics,

> Bango wasn't the only one in our history to suffer . . . Who going to give him what? And what about the others, what about Indian people who were indentured? What about the Caribs and Arawaks, the aboriginal inhabitant? And would they now take away Whitepeople property? And wouldn't that frighten away people and split up the country?[63]

Slavery and indenture are rendered equivalent and the illogic of treating slavery different based on moral imperative is underscored by introducing the Caribs and Arawaks, most of whom, as the victims of genocide, no longer exist, but who present the most compelling case for some type of remedy, vis-à-vis either slaves or indentured servants. In this way, equating genocide, slavery and indenture strips Bango's demand for reparations of its moral authority. Consequently, cries for national unity and progress appeal to a history comprised of a cacophony of equivalent and indistinguishable oppressions, all competing to be heard. Here, slavery is the functional equivalent of indenture and the logic that follows is deceptively simple. If the former slaves have a legitimate claim for reparation, the syllogism goes, then so too must the East Indians and the Chinese.[64] The syllogism's "validity" is then used to turn the relationship between historicity, injury and remedy on its head. Accordingly, Bango, his people and their demand for reparations are cast as threats to progress and examples of "the politics of mash-up-ness, of division"[65] that imperils the apparent stability wrought by the democratic rule of limited self-government that precedes independence. Alford is accused of having "embarked on a campaign to give out government lands and to make purchases of private lands to give to members of his constituency, against the democratic principles of the Party that . . . had kept the country stable and its various

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[62] *Id.* at 188. Dr. Selwyn R. Cudjoe challenges those in contemporary Trinidad not to ignore, but rather to discuss racial and ethnic differences. Dr. Cudjoe asks, "how can we claim to be a 'multiracial society' and yet not talk about race, ethnic privilege, ethnic preference, ethnic balance, etc.?" Dr. Selwyn R. Cudjoe, Race Matters (Dec. 18, 2003), *available at* http://www.trinicenter.com/Cudjoe/2003/1812/htm.

[63] LOVELACE, *supra* note 28, at 106.

[64] *E.g. id.*

[65] *Id.* at 234.

races living in harmony."[66] In this way, the specificity of the debt between those like the Carabons and Bango is too dangerous to be remembered. It must be forgotten. It must be rendered illegitimate.

But, Alford's reconnection with the past through his meeting with Bango and Miss Myrtle gives him a renewed sense of legitimacy, which drives him to try to right the wrong for which he and others have allowed Bango and Miss Myrtle to assume sole responsibility. He is, however, branded an opportunist and accused of seizing "the forum provided by the innocent and patriotic people to celebrate nationhood, to invoke the spectre of racial division by claiming reparation for Africans."[67]

The institution of indenture, which complicated the plantation hierarchy after JoJo's initial demand for reparations, continues to confuse the matter of the Carabons' unpaid debt at Independence. Moon, the descendant of indentured servants recruited to Trinidad in the aftermath of Emancipation reinforces Bango's devalued position on the plantation. Bango and Moon have an exchange that is reminiscent of JoJo's exchange with Feroze, during which Bango finds out that Carabon's original terms that required land to be purchased in forty acre lots have been changed, allowing Moon to buy five acres. Here, again, contract is explicitly brought into the picture as Moon proves he is not a squatter by producing his deed. Moon tells Bango that "I was going way to another estate to work, but the boss say stay, you will get land, so I stay . . . Don't vex with me neighbor."[68] After Miss Myrtle learns that Moon has bought his five acres, she thinks the struggle is over because the Carabons are willing to sell land in smaller, more affordable lots. Only after

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[66] *Id.* at 240. Dr. Cudjoe insists that "race talk" is necessary as Trinidad attempts to figure out the "ways in which [Trinidadians] can live together in productive and harmonious ways." Cudjoe continues, "[t]he only way to understand how the coming of the Ganges has impacted upon the Nile is to recognize that in a land of scarce resources and different ways of looking at the world . . . is to talk incessantly about race and ethnicity, acknowledging that in a multiracial society race matters." Cudjoe, *supra* note 62.

[67] LOVELACE, *supra* note 28, at 259. Lovelace describes the process of constructing such an identity throughout the West Indies through a generic independence mural painted by "a West Indian living then in London, who had done a mural for Jamaica for its Independence, and who would later do ones for Barbados, for Antigua, for St. Lucia when their turn came, each on similarly titled, New Day in Jamaica; New Horizons in Trinidad; New Dawn in Barbados, each one with the three ships of Columbus, each with the crucified leader of what they called a slave rebellion, the rebel leader, arms outstretched like a Carnival sailor doing a movement of the King Sailor dance, dying heroically for Freedom." *Id.* at 126. These murals also included images of "native Indians . . . Las Casas . . . Africans . . . Sir Francis Drake . . . [white] ladies . . . Black maids . . . [b]lood oozing from the bleeding sugar . . . Toussaint L'Ouverture . . . Governor Don Maria Chacon . . . an African obeah man . . . Asian women . . . And in its easy, its simple resolution there stand, in the foreground, a tall white child and next to him a shorter Black girl and an Indian boy and a Chinese girl, so comfortable, so easy." *Id.*

[68] *Id.* at 150.

Bango responds, "Buy?" and she sees "the astonishment on his face she realized that he had never thought of the plantation as property, as something you could buy or sell, that to him it was more of a monster to struggle against, to outwit and outlast and defeat. His struggle she understood . . . had been not to buy the land but to make the land witness to his undefeat."[69] Seen in this way, their struggle is about the freedom and the humanity that comes with reparations and apology. To understand it otherwise is to fail to see not only contract as the fundamental difference between slavery and indenture, but also the false promise of Independence based on the illusion of equality. Without properly compensating those whose lives slavery had mashed up, the future would be one of continuing inequality. For this reason, Bango and Miss Myrtle can be expected neither to buy land nor to forget. To do either would be to accept their place within a nation built on their backs for which they remain uncompensated and in which they remain unfree. Alford has to give Bango and Miss Myrtle their land in the name of reparations.

This time around, the demand for reparation is met, initially, with less incredulity than before. This generation of Carabon men have different views, and there is a wedge of (mis)understanding between the two who were able to leave the Plantation because the other stayed. Those who migrated away from the plantation see the debt as one they cannot afford to pay because the problem of the unpaid debt is bigger than the Carabon plantation. Based, in large part, on the belief that "Massa day done,"[70] Michael Carabon says they cannot afford to pay Bango and Miss Myrtle because if the former slaves are paid, then the indentured servants must be paid too.[71] The formal equality of Michael's world of law, together with the revised history of nation require the injuries of slavery and those of indenture be indistinguishable. Here, the absence and the presence of contract play no useful role in determining if these oppressions are, in fact, equivalent. The fact that now everyone theoretically can purchase land makes paying Bango and Miss Myrtle look more like a gift rather than an equitable way to redress the past. St. Hilaire Carabon, the priest, believes they cannot afford to pay Bango and Miss Myrtle because an individual "can't make reparation for a people, for a race . . . The whole society have to be involved."[72] While St. Hilaire seems to appreciate the importance of contract and the morality of Bango and Miss Myrtle's demand, he fails to see the point of distinguishing the Carabons' personal debt from the collective debt of the planter class. Only Aldolphe Carabon, who not only succeeded his father on the plantation but also, like Bango, continues to live with the

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[69] *Id.* at 155.
[70] *Id.* at 195.
[71] *Id.*
[72] *Id.* at 216.

constant reminder of this very unique and particular debt, sees the family being not only able to afford the costs of paying Bango and Miss Myrtle, but also unable to afford the costs of not paying. Only then does he hear the father who, despite his incredulity, was willing to pay his debt to JoJo more than a generation ago. The fact that they share a connection to the Plantation no longer appreciated by either Michael or St. Hilaire apparently makes them see that paying the debt only requires being asked in a way that the Carabons can hear the demand. But, asking would grant to the Carabons a power over JoJo, Bango and their people, which they will not concede. Alford could make the request without similarly imperiling his humanity because he has a different relationship with Carabon. Alford must make the request to establish the humanity denied to him by both his father's vision of freedom and his political career built on his willingness to forget.

IV.

Through the symbiosis of the absence and the presence of contract, SALT helps to demonstrate that the costs of equating slavery and indenture may be high. For the people of Trinidad, ignoring the importance of the difference between the two systems of oppression means beginning a journey to nationhood on a road of quicksand in which a nation is stuck in the muck of false equality and constructed national identity. In this way, the words of Burning Spear are instructive, for what you remember about the days of slavery depends on your history and that of your people, as well as your relationship with the empowered elite. If we are expected to forget the particularities of the days of slavery, then we may underestimate the need to settle legitimate debts due and owing before moving to a system that assumes equality of oppressions and erases the importance of contract in distinguishing slavery from the contract labor system despite the shared site of the plantation. As Spear tells us, "history can recall the days of slav'ry"[73] and only with a full accounting do we better appreciate the importance of teaching, in contracts, the significance of not only the presence, but also the absence of contract.

[73] Burning Spear, *supra* note 1.

Using History in Teaching Contracts: The Case of *Britton v. Turner*

Robert W. Gordon*

My job in this symposium is to illustrate the potential uses of history in teaching current contract law.

The principal case I'll use as the gateway into this demonstration is one that may be found in almost all the major casebooks: *Britton v. Turner.*[1] In this case a laborer under a one-year contract to work for an annual wage of $120 quit his job in the tenth month, and sued his employer in *quantum meruit* for the reasonable value of the work he had performed up to that point. The employer's defense was that completing the contract was the condition precedent to the employee's right to payment, and that to allow him to recover anything at all would promote immorality by giving people incentives to break their contracts. This court held for the plaintiff: even a breaching party should be able to recover the value of his services, offset by defendant's damages, if any. Otherwise, an employee who had done most of the year's work would suffer a forfeiture: "[T]he party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract"; and "the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach" and thus more than he could recover in damages.[2]

In the casebooks, *Britton* is generally used to illustrate the current mainstream doctrine that even a plaintiff in default should be able to recover the value of part performance (less damages, up to the limit of the contract price or rate) in restitution, and also the more general remedial principles disfavoring forfeitures and penal or deterrent damages. It is also sometimes cited in sections of the casebooks dealing with implied or constructive conditions of exchange, for the purpose of showing that "work first, pay later" is the default rule if no time of payment is expressly specified in service or construction contracts. Putting the case back into historical context, I think, opens up a much wider and more interesting range of issues and questions for students to consider—and especially to get them to ask: what are the real stakes of these technical issues of doctrine? Why does it matter, and for whom, what view you take?

Here is a short digression on the stakes of legal rules. The very first case I read in law school was for Civil Procedure; the case was *Sibbach v. Wilson*,[3]

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* Chancellor Kent Professor of Law and Legal History, Yale University.

[1] 6 N.H. 481 (1834).

[2] *Id.* at *5.

[3] 312 U.S. 1 (1941).

a case brought in the federal diversity jurisdiction. The case was meant to introduce the class to the *Erie* Problem, and for the next few weeks we were kept busy analyzing whether state law or federal procedural rules should govern this case and others like it. The one question we never examined was why anyone—except the litigants who might find federal or state law better or worse for their side in a particular dispute—would care what the answer was. What was at stake? Not until many years later did I learn that the *Erie* Problem had a history, and the history was that of interstate corporations, especially railroads, fleeing state tort law *en masse* into pro-defendant federal jurisdiction with its "federal common law" and essentially using the federal courts to nullify state law protections for personal-injury plaintiffs. Cases like *Sibbach* were the dying embers of these once flaming economic and political wars.[4] The rule in *Britton* is much the same. The particular fighting issues that made the case important in its time have faded. The case continues to shed light, however, on a whole range of social conflicts, involving parties with high stakes in the outcomes, which are very much alive.

The first thing a historically informed teacher of the case can point out (as do some, but not all, of the casebooks) is that *Britton* was very much a minority holding when it was decided. The standard rule in most American jurisdictions was the "entire contract" rule, that the worker who quits before the end of his term forfeits all claims to unpaid wages.[5] The leading case is from Massachusetts, *Stark v. Parker*,[6] which says that if the worker is hired for a year, the contract is presumed to be "entire" so that serving out the year is the condition precedent for his recovering any wages, and that this is a good rule because it discourages contract breach and rewards faithful service. Quite possibly one of the factors influencing this decision was that wage labor in this period of New England's history had recently become very mobile. Farms and households were finding it hard to hold on to hired hands and servants tempted into the burgeoning higher-paying factory economy.[7] The "entire contract" rule seems to aim to deter such defections by imposing a high penalty for quitting work.

The next point to make is that both cases supply implied (default) terms to the contractual relationship. The parties *could* expressly spell out their own

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[4] The (magnificent) history of these conflicts, and also of the depoliticizing of them in postwar academic writing and teaching of federal jurisdiction, is provided by EDWARD PURCELL, LITIGATION AND INEQUALITY (1992) and EDWARD PURCELL, BRANDEIS AND THE PROGRESSIVE CONSTITUTION (2000).

[5] *See* CHRISTOPHER TOMLINS, LABOR, LABOR AND IDEOLOGY IN THE AMERICAN REPUBLIC 273-78 (1993).

[6] 19 Mass. 267 (1824).

[7] *See* JONATHAN PRUDE, THE COMING OF INDUSTRIAL ORDER: TOWN AND FACTORY LIFE IN RURAL MASSACHUSETTS, 1810-1860 68-69 (1983).

times and terms of payment in exchange for performance. In fact, the *Britton* court points out that the parties could, if they wished, contract around its holding and specify the result of the majority doctrine then-prevailing in other states—that is, no payment until and unless a full year's work had been performed. A builder or contractor supplying materials and labor on a building contract, likely to be a business-savvy repeat-playing party, will of course usually insist on structuring the contract to get around any such rule, and provide for periodic payments to finance the work as it proceeds. (He will also get a mechanic's lien on the realty.) And, as in the 1830s, unlike the employee, he will usually get *quantum meruit* for work performed if he is held in breach, since the owner remains in possession of material benefits from the contractor's work. A farm laborer or factory worker is more likely to accept work on the terms offered, less likely to be aware of the invisible terms of the contract; and even if aware of them to be very unlikely, unless labor is scarce and his skills unusual, to be able to contract around them.

Make sure students understand the full implications of the "entire contract" rule. Since it is a default rule, the employer gets its benefit without having to say anything about the payment of wages at the onset of the contract. Unless a worker is willing to lose his wages, he is effectively indentured to his employer for the entire term, even if he gets a better offer elsewhere, and even if the boss is abusive. If the boss were abusive enough, of course, the boss would himself be in material breach of contract, which would entitle the worker both to quit work and to damages. But this is not much comfort to the worker; it leaves a farm laborer who has not yet been paid for his work with the burden of having to bring and finance a lawsuit. The default rule allows even the abusive employer to hold on to the money, to withhold back wages without going to court, and, as Judge Parker points out in his *Britton* opinion, gives the employer an incentive "to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment."[8] Even the *Britton* rule, of course, requires the worker to sue to recover his wage, and as Robert Steinfeld has pointed out, "it was always possible for an unsympathetic judge. . . to find that the damage to the employer from the worker's breach

[8] *Britton v. Turner*, 6 N.H. 481, 494 (1834). A teacher at this point could productively ask the class to compare this occasion for employers to fire opportunistically to avoid paying wages with the corresponding temptation to employees to threaten to quit work in mid-contract when their services are most urgently needed, and the employer has unrecoverable sunk costs, unless the employer agrees to a higher wage – as in another famous contracts case, Alaska Packers Ass'n. v. Domenico, 117 F. 99 (9th Cir. 1902). In such cases the courts use consideration (pre-existing-duty-rule) or duress doctrine to relieve the employer from having to pay the promised higher wage, or to get back the extorted surplus if he has already paid it.

fully equaled the value of any labor performed, leaving the worker to recover nothing."[9]

Now bring in some more history to expand the frame. Robert Steinfeld and Christopher Tomlins have done the best historical work on this subject. The penalty/forfeiture for quitting work is particularly significant as one of the many doctrines that, in combination, constitute the implied terms of the employment relationship.

The central fact of that relationship was this: by the 1820s and 30s the United States had defined itself as a republic of "free labor." This self-definition was especially important to the North, to distinguish its labor system from that of the slave South and also from that of England. Over half the immigrants to the American colonies had arrived as indentured servants, legally bound to their masters for a term of years. The master could inflict corporal discipline on his servant, and have him recaptured by the sheriff if he ran away. Indentured servitude had however almost completely disappeared by 1820. In American law, long terms of labor service, personal powers of discipline, and legal process to recapture defaulting servants were now thought incompatible with the worker's freedom.[10] In England through the 1860s, employers could still use criminal process against employees who quit work before their term, and in fact prosecuted over 10,000 workers for quitting. In the American North, the use of criminal process was denounced as anti-republican.[11]

The South was another country. Even after emancipation, legislative prescription of criminal penalties for contract-breaching was revived in the South to try to keep freed slaves bound to their former masters. If freedmen under contract quit, they could be arrested, convicted, and leased back to their masters by the state.[12] In the 1911 case of *Bailey v. Alabama*,[13] criminal penalties for contract-breaching were held to violate the Thirteenth Amendment and the anti-peonage statutes, though this holding had no actual effect on the practice of Southern planters who were still finding ways to send tenant farmers to jail for quitting through the 1940s.

Thus, first in the North then later in the South as well, another crucial (though again implied, invisible) term of free contract labor in the United States has come to be that specific performance and the criminal process are unavailable against the defaulting employee. Those remedies define the

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[9] ROBERT J. STEINFELD, COERCION, CONTRACT AND FREE LABOR IN THE NINETEENTH CENTURY 300 (2001).

[10] *See* ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR (1991).

[11] *See* STEINFELD, *supra* note 9, at 290-308.

[12] *See* WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915 (1991).

[13] 219 U.S. 219 (1911).

condition of "involuntary servitude"; their unavailability defines "free labor" contracts, the remedies for breach of which are supposedly limited to damages (or negative injunctions, in a proper case).

But as we've seen under the majority rule in *Stark v. Parker*, even Northern employers had the additional remedy of withholding back pay for work already done, the wage-forfeiture penalty of the "entire contract" default rule. Gradually, over a very long period, workers got the default rule changed by legislation—statutes (in effect in most states by the 1930s) requiring that workers must be paid periodically (weekly or bi-weekly) and prohibiting the parties from contracting out.[14] These are striking examples of the use of prohibitions on free contract to promote, as the reformers saw it, the real freedom of employees. Other examples would be the Constitutional (Thirteenth Amendment) and statutory prohibitions of peonage and involuntary servitude; statutes prohibiting the parties from contracting for payment in scrip, redeemable at the company store, instead of cash (some famous cases initially held these statutes to be unconstitutional intrusions upon freedom of contract); statutes limiting the terms of personal-service contracts; statutes prohibiting yellow-dog contracts (contracts requiring workers as a condition of employment to promise not to join a union); and the statutes prescribing minimum wages, maximum hours, and mandatory overtime pay.

"Free labor" as it is understood in modern America turns out to be a surprisingly complex and intricate legal construct. Far from a simple absence of legal coercion of the laborer or employer, it involves and, indeed, seems to require an extensive set of legal regulations in the form of both implied default and state-mandated compulsory and prohibited terms.

This brief history of the defining elements of the "free labor" contract opens up a window into what I think are the most interesting--and very much still current—issues raised by *Britton v. Turner*: what are the invisible (implied, default) terms of contracts? Specifically, what are the terms of the labor contract, and how like or unlike are they to terms of other types of contract relations such as supply (especially requirements or output) contracts, construction contracts, and so forth?

Again, understanding some of the historical background helps out here. By the late nineteenth century, "contract" relations came to be strongly contrasted to "status" relations. Status relations had a content (mandatory terms) prescribed by law and usually unequal or asymmetric rights and duties. Marriage was the prime example of a status: the state's terms could not be varied by the parties; rights of exit from the contract, even by mutual consent, were heavily restricted by divorce law; in the contract relation the wife was subordinated to the husband's orders, control of their joint property, choice of dwelling place,

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[14] *See* STEINFELD, *supra* note 9, at 311-14.

and even citizenship; the wife owed the husband domestic and sexual services, but the husband was also obliged to support the wife. Thus, it was clear to late nineteenth century lawyers and treatise writers that marriage was not a contract. Contract relations were supposedly between formal equals, on terms mutually agreed to by both, and alterable and terminable by mutual consent. Which was employment? Constitutional law (*e.g.*, *Lochner v. New York*[15]) said it was the paradigmatic "free contract" relation. But was it?

A century earlier, around 1800, employment was theorized legally as a contract relation very much like marriage. "Contract" in 1800, generally referred to relations that the parties agreed to enter voluntarily, but that once entered bound them to prescribed terms.[16] English law, in fact, prescribed detailed mandatory terms—wage rates, job tasks, craft rules—for most trades and occupations. In 1799-1800, the English Parliament repealed these detailed rates and rules, allowing the terms of work to be set free of state regulation. It did not, however, contemplate that the parties would set these terms by mutual bargaining. Work was an authoritarian relation, controlled by masters, just as husbands controlled marriage.

The same English statutes that freed the work bargain from state control enacted a strong criminal prohibition on another form of free contracting—contracts among laborers to form unions.[17] The state's rules regarding labor associations, how they may organize, the tactics (strikes, pickets, boycotts, etc.) they may legitimately use, and the subjects over which they can pressure employers to bargain underwent a long and complex history of changes. I won't dwell on these here, except to say that these rules are critical to understanding the employment contract, because, along with market conditions, they ultimately determine the relative bargaining power of the parties. Our present interest remains in the implied terms of the employment relation itself.

One key point here is that in legal contemplation throughout the nineteenth century and, to a very large extent to this day, this relationship remains in law as well as in fact, an authoritarian relationship. American courts in the early republic invented the new field of "employment law" to govern work relations in industrial society. The template they used for the common law governance of the employment relation was lifted, however, from the pre-industrial household—from the law of Master and Servant. Nineteenth century treatises commonly treated industrial and domestic employment under the same master-servant categories. In this relation, masters (employers) are superiors with the right of command, servants (employees) inferiors with the duty of obedience.[18]

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[15] 198 U.S. 45 (1905).

[16] John V. Orth, *Contract and the Common Law*, in THE STATE AND FREEDOM OF CONTRACT 52-53 (Harry N. Scheiber ed., 1998).

[17] *See id.* at 56-63.

[18] *See* TOMLINS, *supra* note 5, at 278-92.

Servants, like wives, were a form of masters' property; masters might bring an action for enticement against competitors who tried to lure their servants away. Servants owed their masters an unqualified duty of loyalty to their interests and this remains an employee's duty today, though it is not reciprocated; employers have no corresponding duty to look after their employee's interest.[19] Masters also owed their servants duties of care akin to the husband's duty of support, to take care of them in sickness, disability and age, but these duties were eroded away by the mid-nineteenth century, leaving—as Southern slaveholders gleefully emphasized—masters of "free labor" free to throw injured or elderly workers out into the snow. Much of this law evolved in ways that granted masters even greater rights vis-à-vis their workers. For example, workers who invented something on the job had the rights to control those inventions until the late nineteenth century, when the law changed the rules to make such inventions "works-for-hire" and the property of the employer.[20]

By the 1880s, the most important implied term of employment is that it is at-will.[21] At-will employment helps to set some outer limits on the employer's power to abuse. If the employee just can't take it any more, she can always quit. But of course quitting is hugely costly to most workers, unless they are lucky enough to have something better lined up. The practical consequence of the at-will rule, especially in sagging labor markets, is that, unless employers run afoul of some specific and *enforceable* statutory prohibition,[22] they can treat their workers pretty much any way they please.

An historian of early twentieth century labor called her study *Belated Feudalism* to emphasize the prescriptive, authoritarian content of the employment relation.[23] Ironically, while marriage has shed many of its incidents of

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[19] This remains true even in Wagner Act (unionized) workplaces. *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN LABOR LAW 95-96 (1983).

[20] *See* Catherine L. Fisk, *Removing the "Fuel of Interest" from the "Fire of Genius": Law and the Employee Inventor, 1830-1930*, 65 U. CHI. L. REV. 1127 (1998); Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441 (2001).

[21] Jay M. Fineman, *The Development of the Employment At Will Rule*, 20 AM. J. LEG. HIST. 118 (1976).

[22] I stress this because, of course, many statutes protecting workers are good on paper only, because the penalties for violating them are too low and long delayed to deter employers or attract lawyers. The influence on courts of the common-law baseline presumption that employers have an arbitrary power to fire at will reaches even into settings where employers seem to be using the power for a specifically illegal purpose, such as firing union organizers. *See* Richard Michael Fischl, *A Domain Into Which The King's Writ Does Not Seek To Run: Workplace Justice in the Shadow of Employment-at-Will*, in LABOUR LAW IN AN ERA OF GLOBALIZATION (Joanne Conaghan, et. al. eds., 2002).

[23] KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991).

unequal status and been transformed into a much more egalitarian form of contract relationship (though still heavily influenced by the customary gendered division of labor and the assumption that whoever brings in the wage or salary income from outside calls the shots), employment remains a domain of top-down and often arbitrary command. The feature of the work contract that distinguishes it from virtually all other contract relations is the vast discretionary authority that the law delegates to one party to exercise near-absolute control over the time and actions of the other.[24]

Over time many different successive rationales have been used to explain the asymmetrical authority relations of the workplace: that the masters were gentlemen and servants low-born; the masters were superior in education and attainments; the masters had emerged on top in the Darwinian struggle for survival, while the servant-drones had been left behind; and even, rather incredibly, that the masters had a preference for being bosses and workers for being bossed around, etc.[25] The current dominant rationales are that hierarchy and "flexibility" are efficient, and that the acquiescence workers give—evidenced by their staying on the job—to their employers' regime under fear of being fired, exhibits their consent to the regime.[26] Again, I venture to say that in no other set of contract relations, would the legal system tolerate such a readily abused discretion to dictate and to alter the constitutive contract terms at one party's unqualified discretion.

Implications for teaching

The purposes of an exercise like this, an exercise in sketching the historical evolution of social institutions such as implied contract relations, are several. First, one purpose is simply to make the legal-realist's/institutional-economist's point that one cannot understand most contract relations simply as the products of mutually agreed-upon terms. Important terms and aspects of the relation are set by customary arrangements and understandings, often reflected in implied terms or default rules, and sometimes just mutely present as

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[24] Another nice topic to explore with students is what are the implied limits of the employer's implied authority? May he require employees to pick up his dry cleaning? Come over on the weekend and wash his car? Contribute to a lobbying effort that benefits the employer, such as a reduction in OSHA's budget and authority? Wear tight T-shirts on the job? Engage in dangerous work? Execute a waiver of employer's liability for injury on the job? Undergo sterilization as a condition of continuing employment in jobs with radiation or chemical hazards? In an at-will world, is the question meaningful?

[25] *See generally* REINHARD BENDIX, WORK AND AUTHORITY IN INDUSTRY: MANAGERIAL IDEOLOGIES IN THE COURSE OF INDUSTRIALIZATION 13-116, 198-340 (1956).

[26] Some nice test cases of the borderlands of duress are in modern peonage cases involving abusive treatment of illegal-immigrant workers, who are easily exploited because they risk deportation by complaining. *See, e.g.*, U.S. v. Kozminski, 487 U.S. 931 (1988).

background conventions (for example, the gendered division of household labor: he works outside the house; she cooks, cleans and takes care of the kids even if she works outside as well). Other important terms are determined by the law's or convention's delegation of effective decisional power to one of the parties such as the party who drafts and supplies the form, or in employment contracts, the party who makes the rules and gives the orders. Since these are default terms only, they can be altered by express agreement, but of course for most workers (other than executives or professionals) they rarely are. The employers set the terms in contracts that employees rarely see and often run strikingly counter to their expectations. Empirical studies of worker expectations of job security, for example, suggest that the vast majority of workers have no idea that their employer may legally fire them for bad reasons or no reasons.[27]

Second, for teaching purposes the *Britton* and *Stark* cases also furnish a nice pair of contrasts in judicial technique—how judges go about creating implied default terms. In each case the judge argues from custom or convention, from policy, and from basic principle. Judge Parker in *Britton* argues from convention that: "[W]e have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary."[28] And as we've seen he adds the policy argument that the contrary rule would tempt the employer to drive out the employee near the end of the term by "ill treatment" to escape payment. *Britton*'s benchmark principle is fair compensation to both parties, neither forfeitures nor windfalls.

In contrast, Judge Lincoln in *Stark* emphatically declares that the "general understanding of the nature of such engagements" and the "usages of the country and common opinion upon subjects of this description" support a "work first, payment later" default regime,[29] and finds "any apprehension that this rule may be abused to the purposes of oppression, by holding out an inducement to the employer, by unkind treatment near the close of a term of service, to drive the laborer from his engagement, to the sacrifice of his wages, is wholly groundless" because if the employer is in fact in breach, the law gives the employee a remedy.[30] This court's basic principle is the sanctity of

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[27] *See, e.g.*, Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105; RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 118-22 (1999).

[28] Britton v. Turner, 6 N.H. 481, 493 (1834).

[29] This might be so, but doesn't speak to whether people commonly think workers should forfeit all their wages if they quit near the end of the term.

[30] Stark v. Parker, 19 Mass. 267, 271-74 (1824).

contractual promises: "Nothing can be more unreasonable than that a man, who deliberately and wantonly violates an engagement, should be permitted to seek in a court of justice an indemnity from the consequences of his voluntary act."[31]

Third, the cases in historical context also dramatize how the law constructs the boundaries between "free contract" and "free labor"—relations that are "consented to"—on the one hand, and relations that are "coerced" on the other. Until the late nineteenth century the legal regimes of most societies did not see how people could be induced to work at unpleasant tasks without direct legal compulsion: specific performance to defaulting workers, the threat of imprisonment, whipping or heavy fines for leaving work, and criminal punishment for vagrancy and confinement to the workhouse for refusing work. Southern planters after emancipation had much the same view: the freed slaves would not stay on the plantation without the threat of the convict-lease system and the chain gang for leaving work, and vagrancy prosecution for refusing work. The great discovery of political economists such as Adam Smith was that the state could remove all these compulsions and let the invisible hand of the market, the force of brute necessity, do the work of pressing workers into lifetimes of hard and disabling labor and submission to employers' authority. The extra attraction of using the "free" market as the force of compulsion was that no visible human agents seemed to be doing the compelling. Laborers entering into the wage bargain to avoid starvation were freely *choosing* work over idleness (just as, it was and by many still is believed, the unemployed were *choosing* idleness) and were freely consenting to all the imposed and silently implied terms of the bargain. The force of necessity was by definition not coercion, and giving into it was thus an exercise of free choice.

The fragile and arbitrary quality of these distinctions is famously made manifest in the law of duress. Threats to use physical force, and even threats simply to breach existing contracts, to induce vulnerable parties to agree to onerous contract terms may constitute such duress as to invalidate the agreements. But the threat to fire or not to hire unless the worker agrees to the onerous terms—even if the consequences of refusing the deal for the vulnerable party may actually be much more severe than a fine or short jail term (*e.g.*, unemployment, humiliation before family and friends, loss of health insurance for a sick child, etc.)—is not duress. There may be valid reasons for distinguishing the different kinds of threats, but as Hale and Dawson memorably pointed out, the reasons cannot be that the parties under threats of force or breach of pre-existing contracts are coerced and the workers under

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[31] *Id.* at 273.

threat of firing/not hiring are free.[32] All are making a rational choice of the less disagreeable alternative. The reasons some threats are held improper and others permitted must be moral, economic and political reasons independent of the degree of coercion.

A fourth purpose is to drive home the related points that legal Progressives such as Hale liked to emphasize—that the degree and type of freedom that people have in contracting is always in part a resultant of how the legal system constructs markets through the distribution of the right to use state force. The deals people are able to make are always dependent on bargaining advantages conferred by, among other factors, background legal entitlements: rules of property, tort, contract, labor law, family law, corporate law, etc. "Freedom of contract" is a slogan whose practical meaning is that the state should not—at least, not very visibly—change the rules to disturb the legal system's *status quo* distribution of state power to coerce people through rights to grant and withhold valuable resources, and its conferral of organizational capacity.[33]

The corollary insight is that practical freedom in contracting is often enhanced by state-mandated or prohibited terms, rather than leaving the parties "free" to bargain away all their freedom, especially by "bargaining" in the form of tacit acquiescence to default terms they probably don't expect or know anything about. Laws that require payment in legal tender and weekly payments, prohibit personal service contracts longer than seven years, criminalize physical abuse of workers, legislate non-waivable minimum safety standards, and refuse enforcement to the remedies of injunctions to return to work, punitive damages and overbroad covenants not to compete are good examples; as are laws that compel employers whose employees vote to form a union to bargain in good faith with the employee's collective bargaining agent, forbid employers to fire union organizers, or grant workers a legal right to strike, and so forth. The shift over the nineteenth century from the *Stark* court's "entirety" rule denying restitution to the worker who quits, to gradual adoption of the *Britton* court's rule permitting restitution was a tiny redistribution of state force in favor of practical freedom. How important the doctrinal change actually was would of course depend on things that study of appellate cases mostly does not reveal, such as whether any but the exceptional worker could actually sue to enforce his rights.

The final purpose is to emphasize that background conventions, legal doctrines, and common understandings of contract relations change, and do so

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[32] Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

[33] For a bravura description and analysis of the views of Hale and fellow Progressive lawyer-economists, *see* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE 29-70 (1998).

because parties or their interest groups, supporters, or reformers and their institutional and managerial practices, lobbies and social movements act to change them. The rules are contested; the shape they eventually take is the result of political struggles, contingent social forces, and—not least—conflicting interpretations of convention, policy and principle. They are therefore unstable and contestable. The content of implicit workplace contracts in the primary sector of employment, for example, seems to have changed dramatically in the last generation from a norm of expected lifetime employment security to a norm in which (ideally at least, the reality is considerably more disappointing) the employer promises no security, but does undertake to equip workers with general, flexible skills they can take to the next job—although none of these implicit bargains is legally enforceable.[34] We are best positioned to see the contingent, constructed nature of our legal-social relations by comparing them to what they were in the recent past, or to those of other societies.[35] What we now learn as the law of contracts was not always thus, nor will it be the same twenty years from now, depending on how the people concerned go about altering their conventional expectations and building them into institutions, and how, in response, their lawyers and legislatures and the courts decide to act.

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[34] *See* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

[35] In teaching the employment at will rules, for example, I bring in both historical materials from the United States and comparative just-cause-dismissal materials from Europe.

Enriching the Contracts Course

Robert A. Hillman*

I have already committed myself in print to the proposition that contract law is a rich subject.[1] In fact, I have gone so far as to say that contracts is "by far the best law school subject to teach and to learn."[2] Although the latter statement was mildly tongue-in-cheek, I have no doubt that the former proposition is true. Theoretical writing about contract law abounds, including promise, consent, relational, economic, psychological, historical, critical, empirical and sociological theory.[3] This should be no surprise. Contract law focuses on society's most important questions, including how society should organize, how to create incentives that benefit society, and what promises the law should enforce and why.[4]

Contract law is also a fertile field in which to study our legal process, including the texture and methods of the common law, the development and nature of statutory law, and the relationship between substantive rights and remedies.[5] For example, what better subject to illustrate that "there have never been two cases *exactly* alike,[6] and that a case's equities supplement the legal rules?[7] Further, contract law is a wonderful vehicle for analyzing the role of lawyers as planners, drafters, counselors, and litigators.[8] In light of contract law's profundity, the professor teaching it may feel a daunting challenge. The question is not so much whether the teacher should go beyond the nuts and bolts, but what should she select from the abundance of potential sources of enrichment.

One viable strategy is to expose students to a smorgasbord of contract law concepts, theories, and principles, while emphasizing a few. But how to select those areas for more intensive study? To some measure, selection depends on what the contracts teacher wants to achieve in the course. For example, a longstanding controversy between the bar and academia is whether law schools, as professional schools, adequately train students for the practice of

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* Edwin H. Woodruff Professor of Law, Cornell Law School

[1] ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW (Kluwer 1997).

[2] Robert A. Hillman & Robert S. Summers, *The Best Law School Subject*, 21 SEATTLE U. L. REV. 735, 735 (1998).

[3] *See generally* Hillman, *supra* note 1 (discussing theories).

[4] *See generally id.*

[5] Hillman & Summers, *supra* note 2, at 735.

[6] Walter Oberer, *On Law, Lawyering & Law Professing: The Golden Sand*, 39 J. LEGAL EDUC. 203, 203 (1989). *Compare* Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935), *with* Harrington v. Taylor, 36 S.E.2d 227 (N.C. 1945).

[7] *See* Oberer, *supra* note 6, at 203-05

[8] *See, e.g.*, ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION (4th ed. 2001).

law.[9] If such training is a teacher's primary goal, exercises on planning transactions, drafting documents, and negotiating to avoid the kinds of breakdowns reported in the cases seem appropriate.[10] If a teacher views her primary goal as helping students understand the nature and function of exchange transactions in society, she may want to rely more heavily on insights from economics, philosophy, psychology or other disciplines. For me, however, this is a false dichotomy. Exposing students to legal theory cannot help but make them better lawyers by enhancing their understanding of human decision making, interaction, culture, and politics. Exploring practice skills cannot help but make students better theorists by alerting them to the many contexts of exchange interaction and exposing them to the formal and "informal and unwritten rules, customs and local legal cultures that exist in the formal legal system[]."[11] I'll have more to say about the relationship between practice and theory shortly.[12]

At any rate, the question remains, how to select from the wealth of perspectives? My view is that a teacher should utilize what interests her and what she believes will be most successful in class. Usually, of course, the two will go hand in hand. Further, to make a wise decision, the teacher must have a grasp of extant theories and their potential for integration in the classroom. Symposia such as this one contribute by informing teachers about the range of perspectives, by presenting various methods of integrating these perspectives, and by emphasizing the potential insights of each illustrated theory.

In my contracts course, I dabble in economic, psychological and moral theory, among other things, but I also try to enrich the course with lessons from the law-practice perspective. In fact, because this symposium does not focus on lawyer skills as a source of enrichment, I'll conclude this introduction with a brief discussion of this subject. But I do not intend to wander from the theme of the importance of theory in teaching contract law. Professors can enrich skills teaching by presenting a theoretical framework for skills analysis.

Consider, for example, the inventory of roles of a lawyer engaged in contractual matters:

> In a contract situation an attorney may be called up to (a) negotiate the terms of a proposed contractual relationship, (b) draft the contract, (c) assist the client to

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[9] *See generally* A.B.A. SEC. OF LEGAL EDUC. AND ADMISSION TO THE BAR, REP. OF THE TASK FORCE ON LAW SCHS. AND THE PROF.: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT–AN EDUCATIONAL CONTINUUM (1992). For a recent perspective, *see, e.g.*, Pauline A. Schneider, *Is There A Disconnect Between the Academy and the Private Practice of Law?* 35 SYLLABUS 1 (September 2003).

[10] *See infra* notes 13-25 and accompanying text.

[11] Andrea M. Seielstad, *Unwritten Law and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127 (1999).

[12] *See infra* notes 13-25 and accompanying text.

> settle disputes arising during performance of the contract, and if a settlement cannot be reached, (d) advise the client concerning the hazards, costs and likely decision in event of litigation, and (e) represent the client in litigation whether before a trial or appellate court or an arbitrator or other alternative dispute resolution personnel.[13]

How to conceptualize the skills teaching of all of these tasks? Of course, a rich collection of articles and books discusses the purpose of lawyers.[14] One theory is that lawyers "assist in the formulation of wise and informed decisions . . . ."[15] Although obviously quite general, this may be a useful unifying theme for contracts teachers. Not only must a lawyer explain legal rules, principles, and background facts to help her client make informed decisions,[16] she also must assist her client in making *wise* ones.

As behavioral decision theorists tell us (this genre is represented by Russell Korobkin's contribution to this symposium), people have a limited ability to gather and process information, often utilize "mental shortcuts" to reach decisions, and frequently make biased or emotional decisions.[17] For example, people generally are too confident and do not believe low-probability risks will occur.[18] People also oversimplify their information processing by believing that easily-recalled events are more likely to occur than vague memories.[19] In addition, people do not like ambiguity and make choices to avoid it.[20] And people allow their emotions to control decisions.[21] Clients are, of course,

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[13] Clark Byse, *Introductory Comments to the First-Year Class in Contracts*, 78 B.U. L. REV. 59, 60-61 (1998).

[14] E.g., THE ETHICS OF LAWYERS (David Luban ed., NYU Press 1994), and articles therein; John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

[15] Noonan, *supra* note 14, at 1488.

[16] *See* Byse, *supra* note 13, at 61.

[17] *See generally* Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 CORNELL L. REV. 717 (2000) (discussing cognitive biases and heuristics).

[18] *Id.* at 723-24.

[19] This is called the "availability heuristic." *See id.* at 721.

[20] *Id.* at 724.

[21] Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 606 (2003) ("[R]esearch . . . points to the central role of emotion in decision making. In fact, research shows that even anticipated emotions appear to impact decision making."); Peter Brandon Bayer, *Not Interaction but Melding—The "Russian Dressing" Theory of Emotions An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV 1033, 1039 (2001) ("Because human beings are incapable of ascribing meaning and significance without recourse to emotions—thus legal decision making simply cannot be performed absent emotion—any theory allowing legal decision makers to imagine the contrary profoundly distorts the reality of the process . . . .").

people, and left to their own devices, often would make bad decisions or at least sub-optimal ones. One theory of contract lawyering, then, is that the lawyer's role, beyond educating the client, is to correct for her client's cognitive deficiencies.

So, if a client is too optimistic that a proposed exchange will go smoothly, and therefore fails, for example, to study a proposed liquidated damages provision, the lawyer's job is to bring the client down to earth.[22] If a client-purchaser of goods believes she must suspend performance because she has reasonable grounds for insecurity,[23] the lawyer must establish whether the purchaser bases her concerns illogically on a recently publicized failure of a different supplier. If a client's aversion to ambiguity motivates her to demand that a proposed contract list all of the events that would constitute a default, the lawyer must alert the client to the problem of unanticipated or unforeseeable defaults.

The lawyer's greatest challenge may be in assisting a client to make a wise decision when emotions get in the client's way. One of my favorite examples, which illustrates the limits of a lawyer's effectiveness in this regard, involves the dispute in *White v. Benkowski*.[24] The Benkowskis agreed to supply water to their neighbors, the Whites, through a well on the Benkowskis' property. The Whites claimed that the Benkowskis maliciously withheld water, and brought a lawsuit against them. The Whites prevailed on their substantive claim, but could not prove serious damages. What is important for present purposes is that the parties became downright hostile, as revealed in a transcript of the trial:

> Gwynneth [White] testified that the relationship of the families was good until . . . the Whites' daughter picked an apple in the Benkowskis' yard. Ruth Benkowski then called the daughter an "S.O.B." Gwynneth told Ruth that "she didn't like this." Later, Ruth called Gwynneth "a redheaded bitch." Virgil White stated that Paul Benkowski lodged a complaint with Virgil's superior that Virgil had tried to run over Paul's child. The district attorney's investigation absolved Virgil. Paul Benkowski also complained to the police chief that Virgil . . . had wild parties at home. Virgil was again absolved of any wrongdoing.[25]

The Benkowskis obviously came to despise the Whites, which impeded the Benkowskis from making rational decisions. But a lawyer probably could not have dissuaded them from turning off the water. Further, I doubt that if the Whites had hired a lawyer to draft the agreement with the Benkowskis, the lawyer would have had much success drafting an agreement that would have

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[22] Hillman, *supra* note 17, at 727.

[23] *See* UCC § 2-609 (1998).

[24] 155 N.W.2d 74 (Wis. 1967).

[25] Summers & Hillman, *supra* note 8, at 17.

deterred the Benkowskis from turning off the water. To pursue the latter theme, I ask my class whether they would have included a liquidated damages clause in the agreement and if they thought it would have done any good. Students usually exhibit a great deal of skepticism.

Of course, cognitive deficiencies and emotions may also impede a lawyer's decision. Teachers can discuss the kinds of legal training that may help lawyers avoid these problems, at least when advising clients.[26] An obvious example is a bombardment of case reports revealing things that have gone wrong, so that future lawyers do not assume that nothing will go wrong. Students seem especially appreciative of training that improves their future legal advice.

CONCLUSION

There are many ways to enrich the contracts course. This symposium consists of some excellent examples. Teachers should find some helpful hints herein and the symposium is worth reading for this reason alone. More important, however, reading these articles hopefully will convince teachers of the merits of using *some* form of enrichment to get beyond the holdings and rules.

[26] *But see* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) ("Even lawyers fall prey to cognitive illusions."). For a discussion of how to improve judicial judgment, *see id.* at 822-27.

A "Traditional" and "Behavioral" Law-and-Economics Analysis of *Williams v. Walker-Thomas Furniture Company*

Russell Korobkin*

ABSTRACT:

Williams v. Walker-Thomas Furniture Co.[1] *is a casebook favorite, taught in virtually every first-year Contract Law class. In the case, the D.C. Circuit holds that courts have the power to deny enforcement of contract terms if the terms are "unconscionable," and it remands the case to the lower court to consider whether the facts of the case meet this standard. This article analyzes the question that the D.C. Circuit posed to the lower court in* Williams*—and that Contracts teachers routinely pose to their students—from a "traditional" law-and-economics perspective, and from a "behavioral" law-and-economics perspective.*

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In 1962, Ora Lee Williams purchased a stereo set at the Walker-Thomas Furniture Company's retail store in Washington D.C. for a price of $514.95.[2] Williams did not pay cash for the stereo, but instead signed a contract with the store promising to make installment payments. According to the pre-printed form contract, the store would retain title of the stereo until the full value had been paid.[3] If Williams missed a payment before fully paying for the stereo, the store would have the right to repossess it.[4]

The contract also provided that each installment payment made by Williams would be credited on a pro rata basis to all outstanding debts that she owed the store, as had credit agreements she had signed with the store over the five previous years. The effect of the contract's "cross-collateralization"[5] provision

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* Professor of Law, University of California, Los Angeles. This article was written for the Association of American Law Schools (AALS) Contracts Section's session at the 2004 AALS Annual Meeting. Helpful comments were provided by Dick Craswell, Jerry Kang, Kristen Madison, Mitch Polinsky, and Tom Ulen, as well as participants in the 2004 AALS Annual Meeting and in the Stanford Law School Law and Economics Workshop. Heather Richardson provided excellent research assistance.

[1] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[2] *Id.* at 447. Williams' case was consolidated on appeal with the case of William Thorne, who purchased a Daveno, three tables and two lamps, for a total price of $391.10, from the same defendant at approximately the same time and who suffered the same fate as Williams. *Id.*

[3] *Id.*

[4] *Id.*

[5] A cross-collateral clause is "an installment-contract provision allowing the seller, if the buyer defaults, to repossess not only the particular item sold but also every other item bought

was that none of William's purchases from Walker-Thomas Furniture would be paid in full until all were paid in full, and the store would retain title to all of the items purchased.[6] The practical impact of this was that if Williams missed a payment Walker-Thomas would have the right to repossess all of the furniture it had sold her, even if the payments she had previously made totaled to an amount greater than the price of all of the items except for the most recently purchased one.

Shortly after purchasing the stereo, Williams defaulted.[7] Walker-Thomas then moved to repossess $1800 of merchandise she had purchased from the store since 1957,[8] even though the balance due on her account before she purchased the new stereo was only $164.[9] Williams' legal aid lawyers[10] argued that the cross-collateralization clause violated public policy and was thus unenforceable as a matter of law. The District of Columbia Court of Appeals affirmed a trial court judgment for Walker-Thomas, determining that it had no legal basis for not enforcing the contract, but the court made no effort to hide its sympathy for Williams. The court took notice of the fact that Williams' monthly income was limited to a $218 welfare payment, with which she had to support herself and seven children, and that Walker-Thomas was aware of her financial position: "We cannot condemn too strongly [Walker-Thomas'] conduct," the court wrote. "It raises serious questions of sharp business practices and irresponsible business dealings."[11]

The opinion of the United States Court of Appeals for the D.C. Circuit—not to be confused with the D.C. Court of Appeals decision that it reviewed—is a classic to contract law teachers, appearing in nearly all major contracts casebooks.[12] In its opinion, written by Judge J. Skelly Wright,[13] the D.C. Circuit

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from the seller on which a balance remained due when the last purchase was made." BLACK'S LAW DICTIONARY 312 (7th ed. 2000).

[6] *Williams*, 350 F.2d at 447.

[7] *Id.*

[8] *Id.* at 447 n.1.

[9] *See* Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 916 (D.C. Ct. App. 1964).

[10] Williams was represented by R. R. Curry and Pierre E. Dostert of the Legal Assistance Office of the bar association. Dostert also handled the companion case, *Thorne v. Walker Thomas Furniture*, 198 A.2d 914 (D.C. Ct. App. 1964). The Legal Assistance Office commonly dealt with complaints of consumer creditors. E. ALLAN FARNSWORTH, WILLIAM F. YOUNG, & CAROL SANGER, CONTRACTS: CASES AND MATERIALS 408 (6th ed. 2001).

[11] Williams, 350 F.2d at 447.

[12] Of the 20 contracts casebooks published by Aspen Law & Business, West, Foundation, and LexisNexis, only two books do not include *Williams v. Walker-Thomas* in their most recent editions (although the basic facts of the case make up a problem in the latter): JOHN D. CALAMARI, JOSEPH M. PERILLO & HELEN H. BENDER, CASES AND PROBLEMS ON CONTRACTS (2d ed. 1989) and ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE (4th ed. 2001). Two books discuss *Williams* in a casenote: JOHN P. DAWSON, WILLIAM B. HARVEY & STANLEY D. HENDERSON, CONTRACTS:

reversed the lower court's ruling that it lacked the authority to refuse enforcement of Walker-Thomas' contract with Williams and remanded the case for further consideration of whether the contract was "unconscionable."[14] Relying on the persuasive authority of section 3-302 of the Uniform Commercial Code (UCC),[15] enacted as part of the D.C. Code after Williams contracted with Walker-Thomas, as well as the tradition of the unconscionability doctrine in the common law of other states, Judge Wright instructed that courts may find a contract unconscionable if there was "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[16] Judge Wright's test was quickly translated by most courts into a requirement—still the law today in most jurisdictions—that a plaintiff must demonstrate both "procedural" and "substantive" aspects of unconscionability before a court will deny a contract's enforcement.[17]

CASES AND COMMENTS (8th ed. 2003); and ROBERT W. HAMILTON, ALAN S. RAU & RUSSELL J. WEINTRAUB, CONTRACTS: CASES AND MATERIALS (2nd ed. 1992). The remaining 16 casebooks use *Williams* as a main case: RANDY E. BARNETT, CONTRACT: CASES AND DOCTRINES (3d ed. 2003); STEVEN J. BURTON, PRINCIPLES OF CONTRACT LAW (2nd ed. 2001); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS (2nd ed. 1993); MICHAEL L. CLOSEN, GERALD E. BERENDT & DORIS E. LONG, CONTRACT LAW AND PRACTICE: CASES AND MATERIALS (1999); DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, MAKING AND DOING DEALS: CONTRACTS IN CONTEXT (2002); E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, CONTRACTS: CASES AND MATERIALS (6th ed. 2001); LON L. FULLER & MELVIN A. EISENBERG, BASIC CONTRACT LAW (7th ed. 2001); FREDERICH KESSLER, GRANT GILMORE & ANTHONY T. KRONMAN, CONTRACTS: CASES AND MATERIALS (3d ed. 1986); CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (5th ed. 2003); STEWART MACAULAY, JOHAN KIDWELL & WILLIAM WHITFORD, CONTRACTS: LAW IN ACTION; THE CONCISE COURSE (2nd ed. 2003); IAN R. MACNEIL & PAUL G. GUDEL, CONTRACTS: EXCHANGE, TRANSACTIONS, AND RELATIONSHIPS (3d ed. 2001); WILLIAM MCGOVERN, LARY LAWRENCE & BRYAN D. HULL, CONTRACTS AND SALES: CONTEMPORARY CASES AND PROBLEMS (2nd ed. 2002); EDWARD J. MURPHY, RICHARD E. SPIEDEL & IAN AYERS, CONTRACT LAW (6th ed. 2003); JOHN E. MURRAY, CONTRACTS: CASES AND MATERIALS (5th ed. 2001); ARTHUR ROSETT & DANIEL J. BUSSEL, CONTRACT LAW AND ITS APPLICATION (6th ed. 1999); and ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY (3d ed. 2002).

[13] James Skelly Wright served as U.S. Attorney for the Eastern District of Louisiana. He was nominated to serve on the federal district court for the Eastern District of Louisiana in 1950 by Harry S. Truman, and he was elevated to the D.C. Circuit in 1962 by John F. Kennedy. On the bench in Louisiana, Wright restrained officials from blocking a plan to desegregate New Orleans schools. On the D.C. Circuit, he was famous for upholding federal laws requiring equal opportunity, as exemplified in the case *Hobson v. Hansen*, which mandated equity for school funding between blacks and whites. *See generally* Arthur Selwyn Miller, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT (1984).

[14] *Williams*, 350 F.2d at 450.

[15] UNIF. COMMERCIAL CODE § 2-302 (1998).

[16] *Williams*, 350 F.2d at 449.

[17] *See, e.g.*, Vockner v. Erickson, 712 P.2d 379, 383 (Alaska 2003); Armendariz v. Found. Health Psychcare Servs., 24 Cal. 4th 83, 115 (2000); Maxwell v. Fidelity Fin. Servs., 907 P.2d

The statutory version of the unconscionability doctrine, as provided in UCC section 2-302, provides no clear rule to guide judges in their decisions concerning whether to enforce a disputed contract or disputed portion of a contract.[18] Even Judge Wright's suggestions that there be some element of procedural unfairness in the bargaining process and substantive unreasonableness with the contract itself provides little specific guidance as to what facts should sum to a verdict of unenforceability. The unconscionability doctrine clearly sits far to the "standards" side of the familiar "rules" versus "standards" spectrum,[19] requiring judges to exercise substantial discretion in each case.

The flexibility of the unconscionability doctrine provides judges substantial freedom to consult background principles in their attempt to resolve disputes like the lawsuit between Williams and Walker-Thomas. This article contends that law-and-economics analysis can provide a principled analytical structure for determining whether courts should employ the rubric of unconscionability to strike contract terms or even refuse to enforce entire contracts. As a positive matter, the article also argues that most courts fail to employ the doctrine in a way likely to produce case outcomes consistent with any plausible principle underlying the doctrine. Part I will define what, for the purposes of this article, constitutes "law-and-economics analysis," and how the "traditional"

51, 57 (Ariz. 1995); Schroeder v. Fageol Motors, 544 P.2d 20, 23 (Wash. 1975); Smith v. Mitsubishi Motors Credit of Am., 721 A.2d 1187, 1190-92 (Conn. 1998); NEC Techs. v. Nelson, 478 S.E.2d 769, 773 (Ga. 1996); Lovey v. Regence BlueShield of Idaho, 72 P.3d 877, 882 (Idaho 2003); Zapatha v. Dairy Mart Inc., 408 N.E.2d 1370, 1377 n. 13 (Mass. 1980); People by Abrams v. Two Wheel Corp., 71 N.Y.2d 693, 695 (1988); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); Iwen v. U.S. West Direct, 977 P.2d 989, 995 (Mont. 1999); Rosenberg v. Merrill Lynch, 170 F.3d 1, 17 (1st Cir. 1999); Dorsey v. Contemporary Obstetrics & Gynecology Inc., 680 N.E.2d 240, 243 (Ohio Ct. App. 1996); Powertel, Inc. v. Bexley, 743 So. 2d 570, 574 (Fla. 1999); Harris v. Green Tree Fin. Corp., 183 F.3d 173, 181 (3d Cir. 1999); Andersons Inc. v. Horton Farms, Inc., 166 F.3d 308, 322-23 (6th Cir. 1998). The terms "procedural unconscionability" and "substantive unconscionability" were coined by Professor Arthur Leff. Arthur Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 550 (1967).

[18] The U.C.C. provision provides, in full:

§ 2-302. Unconscionable Contract or Clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

[19] *See, e.g.*, Russell Korobkin, *Behavioral Analysis and Legal Form: Rules Versus Standards Revisited*, 79 OR. L. REV. 23, 25 (2000).

and "behavioral" versions of this analysis differ. Parts II and III will then use the traditional and behavioral law-and-economics frameworks to evaluate whether the cross-collateralization clause in *Williams v. Walker-Thomas* should have been enforced.

I. LAW-AND-ECONOMICS ANALYSIS: "TRADITIONAL" AND "BEHAVIORAL"

All, or nearly all, legal scholars would agree that the label "law-and-economics" represents a style of analysis that has had a significant impact on jurisprudential thought, and that this style of analysis has produced both faithful followers and fervent critics. What constitutes the core principles of this school of thought, however, are subject to debate. This Part defines, for the purposes of this article, what I view to be the core elements of "traditional" law-and-economics analysis, and the difference between this traditional approach and the new "behavioral" approach to law-and-economics that is rapidly gaining adherents and becoming the mainstream version of the analytical approach.

The law-and-economics approach to legal analysis is based on a positive view of how law operates and a weak normative commitment concerning the ends that legal policymakers, such as judges and legislators, should pursue. The positive view, once revolutionary but now a mainstream element of centrist legal-realist thought, is that law affects the incentives that those subject to it have to take various actions, and that the law will affect the actions actually taken by its subjects in much the same way that prices do.[20] For example, making marijuana use illegal and subject to criminal sanctions increases the cost of smoking marijuana and therefore reduces the incidence of its use. Recognizing the tort of medical malpractice increases the cost to physicians of negligence and thus increases the amount of care that they take in their practice. Providing welfare to the poor reduces the cost of not working and causes fewer people to work.

It is important to note that law-and-economics analysis is consistent with other positive views of the effects of law: for example, that law can serve as a voice for society's views of right and wrong or that it can remedy unjust initial resource distributions. At the same time, it is fair to say most law-and-economics practitioners believe that law's marginal incentive effects on behavior are of primary significance.

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[20] *See, e.g.*,Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1054 (2000); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 4, 23 (1992); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 3 (1995).

A corollary to law-and-economics' focus on incentives is the discipline's emphasis on the precedential consequences of judge-made law rather than on the effect a judicial disposition has on the disputants.[21] When a court resolves a case, it settles a dispute between the litigating parties, and it also establishes a rule of law that affects the future behavior of non-parties. Whatever incident or conflict has led to litigation is in the past. A judicial decision can compensate a party for harms or injustices, but it cannot change the past behavior that brought the parties to court. Whatever incentive effects the decision might have pertain only to future actions.

Normatively, law-and-economics analysis is committed to consequentialist legal policies, meaning policies that maximize social benefits net of social cost.[22] For example, law-and-economics scholars evaluate gun control laws on the basis of whether such laws increase or decrease the amount of crime, rather than arguing either that the right to bear arms is a fundamental element of individual liberty and that individual liberty should trump the material consequences of such laws or, alternatively, that permitting private gun ownership sends a bad moral message to children.[23]

Much law-and-economics scholarship is concerned with maximizing "social welfare" or the efficient production and/or allocation of resources. For example, a law-and-economics analysis of tort law might try to determine whether a regime of negligence or one of strict liability will maximize social welfare, taking into account the utility of both purveyors and victims of harm, without regard to the allocation of resources or utility among members of these two groups.[24] This strain of law and economics scholarship is, loosely

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[21] *See* POSNER, *supra* note 20, at 4-12; COOTER & ULEN, *supra* note 20, at 3-4.

[22] For a more detailed discussion of consequentialism, *see* S. Scheffler, *Introduction*, CONSEQUENTIALISM AND ITS CRITICS 1 (S. Scheffler ed. 1988) ("Consequentialism in its purest and simplest form is a moral doctrine which says that the right act in any given situation is the one that will produce the best overall outcome, as judged from an impersonal standpoint which gives equal weight to the interests of everyone. . . .[It] gives some principle for ranking overall states of affairs from best to worst from an impersonal standpoint, and then it says that the right act in any given situation is the one that will produce the highest-ranked state of affairs that the agent is in a position to produce.").

[23] *See, e.g.*, JOHN LOTT, MORE GUNS, LESS CRIME (1998); Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1204 (2003); Mark Duggan, *More Guns, More Crime*, 109 J. POL. ECON. 1086 (2001); John R. Lott, Jr., *Guns, Crime, and Safety: A Conference Sponsored by the American Enterprise Institute and the Center for Law, Economics, and Public Policy at Yale Law School: Guns, Crime, and Safety: Introduction*, 44 J. LAW & ECON. 605, 609-10 (2001).

[24] *See* POSNER, *supra* note 20, at 177; Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143 (2002) (arguing that secondary, academic literature about tort law is primarily focused with the aggregate effect on social welfare of tort rules, and that courts do not generally subscribe to this theory); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54

speaking, utilitarian. It is important to note, however, that a law-and-economics analysis can and often does limit the relevant portion of society under consideration. For example, an analysis of whether gun control laws would make children who live in houses with guns more or less safe falls squarely within the category of law-and-economics analysis, even though it considers the welfare of only one subset of the general population and draws conclusions only concerning that subset, ignoring the utility of other groups whom the laws might affect, such as hunters.

In order for law-and-economics scholars to predict the marginal effect of potential changes in the law on the behavior of the governed and, consequently, to reach normative opinions about such potential changes, assumptions about how the governed react to and change their behavior as a result of law are necessary. Traditionally, law-and-economics scholars have assumed, usually implicitly rather than explicitly, behavior on the part of the governed consistent with "rational choice theory" ("RCT").[25]

As is true of the label "law and economics," the term "rational choice theory" lacks a single, standard definition.[26] Although different scholars use RCT as a placeholder for somewhat different sets of assumptions, however, most versions of RCT assume, at a minimum, that individuals will use all available information to select behaviors that maximize their expected utility.[27] Or, put in other words, individuals will take actions designed to maximize the differential between expected benefits of their actions and expected costs. I will call law-and-economics analysis based on the assumptions of RCT "traditional" law-and-economics analysis, although this single label masks some heterogeneity in the assumptions relied upon by scholars who work in this field. For example, some traditional law-and-economics analyses assume that individuals possess all relevant, available information and maximize their expected utility based on that information. Others take into account that collecting all available information is costly and assume that individuals will decide whether or not to acquire information based on their estimate of whether doing so will maximize their expected utility.

"Behavioral" law-and-economics analysis retains the positive and normative core of law-and-economics but loosens the behavioral assumptions employed

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VAND. L. REV. 813, 855-56 (2001) (arguing that negligence law that follows the Hand Formula is an ethic of social welfare).

[25] *See, e.g.*, Korobkin & Ulen, *supra* note 20, at 1055.

[26] *See id.* at 1060.

[27] *See, e.g.*, Alan Schwartz & Louis L. Wilde, *Imperfect Information for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1398 (1983) (recognizing that their analysis and conclusions rest on the assumption that "consumers always know what their contracts say"- a necessary precondition to making an expected utility calculation).

under the traditional approach. Behavioralists substitute for a strict adherence to rational choice theory a more subtle and context-dependent view of how individuals chose behaviors and actions based largely on empirical studies of behavior conducted by social scientists, most often cognitive and social psychologists and experimental economists.[28] This body of literature suggests that individuals often make decisions and select actions based on heuristics, or rules of thumb, rather than on the basis of "rational" calculations of cost and benefits, and, importantly, that these different cognitive approaches can lead to different behaviors. Proponents of the behavioral approach to law-and-economics analysis contend that their favored methodology makes their positive predictions more likely to be correct and their policy positions more likely to serve the normative goal of welfare maximization.[29]

II. THE "TRADITIONAL" LAW AND ECONOMICS OF CROSS-COLLATERALIZATION CLAUSES

It is human nature to feel badly for Williams. She paid for the vast majority of the items that she purchased on credit over a period of many years, but her contract with Walker-Thomas permitted the store to repossess every one of those items based on a single missed payment. The penalty seems completely out of proportion to the transgression. But law-and-economics analysis, with its focus on the incentive effects of law, concerns itself with the precedential effect that the court's decision of whether or not to strike down the cross-collateralization clause as "unconscionable" will have on the future behavior of people *like* Williams and businesses *like* Walker-Thomas, and whether these effects will tend to promote or impede utility maximization of whatever class of people the law intends to benefit.

A. Basic Analysis

In a competitive market, stores like Walker-Thomas will, over time, earn "zero profits;" that is, enough of a profit to justify remaining in business rather than shifting their capital to other ventures, but no more.[30] If stores earn less than this, they will go out of business. If they earn more, competitors will

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[28] *See, e.g.*, Korobkin & Ulen, *supra* note 20, at 1074-75; Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Jeffrey J. Rachlinksi, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000).

[29] Korobkin & Ulen, *supra* note 20, at 1075; Jolls et al., *supra* note 28, at 1481-85, 1494-95 and 1546; Rachlinski, *supra* note 28, at 765-76.

[30] MICHAEL PARKIN, MICROECONOMICS 240 (6th ed. 2003).

enter the market and competition will drive out excess profits, at least in the long run.

Cross-collateralization clauses benefit sellers like Walker-Thomas in two ways. (1) Because non-payment by a buyer triggers the store's right to repossess all of the items the buyer purchased from the store (rather than just one), the clause creates a strong disincentive for the buyer to default. (2) If the buyer does default, the right to repossess several items (again, rather than just one item) allows the store to recoup a greater percentage of its losses caused by the default. If a court were to determine that the cross-collateralization clause is unconscionable and, therefore, unenforceable, then Walker-Thomas would lose money, although it is impossible to know whether the effect would be small or large. Because we presume Walker-Thomas earns just enough profit to justify staying in business, an unconscionability ruling would force it to find another way to mitigate losses caused by credit customer default. Presumably the store would increase the price of its goods, or the price of credit, or both.

Would customers like Williams prefer that Walker-Thomas and other similar stores not be permitted by the courts to enforce cross-collateralization clauses and, instead, charge higher prices for stereos or a higher rate of interest on credit purchases? Although we cannot read the minds of Williams and her fellow shoppers, the answer must be no, or else stores would, of their own accord, charge higher prices and not include cross-collateralization clauses in their contracts.

To understand the reasoning that leads to this conclusion, assume that credit-customer defaults would increase the cost of selling stereos to Walker-Thomas and its competitors by $20 per customer if they were to remove the cross-collateralization provision from their contracts. Assume also that customers like Williams would be willing to pay $30 more for a stereo that does not come bundled with a cross-collateralization clause (because customers would not risk losing their other furniture were they forced to default on the stereo purchase). In these circumstances, a competitor would offer stereos without cross-collateralization clauses at a price of at least $20 but less than $30 more than Walker-Thomas' price, and all customers would prefer to buy from that competitor, forcing Walker-Thomas to eliminate its clause.[31] The fact that Walker-Thomas continues to use a cross-collateralization clause is evidence that customers prefer the combination of term (bad) and price (low) relative to other economically possible combinations of term and price.

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[31] *Cf.* Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 370-71 (1991); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1209-10 (2003).

Now assume that eliminating the cross-collateralization clause would increase sellers' costs by $20 per stereo and that buyers are willing to pay only $10 more for stereos without such a clause. If Walker-Thomas were to eliminate the clause from its contract and raise prices by $20, no customer would buy from it—all would patronize a competitor who continued to use a cross-collateralization clause and the lower price. In this situation, Walker-Thomas obviously would keep the clause in its contract, because doing so would suit the preferences of its potential customers and allow the store to attract them.

Finally, assume that eliminating the cross-collateralization clause would increase sellers' costs by $20 per stereo, customers would be willing to pay only $10 to avoid the unpleasant clause, and the court ruled the clause was unconscionable and thus unenforceable. Walker-Thomas would be forced to raise its price to compensate for the loss of the clause, but in this scenario its competitors would have to do the same. The supply curve for stereos in Walker-Thomas' market would thus shift upward by $20, and the demand curve would shift upward by $10. Depending on the relative elasticities of supply and demand, the market price would increase by at least $10 but less than $20, and fewer stereos would be sold. The consequences would be as follows:

(1) Overall social welfare would be reduced because sellers are required to do something (here, remove the cross-collateralization term) that costs them more than the offsetting benefit to buyers.

(2) Marginal stereo buyers (those for whom it used to be just barely worth it to buy a stereo) will no longer buy stereos, and they will be worse off because they will enjoy no consumer surplus (the difference between the value of a purchase to the buyer and the price paid) rather than some surplus.

(3) Inframarginal stereo buyers (whose who used to enjoy a lot of consumer surplus from purchasing a stereo) will continue to buy stereos, but they will enjoy less consumer surplus because the price increased by more than the benefit to them of no longer having to accept a cross-collateralization clause.

(4) Sellers in a competitive market will continue to earn "zero profits" per stereo, but fewer stereos will be sold, making sellers worse off.

It is important to observe that this analysis suggests, counter intuitively, that buyers and sellers have common interests ex ante concerning whether contract terms are enforceable.[32] After Williams defaults and her case goes to court,

[32] *See generally* Craswell, *supra* note 31, at 362.

she and Walker-Thomas obviously have adverse interests: an unconscionability ruling would be good for Williams (she does not lose all of her furniture) but bad for the store (it cannot repossess and resell her furniture). Prior to contracting, however, sellers and buyers in a competitive market have common interests: to be competitive, sellers must provide the combination of price and contract terms (and other product attributes) that customers value the most. This means that any term included in the contract must be efficient, beneficial to buyers as a class, and beneficial to sellers as a class.[33]

B. Unconscionability Analysis

A traditional law-and-economics analysis concludes that a well-functioning market will ensure that contract terms that exist in the marketplace will maximize social welfare and buyer welfare. On the flip side, any judicial interference with the enforcement of such terms through the use of the unconscionability doctrine will reduce net social welfare, and it will also harm buyers like Williams. To be sure, traditional law-and-economics analysis does not yield the conclusion that there are no circumstances in which markets will fail to guarantee efficient contract terms. Some law-and-economics scholars have questioned, in particular, whether consumers like Williams would be likely to possess all of the information necessary to insure a well-functioning market.[34] But standard statements of the traditional analysis imply that circumstances in which courts should refuse to enforce contract terms are rare and that a specific "market failure" must be identified before judicial intervention is appropriate.[35] This section considers whether the factual circumstances in which courts often invoke the unconscionability doctrine are

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[33] Assuming buyers have heterogeneous preference, some terms might be undesirable for some individual buyers. When there are multiple market segments with different preferences, sellers can be expected to design their products—including contract terms—to appeal to different segments. But in a mass production economy with complex products, it is unlikely, even if sellers offer a range of slightly different products, that all consumers will be able to find a product that maximizes their utility across every attribute. This means that it is likely that some stereo buyers will be willing to pay more for a contract without a cross-collateralization clause than the seller's marginal cost to provide such a contract and that they might not be able to find a seller that offers a contract without the clause if most buyers prefer the alternative combination of term and price.

[34] *See* RICHARD CRASWELL, FREEDOM OF CONTRACT, IN CHICAGO LECTURES IN LAW AND ECONOMICS 81, 88-91 (Eric A. Posner, ed., 2000) (imperfect information on the part of buyers can lead to a "lemons" market); Richard Craswell, Property Rules and Liability Rules in Unconscionability and Related Doctrines, 60 U. CHI. L. REV. 1, 49 (1993) (same); see also, Howard Beales et al., The Efficient Regulation of Consumer Information, 24 J. L. & ECON. 491, 509-511 (1981): Richard Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B.U. L. REV. 661, 677-78 (1982)

[35] *See, e.g.*, COOTER & ULEN, *supra* note 20, at 41.

sufficiently indicative of market failure that judicial intervention is defensible under the traditional law-and-economics analysis.

1. Procedural unconscionability

Courts in most jurisdictions, following the lead of Judge Wright, require a finding of procedural unconscionability—some defect in the bargaining process—as well as a finding that the contract term in question is substantively unconscionable before striking down a term as unenforceable under the unconscionability doctrine.[36]

Some courts and scholars have argued that adhesive contract terms—those offered on a take-it-or-leave-it basis with no opportunity for bargaining—are sufficiently suspect to satisfy the procedural unconscionability requirement.[37] *Williams v. Walker-Thomas* clearly satisfies this factual predicate: the cross-collateralization clause apparently was part of Walker-Thomas' standard-form contract provided to all of its customers wishing to purchase merchandise on credit. Presumably, no employee of the store had the authority to bargain over the term, or even to strike it out if Williams offered to pay more money in exchange for having it excised. Recall that Judge Wright warned of contracts in which the buyer has no "meaningful choice."[38] If Williams wanted to purchase a stereo from Walker-Thomas, she had no choice but to accept the cross-collateralization term.

Under the traditional law-and-economics analysis, however, the adhesive nature of the clause does not make it suspect. The store's incentive to include only efficient terms in its contract is guaranteed not by the ability of buyers to bargain for better terms, but by the ability of buyers to shop elsewhere if they don't like the combination of price, product attributes, and terms that Walker-Thomas offers.[39] There is no reason to believe that Williams lacked the choice of shopping elsewhere.

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[36] *See* cases cited *supra* note 17.

[37] *See, e.g.*, Iwen v. U.S. West Direct, 977 P.2d 989, 996 (Mont. 1999) (because a contract was presented on a take-it-or-leave-it basis there was "no meaningful choice" on the part of the buyer); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (finding an arbitration clause "procedurally unconscionable because it is a contract of adhesion"); Ting v. AT&T, 182 F. Supp. 2d 902, 929 (N.D. Cal. 2002) (case law favors plaintiff's position that a finding that contract is adhesive is "tantamount to a finding of procedural unconscionability"); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1534 (1997) (employment contract was a contract of adhesion and thus procedurally unconscionable); Entergy Miss., Inc. v. Burdette Gin Co., 726 So. 2d 1202, 1208 (Miss. 1998).

[38] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

[39] *Cf.* Korobkin, *supra* note 31, at 1210.

Most courts have ruled that the fact that a term is adhesive does not alone render it procedurally suspect;[40] after all, most business is conducted on the basis of standard-form contracts with non-negotiable terms.[41] More often, courts look to whether the seller enjoys "market power," such that a buyer cannot meaningfully shop elsewhere for a more desirable set of terms. This can be satisfied by the seller enjoying a monopoly,[42] but courts have at times also been willing to strike terms when markets have only a small number of sellers that all offer the same adhesive term.[43] A recent California Supreme Court decision finding unconscionable a term in an employment contract[44] demonstrated that courts sometimes also are willing to find procedural unconscionability when the seller's product (in that case, a job) is particularly important to buyers,[45] even when there are many sellers.

Law-and-economics analysis suggests, however, that none of these conditions are likely to create a market failure that would give sellers an incentive to offer contract terms that are socially inefficient or undesirable for buyers as a class. Monopolists generally can maximize their profits by providing the efficient combination of price and terms, and then charging a monopoly price, rather than providing inefficient terms.[46] Even assuming that Walker-Thomas

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[40] *See, e.g.*, Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758, 769 (1989) ("[W]e are not prepared to hold that [oppression and adhesiveness] are identical.").

[41] *See, e.g.*, W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (estimating that ninety-nine percent of all contracts fit this description).

[42] *See, e.g.*, *Entergy*, 726 So. 2d 1202 (finding indemnification term procedurally unconscionable because of seller's monopolistic position and refusal to negotiate terms); Rozeboom v. Northwestern Bell Tel. Co., 358 N.W.2d 241, 242-45 (S.D. 1984) (finding term unconscionable because the seller was a monopoly and the buyer could obtain the product "from only one source"); Allen v. Michigan Bell Telephone Co., 171 N.W.2d 689 (Mich. Ct. App. 1969) (fact that telephone company was "sole provider" of service made its adhesive term procedurally unconscionable); Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 324 (6th Cir. 1998) (finding no procedural unconscionability because plaintiff "essentially admits that it had at least some alternative buyers").

[43] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 388-89 (1960).

[44] Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669, 690 (Cal. 2000).

[45] *Id.*

[46] *See, e.g.*, Craswell, Tying Requirements, supra note 34, at 80 ("most sellers with market power will do better to exercise that power by raising the basic price rather than by changing the other terms of the purchase agreement"); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 608 (1982) ("[E]ven a monopolist has an interest in providing contract terms if buyers will pay him their cost, plus as much in profit as he can make for alternate uses of his capital."); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1321 (1981) ("[M]onopoly profits are maximized by selling a product identical in all respects (except price) to the product offered under competition."); Avery Weiner Katz, *Standard Form Contracts*, *in* 3 THE NEW PALGRAVE DICTIONARY OF

was the only store accessible to Williams, and thus effectively a monopolist, if customers would be willing to pay more for a contract without the cross-collateralization term (i.e., $30) than removing the term would cost Walker-Thomas (i.e., $20), the store could earn more profits by removing the term and raising price by more than $20. If Walker-Thomas were one of a small number of neighborhood stores, all of which offered the same terms, the store would have had an even greater incentive to remove the term and raise price: doing so would allow it to steal customers from its competitors. The same incentive exists even if, as the *Walker-Thomas* dissent suggests,[47] an item that appears to be a luxury to some might be a source of income to others.

Still other courts have found terms procedurally suspect when they are abnormally difficult to read: for example, when they are in extremely small type,[48] when they are engulfed in a sea of fine print and do not stand out in any way,[49] or when they are written in confusing language difficult for a lay person to understand.[50] Such facts could suggest the possibility of market failure under a traditional law-and-economics analysis, justifying a judicial determination not to enforce the term. Although many strict rational-choice approaches to law and economics assume that buyers and sellers have perfect information about market choices, more nuanced approaches recognize that information is costly to obtain, and that lack of information can cause market failure, which can potentially justify judicial intervention.[51] If customers like

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ECONOMICS AND THE LAW 502, 502 (1998). For a discussion of situations in which this proposition might not be correct, *see* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1071-76 (1977).

[47] *Williams v. Walker-Thomas Furniture Co.*,, 350 F.2d 445, 450 (D.C. Cir. 1965) (Danaher, J., dissenting).

[48] *See, e.g.*, East Ford, Inc. v. Taylor, 826 So. 2d 709, 714-15 (Miss. 2002) (arbitration clause printed in less than one-third the size of other terms); Philadelphia Indem. Ins. Co. v. Barerra, 21 P.3d 395, 402 (Ariz. 2000); John Deere Leasing Co. v. Blubaugh, 636 F. Supp. 1569, 1574 (D. Kan. 1986) ("minute print. . . in such light grey type as to be illegible."); McCarthy Well Co. v. St. Peter Creamery, Inc., 410 N.W.2d 312, 316 (Minn. 1987).

[49] *See, e.g.*, Henningsen v. Bloomfield Motors, 161 A.2d 69, 92 (N.J. 1960) (asserting that the seller's use of fine print was to "promote lack of attention rather than sharp scrutiny"); Kinney v. United Healthcare Services, 70 Cal. App. 4th 1322, 1330 (1999) (arbitration clause included by employer in "large three-ring binder" and employee was "pressured to sign [contract] that same day"); Villa Milano Homeowners Association v. IL Davorge, 84 Cal. App. 4th 819, 829 (2000) (contract terms "are 70 pages long and the arbitration clause appears on pages 67-68 . . . . In short, it is unlikely the arbitration clause popped right out to the purchaser's attention . . . .").

[50] *See, e.g., Kinney*, 70 Cal. App. 4th at 1332 (arbitration clause "language . . . is so extensive as to render it difficult for a lay person to read and understan"); *Blubaugh*, 636 F. Supp. at 1574 ("legalistic language" that defendant "could not possibly decipher"); Bank of Indiana, Nat. Ass'n v. Holyfield, 476 F. Supp. 104, 111 (D. Miss. 1979).

[51] *See* sources cited in note 34, *supra*. The seminal work on which these analyses are built is George Stigler, *The Economics of Information*, 69 J. POL. SCI. 213 (1961)

Williams do not know that their contracts contain a cross-collateralization clause or do not understand what that clause means, they will not use their shopping behavior in a way that provides an incentive for Walker-Thomas to offer efficient price/term combinations.

If the court finds that buyers like Williams do not read or do not understand the cross-collateralization term, should the term be found procedurally unconscionable under a law-and-economics analysis? If the clause is literally unreadable, the answer is probably yes (although the court might alternatively hold that Williams never assented to the term so it is not a part of the contract). If the clause is merely difficult to read or to understand, the question becomes more difficult because an unconscionability determination will create a negative incentive: if buyers can avoid the enforcement of a cross-collateralization term by not reading or understanding it, they would have an incentive to not read or not try to understand the term;[52] knowing this, sellers would have an incentive to offer a price/term combination without the clause even if the clause is efficient and good for buyers as a class ex ante.

Moreover, even if difficulty in reading or understanding a term were grounds for a procedural unconscionability finding, Walker-Thomas ought to be able to avoid this outcome by requiring its customers to read the cross collateralization clause (perhaps requiring each buyer to individually initial next to the term) and explain its ramifications verbally. To generalize the point, where lack of information could cause a market failure, sellers should be able to avoid an unconscionability determination by taking steps to insure that buyers have the information necessary for market forces to work.[53]

Finally, Judge Wright takes pains to point out that Williams is a welfare recipient with a number of dependents, and that Walker-Thomas knew this.[54] Other courts have also found the educational or income level of buyers relevant in unconscionability cases.[55] It is difficult to see how these factors

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[52] *See, e.g.*, Korobkin, *supra* note 31, at 1269 (describing this as a species of a moral hazard problem).

[53] *Cf.* Beales et al., *supra* note 34, at 513 ("information remedies" are the preferred solution to problems in the consumer information market because they introduce "less rigidity into the market" than do direct regulations); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 612-13 (1990) (actual knowledge of a term justifies the enforcement of it).

[54] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965).

[55] *See, e.g.*, Frostifresh Corp. v. Reynoso, 281 N.Y.S.2d 964, 964 (N.Y. App. Div. 1967); Weaver v. Am. Oil Co., 276 N.E.2d 144, 145 (Ind. 1972) (plaintiff, who had left high school after one and one half years, "was not one who should be expected to . . . understand the meaning of technical terms"); Jones v. Star Credit, 298 N.Y.S.2d 264, 265 (N.Y. Sup. Ct. 1969) (registering concern for the protection of the "uneducated and often illiterate individual . . . against overreaching by the small but hardy breed of merchants who would prey on them"); Kugler v. Romain, 58 N.J. 522, 544 (1971) ("The need for application of the [unconscionability] standard is most acute when the professional seller is seeking the trade of those most subject to

could be directly relevant to the issue from a traditional law-and-economics perspective. Rational choice theory assumes that every legally competent individual is the best judge of his or her preferences, so neither Williams' welfare status nor the store's knowledge of it should cause the court to determine that she either (a) would be better off if no one would sell her a stereo, or (b) would be better off being forced to pay more for a stereo without a cross-collateralization clause. If most of Walker-Thomas' customers are welfare recipients, and if we assume that this means they are of lower-than-average educational achievement, law-and-economics analysis might suggest that the law should require the store to take greater-than-average pains to explain the significance of the term.

2. Substantive unconscionability

Judge Wright was careful to say that unconscionability requires the lack of meaningful choice on the part of Williams "*together with* contract terms which are unreasonably favorable" to Walker-Thomas.[56] Following Judge Wright's guidance, most courts today require both procedural and substantive unconscionability before they will invalidate a contract term.

Courts typically determine whether a term is substantively unconscionable by examining that term in isolation and asking whether it is "overly harsh" or "one-sided,"[57] or "shocks the conscience."[58] So, for example, most courts have found mandatory arbitration terms in standard form contracts generally enforceable,[59] but courts have held arbitration clauses unenforceable when they require the buyer but not the seller to arbitrate claims,[60] when they require

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exploitation—the uneducated, the inexperienced and the people of low incomes."); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 538 (Ala. 2002) (declining to enforce arbitration agreement in part because plaintiffs were neither sophisticated nor wealthy); Denlinger, Inc. v. Dendler, 608 A.2d 1061, 1066 (Pa. Super. Ct. 1992) (enforcing term because plaintiff was a sophisticated businessman); *Blubaugh*, 636 F. Supp. at 1574 (finding procedural unconscionability in part because "there was clearly a disparity in sophistication between John Deere Leasing and the defendant, a farmer").

[56] *Williams*, 350 F.2d at 449 (emphasis added).

[57] *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (Cal. 2000); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 17 (1st Cir. 1999).

[58] *See, e.g.*, Ferguson v. Countrywide Credit Indus., Inc. 298 F. 3d 778, 784-85 (9th Cir. 2002); Ting v. AT&T, 182 F. Supp. 2d 902, 931 (N.D. Cal. 2002).

[59] *See, e.g.*, Doctor's Associates v. Casarotto, 517 U.S. 681 (1996); *In re* Oakwood Mobile Homes, Inc., 987 S.W.2d 571 (Tex. 1999); Kindred v. Second Judicial Court, 996 P.2d 903 (Nev. 2000); Southern Energy Homes, Inc. v. Gary, 774 So. 2d 521 (Ala. 2000); *In re* H.E. Butt Grocery, 17 S.W.3d 360 (Tex. Ct. App. 2000); Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360 (S.C. 2001).

[60] *See, e.g.*, *Ferguson*, 298 F.3d at 785 (arbitration clause that exempts claims drafter is most likely to be unconscionable); Ticknor v. Choice Hotels Int'l, Inc., 265 F.3d 931, 940-41

buyers to pay large arbitration fees relative to the size of their claims,[61] or when they forego the right to bring class action lawsuits.[62] Under this approach, a court might find the cross-collateralization clause substantively unconscionable because it works a hardship on buyers like Williams who default on their payments: by missing a payment on the stereo after making enough payments to pay for all of her other items, Williams is subject to repossession of all the furniture rather than just the stereo.

This approach noticeably focuses on the dispositional rather than the precedential aspect of judicial opinions and is therefore inconsistent with law-and-economics analysis. A law-and-economics analysis would take into account the market forces that would affect the incentives of parties to future transactions after the court ruled in *Williams v. Walker-Thomas*. By evaluating challenged terms in isolation, courts implicitly assume that if they were to ban that challenged term from the contract, all other terms would remain identical. Of course, rational choice assumptions lead to the prediction that this would not be the case. Every term in a contract is part of a price/term combination. Labeling the cross-collateralization term unenforceable could reduce the total utility of buyers ex ante, no matter how severe it seems to Williams ex post. The appropriate question is not how one-sided is the cross-collateralization term, but how does the cost of the term to buyers compare to the offsetting value of other terms (including price) to buyers ex ante.

Without market failure, law-and-economics analysis suggests that price/term combinations found in contracts will not be disadvantageous to buyers as a

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(9th Cir. 2001) (arbitration clause allowing drafter to bring claims in court unconscionable); *Armendariz*, 24 Cal. 4th at 117 (unilateral obligation to arbitrate is "itself so one-sided as to be substantively unconscionable"); Am. General Fin., Inc. v. Branch, 793 So. 2d 738, 749 (Ala. 2000) (exemption of drafting party from duty to arbitrate indicia of unconscionability); Iwen v. U.S. West Direct, 977 P.2d 989, 995 (Mont. 1999); Flores v. Transamerica Homefirst, Inc., 93 Cal. App. 4th 846, 854 (2002) (arbitration clause lacking a "modicum of bilaterality" invalid); Stirlin v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1542 (1997) (arbitration clause providing employer more rights and employee fewer rights unconscionable); Kinney v. United Healthcare Servs., 70 Cal. App. 4th 1322, 1332; *but see Munoz*, 542 S.E.2d at 365 (declining to find arbitration clause unconscionable solely because it allows creditor to pursue foreclosure claims in court).

[61] *See, e.g., Armendariz*, 24 Cal. 4th at 92 (clause limiting employee's damages to back pay); Powertel, Inc. v. Bexley, 743 So. 2d 570, 576 (Fla. Dist. Ct. App. 1999) (clause prohibiting punitive damages); *Ting*, 182 F. Supp. 2d at 930; *Iwen*, 977 P.2d at 995.

[62] *See, e.g., Ting*, 182 F. Supp. 2d, at 931; Szetela v. Discover Bank, 97 Cal. App. 4th 1094 (2002); Powertel, 743 So. 2d at 576; Bolter v. Superior Court, 87 Cal. App. 4th 900, 910 (2001); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 539 (Ala. 2002); Ramirez v. Circuit City Stores, Inc., 76 Cal. App. 4th 1229 (1999). *Cf.* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) (arguing that prohibitions on class action in contractual arbitration provisions should not be enforced).

class.[63] This means it would be inconsistent with law-and-economics analysis for a court to *ever* refuse to enforce a term on the grounds of substantive unconscionability alone. However, it is possible that terms can be both socially inefficient and substantively disadvantageous to buyers if there is a procedural defect consistent with market failure, such as insufficient information. For example, if the cross-collateralization clause is printed in one-point type that cannot be read by the naked eye, then the shopping behavior of buyers will not force sellers to remove the term if it is inefficient ex ante.

III. THE "BEHAVIORAL" LAW AND ECONOMICS OF CROSS-COLLATERALIZATION CLAUSES

Behavioral law and economics maintains the focus of traditional law and economics on the precedential effect that judicial decisions have on the incentives of parties subject to the legal system as well as the normative commitment to welfare maximization, either of society generally or a particular class of people the law intends to benefit. It is less sanguine, however, about the ability of individuals to always make judgments about the world that will enable them to maximize their expected utility.[64] When individual behavior deviates from the predictions of rational choice theory, the incentive effects of market forces and legal rules can deviate from those predicted by traditional law-and-economics analysis, which in turn can shift normative policy conclusions. This section considers how a behavioral law-and-economics analysis of *Williams v. Walker-Thomas* differs from a traditional law-and-economics analysis.

A. Differences from the Traditional Analysis

1. Choice heuristics

The conclusions of traditional law and economics that (1) Walker-Thomas will offer a contract with a cross-collateralization clause only if the clause is socially efficient and that, therefore, (2) a court's refusal to enforce the clause will reduce social welfare and reduce the utility of buyers as a class, depend not only on the assumption that the parties have all information relevant to making a decision, but also on the assumption that they evaluate all of that information as part of their decision process. For example, Williams is assumed not only to have a reasonable opportunity to discover and understand the meaning of the clause but also to determine the marginal value to her of

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[63] *See, e.g.*, Craswell, *supra* note 31, at 371-72.

[64] *See, e.g.*, Korobkin & Ulen, *supra* note 20, at 1076.

having a contract without that clause. If a competitor of Walker-Thomas were to offer a contract without a cross-collateralization clause at a correspondingly higher price, it is assumed that Williams will choose the price/term combination that will maximize her expected utility.[65] The same is expected of Williams if a competitor offers a contract without a cross-collateralization clause (good) but other onerous terms (bad).

In the jargon of decision theory, for buyers like Williams to ensure that sellers like Walker-Thomas have an incentive to provide only efficient contract terms that benefit buyers as a class ex ante, they must engage in a decision making process that is both non-selective and compensatory.[66] For the process to be non-selective, the decision maker must consider all relevant pieces of information.[67] For the process to be compensatory, the decision maker must be able to compare and trade-off the utility consequences of very different product attributes.[68] Empirically, however, few people approach decisions with this degree of thoroughness and circumspection. Instead, we rely on heuristic processes that economize on time and effort[69]—for example, by selecting a product from among the range of choices if it is the most desirable on the most important attribute, or if it satisfies a minimum threshold of value on several attributes, or if its combination of a few critical attributes is more desirable than the combination of those attributes provided by other sellers.[70]

While it is possible that individuals employ more non-selective and compensatory decision making approaches when making particularly important choices or that "expert" decision makers on average do so in comparison to lay decision makers, neither of these conjectures is supported by empirical evidence.[71] And even assuming that some decision makers tend to employ, or some types of decisions tend to encourage, more thorough decision making processes, it is almost certainly the rare case in which a decision maker approaches even a moderately complicated decision—of the type all of us face routinely in twenty-first century developed economies—with a completely non-selective and compensatory decision making strategy.[72] Although the empirical data is somewhat murky, the best evidence suggests that decision

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[65] *Cf.* Korobkin, *supra* note 31, at 1219.

[66] *See* John W. Payne et al., THE ADAPTIVE DECISION MAKER 29-30 (1993)

[67] *Id.* at 30.

[68] *Id.* at 29-30.

[69] *Id.* at 34.

[70] *See generally* Korobkin, *supra* note 31, at 1222-25 (reviewing literature).

[71] *Cf.* Ruth H. Phelps & James Shanteau, *Livestock Judges: How Much Information Can an Expert Use?*, 21 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 209, 209-10 (1978) (finding that experts are similarly selective in the amount of information they use to make decisions).

[72] *See* Korobkin, *supra* note 31, at 1222-34.

makers rarely consider more than five to ten factors when making market choices.[73]

If buyers like Williams do not take into account the Walker-Thomas cross-collateralization clause when making the decision of whether to purchase a stereo from Walker-Thomas, purchase one from another store, or do without a stereo altogether, the positive predictions and normative conclusions of the traditional law-and-economics model are severely undermined. On the positive side, in a world in which cross-collateralization clauses did not factor into buyers' purchase decisions, Walker-Thomas would not face market pressure to remove the clause if it is inefficient, because including the clause in its contract would not drive away potential customers and eliminating it would not attract potential customers. In fact, the implications are even more pernicious. Walker-Thomas would face market pressure to include the clause in its contract, even if it were inefficient. This is because competitors would do so, reduce costs, use the savings to lower prices or provide other product features that buyers do take into account when making their purchase decisions, and gain a competitive advantage at Walker-Thomas' expense if Walker-Thomas did not do the same.[74]

On the normative side, if buyers do not factor the consequences of the cross-collateralization clause into their purchase decision, it is not clear that the terms observed in contracts necessarily maximize social welfare or even buyer welfare. If cross-collateralization terms do not factor into buyers' market choices, it is possible that one or more of the many other economically feasible price/term (or term/term, or functional attribute/term) combinations that Walker-Thomas could conceivably offer is both more socially efficient and better for buyers as a class. In this situation, if a court were to label the clause unconscionable and refuse to enforce it, thus effectively requiring Walker-Thomas to offer a different price/term combination, society as a whole and buyers could be made better off.

2. Judgment biases

In addition to assuming that buyers' market decisions take into account and compare all relevant attributes of the available choice alternatives, the traditional law-and-economics approach also assumes that buyers will correctly make factual judgments that determine the expected utility of those choice alternatives, at least in so far as the information necessary to make such determinations is available. For example, if a decision maker is asked to choose between a certain $100 and a coin toss that will pay $200 if heads and

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[73] *See id.* at 1227-29 (reviewing studies).

[74] *Cf. id.* at 1235.

$0 if tails, traditional law-and-economics analysis assumes not only that she can (and will) compare a certain outcome to a risky outcome, but also that she knows that the chance of the coin flip coming up heads is 50%. If the coin is "fair" (i.e., not a trick coin) but the decision maker believes the chance of heads coming up is 99%, our prediction as to her choice will be different than if she understood the true chance was 50%, and we would feel far less certain that her choice of the flip rather than the certain payoff would maximize her expected utility as between the two options.

At least two judgment biases in decision making described by behavioral scientists support the hypothesis that many—although certainly not all—buyers such as Williams will fail to understand the true costs of a cross-collateralization clause, and, importantly, that these buyers' faulty estimations will be biased in a predictable direction. Evidence of the overconfidence (or optimism) bias demonstrates that, on average, decision makers underestimate the likelihood of a bad event happening to them[75] and, relatedly, overestimate their ability to prevent a bad event from occurring.[76] Assume that buyers in Williams' financial position have a 10% chance of defaulting on their payments before the stereo is completely paid off, based in large part on the potentially devastating financial consequences of any unforeseen major expense, such as an illness or accident. If Williams believes that she has more control over unforeseen expenses than she actually does, and she thus incorrectly believes the chance that she will default is only 1%, she might prefer a cross-collateralization clause that allows the store to keep stereo prices $20 lower than they would otherwise be, even if her objective expected utility would be higher if Walker-Thomas were to eliminate the clause and raise its prices. [77]

Independent of overconfidence, behavioral researchers have also discovered that decision makers underestimate low probability risks in some circumstances and overestimate them in others.[78] Consistent with the theory that decision makers rely on heuristics to make decisions, empirical evidence suggests that most decision makers estimate risks to either be significant or

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[75] *See, e.g.*, Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1659 n.22 (1998).

[76] *See, e.g.*, Dan Stone, *Overconfidence in Initial Self-Efficacy Judgments: Effects on Decision Processes and Performance*, 59 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 452, 452 (1994); J. Crocker, *Biased Questions in Judgment of Covariation Studies*, 8 PERSONALITY AND SOC. PSYCHOL. BULL. 214, 214-20 (1982); E.J. Langer, *The Illusion of Control*, 32 J. OF PERSONALITY AND SOC. PSYCHOL. 311, 311-28 (1975).

[77] *Cf.* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1784 (2000) (overconfidence could cause contracting parties to underestimate the likelihood that they will be unable to perform).

[78] *Cf.* Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L. J. 61, 74 (2002); Garg H. McClelland, *Insurance for Low-Probability Hazards: A Bimodal Response to Unlikely Events*, 7 J. RISK & UNCERTAINTY 95 (1993).

non-existent—at least for the purpose of making decisions based upon those risks.[79] Whether a risk is considered significant or discounted to zero for purposes of processing a choice is, in turn, dependent on heuristics. If a decision maker uses the availability heuristic, for example, his estimate of a risk will depend on the extent to which an example of the risk coming to pass comes easily to mind.[80] So, for example, whether a buyer like Williams considers the cross-collateralization clause costly could turn on whether examples of purchasers like herself defaulting on credit purchases and facing repossession are readily available, whether or not the vividness of those examples reflect the actual risk of default. If examples of defaults are not readily available to Williams, use of the availability heuristic could reinforce the overconfidence bias in causing her to underestimate the likelihood of default and, thus, the cost of the cross-collateralization clause.

If either overconfidence or availability, or a combination of the two, causes buyers like Williams to underestimate the risk-adjusted expected costs of the cross-collateralization clause, the market behavior of those buyers could encourage stores like Walker-Thomas to include cross-collateralization clauses in their contracts even if the expected cost of the clauses to buyers ex ante exceeds the benefits to the sellers. In this case, the clause will be socially inefficient, and it also will make buyers worse off than they need be because the expected cost of the clause to buyers will exceed the accompanying price reduction that market competition among sellers will provide. A court's decision to not enforce cross-collateralization clauses will lead to an increase in stereo price, but the expected benefit to buyers of avoiding the harsh consequences of default under a cross-collateralization clause will exceed the cost of the price increase.

B. Unconscionability Analysis

Compared to a traditional law-and-economics analysis, a behavioral law-and-economics analysis is less confident that market forces will insure that all contract terms will be socially efficient and/or beneficial to buyers as a class.

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[79] Garg H. McClelland, *Insurance for Low-Probability Hazards: A Bimodal Response to Unlikely Events*, 7 J. RISK & UNCERTAINTY 95 (1993); AMOS TVERSKY & DANIEL KAHNEMAN, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES at 3 (Daniel Kahneman et al., eds., 1982); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980) (demonstrating overconfidence in predictions about the likelihood of subjects experiencing positive and negative events).

[80] *See generally* AMOS TVERSKY & DANIEL KAHNEMAN, *Judgment Under Uncertainty: Heuristics and Biases,* in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES at 3 (Daniel Kahneman et al., eds. 1982); Sunstein, *supra* note 78, at 70 ("When it comes to risk, a key question is whether people can imagine or visualize the worst-case outcome.").

The flip side of this observation is that judicial invalidation of contract terms under the unconscionability doctrine has the potential, at least in some cases, to increase overall social welfare and the welfare of buyers as a class. This section considers whether the factual circumstances in which courts invoke the unconscionability doctrine are more consistent with a behavioral law-and-economics analysis than with a traditional law-and-economics analysis.

1. Procedural unconscionability

From a behavioral law-and-economics perspective, the primary concern with the bargaining process is that buyers will not make market choices in accordance with the predictions of rational choice theory, which are necessary for sellers to have an incentive to provide only efficient contract terms. In *Williams v. Walker-Thomas* specifically, the concern is that buyers like Williams either will misjudge the expected costs and benefits of the cross-collateralization term or will fail altogether to factor those costs and benefits into their purchase decisions, with the consequence of making a market choice that fails to maximize their expected utility. To be sure, sellers like Walker-Thomas might also fail to maximize their expected utility in light of the incentives created by buyer behavior. Sellers, however, are more likely to modify their behavior over time, because they receive feedback from the market on a continual basis. For example, if buyers prefer a higher stereo price to a cross-collateralization clause, but Walker-Thomas provides the clause and a correspondingly lower price, the store will lose profits. One such "incorrect" decision might be sustainable, but a series of them will squeeze profits, and the store would likely modify its business strategies—even if unsystematically—in an effort to stay in business.

From a behavioral law-and-economics perspective, like a traditional law-and-economics perspective, it is irrelevant that Walker-Thomas presents the cross-collateralization term to Williams on an adhesive basis. As long as Williams and others like her accurately predict the expected cost of that term and factor it into their purchase decisions, Walker-Thomas should have the incentive to provide the term only if it is efficient and, therefore, good for buyers ex ante. Whether Walker-Thomas enjoys market power vis-à-vis Williams is similarly irrelevant to any prediction about whether Williams' behavior will provide Walker-Thomas with the incentive to impose cross-collateralization if and only if doing so is efficient.[81]

In contrast, if the term is difficult to read or understand, market forces might fail to discipline Walker-Thomas to offer the term only if it is efficient.

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[81] *See* Korobkin, *supra* note 31, at 1260-64. For some qualifications to this statement, *see id.* at 1260, nn. 210-11.

Because boundedly-rational buyers evaluate purchase decisions by considering relevant information only selectively, in part as a method of conserving effort, information presented in a way that is difficult to process is particularly likely to be ignored in the purchase decision. From a traditional law-and-economics perspective, the concern over difficult-to-read or difficult-to-understand information disappears if the seller directs buyers' attention to those terms. From a behavioral law-and-economics perspective, such mitigating action by the seller might not entirely solve the problem, because the cross-collateralization clause might still be more difficult for buyers to assimilate into their purchase decision than other product attributes, such as price or functional features.

Williams' socioeconomic or educational status could conceivably be relevant to a behavioral law-and-economics analysis, but only if two generalizations are true. First, buyers of low socioeconomic/educational status tend to be more selective than other buyers when processing information for the purpose of making market decisions and/or such buyers are worse than other buyers at predicting the true likelihood of default. Second, Williams' socioeconomic/educational status is typical of Walker-Thomas customers.

The first generalization is plausible, but there is no clear evidence to support it, and it would be extremely difficult for a court to determine its veracity. Even if the first generalization is correct, the accuracy of the second generalization is important, because Walker-Thomas' decision to offer a cross-collateralization clause will not be affected by any idiosyncrasies of Williams —she is not singled out to receive the clause, which is included in Walker-Thomas' standard form contract and provided on an adhesive basis to all credit purchasers. At a minimum, then, when the court considers whether or not to enforce the term, it should be concerned with the status of Walker-Thomas' customer base generally rather than with Williams specifically.

To the extent that the difficulty of reading the term generally or Williams' socioeconomic status specifically are at all relevant to whether a court should enforce the term, the relevance of these facts is only indirect. The directly relevant issue is whether buyers like Williams will incorporate the presence of the cross-collateralization term into their purchase decision and do so based on an objectively accurate understanding of the risks the term poses. From a behavioral law-and-economics perspective, courts should analyze this question directly when determining whether there is a procedural defect in the operation of the market justifying judicial intervention, whether to promote social welfare generally or protect buyers like Williams specifically.

Courts might suspect that a buyer like Williams is likely to underestimate her likelihood of defaulting on her payment obligation to Walker-Thomas, and thus underestimate the value to her of a contract without a cross-collateraliza-

tion clause. Studies show that financial problems (like marital problems[82]) are events about which people tend to be overconfident that they will avoid, relative to the statistical probabilities.[83]

Courts also might suspect that when a buyer like Williams considers whether to purchase a stereo from Walker-Thomas, as opposed to her alternative of shopping elsewhere or not purchasing a stereo at all, the details of how the credit terms operate are unlikely to be salient product attributes she factors into her purchase decision. With limited processing ability, buyers are most likely to take into account the attributes that are most important to them and/or the attributes they believe are most likely to vary from seller to seller. The price of the stereo—perhaps including, the credit rate of interest charged —along with functional attributes of the stereo (i.e., sound quality, reliability, features) are likely to be the most important attributes to buyers. Independent of buyers' ability to predict their true probability of defaulting, the fact that the clause becomes relevant only in the unlikely case that the buyer defaults also suggests that buyers are relatively unlikely to devote their limited processing capacity to this attribute.[84] At the same time, the fact that the cross-collateralization clause is complicated to understand and buried in a sea of fine print makes its quality difficult to compare from seller to seller. As a result, buyers using selective information processing approaches are relatively unlikely to think that there are differences between terms offered by various sellers that justify a close comparison.

2. *Substantive unconscionability*

If a court finds that the cross-collateralization term satisfies the doctrinal requirement of procedural unconscionability because it is the type of term buyers are unlikely to correctly price as part of their purchase decision and, thus, sellers are likely to lack a market incentive to provide the term only if it is efficient, its analysis cannot (under the unconscionability doctrine) and

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[82] *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993) (finding that subjects knew the divorce rate is approximately 50% but estimated their likelihood of getting divorced at a fraction of that rate).

[83] Mark W. Nelson et. al., *The Effect of Information Strength and Weight on Behavior in Financial Markets*, 86 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 168, 169-70 (2001) (reporting that individuals are typically overconfident in financial transactions if they have more high-weight, low-strength information); Korobkin & Ulen, *supra* note 20, at 1090-92.

[84] This point was recognized intuitively by Professor Leff. Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 351 (1970) (observing that "most of the boilerplate is about contingencies," and that "[i]t is hard to focus attention on what should not ordinarily happen").

should not (normatively) end there. Even if buyers systematically underestimate the risk of default, or if cross-collateralization clauses are simply not salient in their purchase decisions, this does not mean that the presence of the clause in Williams' contract with Walker-Thomas is necessarily inefficient or bad for buyers as a class. Such conclusions would suggest only that Walker-Thomas has an incentive to include a credit term that favors the store whether or not that term is efficient; however, the term might be efficient nonetheless. For example, assume that the true expected cost of the cross-collateralization clause to Williams (taking into account her actual risk of default and the cost to her if she does default) is $10, but the expected savings to Walker-Thomas as a result of the clause is $20. Assume also that buyers like Williams either wrongly estimate the expected cost of the clause to them to be only $5 or fail to take the clause into account at all when making their purchase decisions. Given these assumptions, the cross-collateralization clause is substantively beneficial to buyers ex ante notwithstanding the procedural defects that raise preliminary concerns about the clause.

Recall that courts usually determine whether a contract term is substantively unconscionable by asking whether that term, analyzed independently of the rest of the contract, is unduly one-sided.[85] The answer to these questions might serve as a rough proxy for whether the costs of the term to buyers outweigh the benefits to sellers. For example, if the court determines that the cross-collateralization clause works an undue hardship on Williams after she defaults, this might suggest an implicit determination that the costs to buyers if they default multiplied by their risk of default must exceed the benefit to the seller in the case of default multiplied by the risk of the buyer defaulting.[86] Thus, although the doctrinal tests that courts use technically fail to address the relevant normative question of whether the challenged term is inefficient, judges employing the test might succeed in striking inefficient terms as unconscionable and enforcing efficient terms.

Notwithstanding this conjecture, from a behavioral law-and-economics perspective, courts would be better off analyzing the normatively relevant issue directly rather than relying on indirect proxies, which are bound to be

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[85] *See supra* notes 57 to 62.

[86] Glimpses of this reasoning are occasionally visible in published opinions. *See, e.g.*, Mendez v. Palm Harbor Homes, Inc., 45 P.3d 594, 604-05 (9th Cir. 2002) (invalidating arbitration clause that would require plaintiff to "spend up front well over $2,000 to try to vindicate his rights under a contract to buy a $12,000 item in order to resolve a potential $1,500 dispute"); Leonard v. Terminix Int'l Co., 854 So. 2d 529, 539 (Ala. 2002) (invalidating arbitration provision where "expenses of pursuing [] claim far exceeds the amount in controversy"); Comb v. Paypay, Inc., 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (arbitration provision would result in excessive cost because plaintiffs would be required to share in arbitration expenses but company's average transaction was only $55); *see generally* Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 90-92 (2000).

somewhat under- and over-inclusive. The proper question for courts to ask concerning the substance of Walker-Thomas' cross-collateralization clause is whether the expected cost of the clause ex ante to buyers exceeds the expected benefit of the clause to sellers. If the answer is "yes," the clause is socially inefficient, and it is bad for buyers as a class because the expected cost of the clause to buyers exceeds the benefits that they will receive if the clause is enforceable in the form of a lower price (or improved quality of other product attributes). If the answer is "no," the clause is socially efficient and good for buyers as a class because the benefit of the lower accompanying price exceeds the expected cost of the unfavorable term.

Identifying the appropriate question, given the normative assumption that the law of unconscionability should be used by courts either to improve social efficiency or protect the interests of buyers, is not to suggest that it is an easy question for judges to answer. On one hand, it is likely that if Williams defaults and Walker-Thomas is permitted to repossess all of her furniture as the cross-collateralization clause allows, the cost of the repossession to Williams will exceed the benefit to Walker-Thomas. Although the now-used furniture is important to Williams because it is part of her living space, it probably has less value to others who might purchase it used from Walker-Thomas and, logically, the price that it might bring at resale less the costs of repossession is the maximum that the right of repossession is worth to Walker-Thomas—at least after the default. On the other hand, the presence of the clause in the purchase contract might make Williams less likely to default than she otherwise would be. If the clause substantially deters defaults, which are costly to Walker-Thomas, this incentive effect might make the total expected benefits of the clause to Walker-Thomas exceed the expected costs to Williams.

IV. CONCLUSION

Bringing a law-and-economics perspective to bear on the facts of *Williams v. Walker-Thomas*—whether "traditional," "behavioral," or both—provides a framework for critically analyzing the facts courts consider relevant when applying the unconscionability doctrine. At the same time, it can provide a basis for developing alternative normative theories of what facts should be required for courts to find a contract term "unconscionable" and, as such, unenforceable.

The latter purpose has more practical relevance for members of the bar in the context of unconscionability than in many other doctrinal areas, because unconscionability is a doctrine that, by its terms, provides judges with tremendous discretion. A lawyer might argue that a promise should be enforced notwithstanding that it was made without consideration and did not cause

reasonable reliance, or notwithstanding the fact that the opposing party was incompetent and subject to duress, but such pleas are likely to fall on deaf judicial ears; the consideration, competency, and duress doctrines are made up of rules that substantially constrain judges' discretion. Not so in the area of unconscionability, where the statements of doctrine (such as UCC section 2-302) provide little specific guidance. A contract term is "unconscionable" if a judge says that it is, and it is not "unconscionable" if a judge says that it is not. There is not much more to the formal doctrine in terms of rules than this.

From a law-and-economics perspective, judges should determine that contract terms are unconscionable if (a) there is reason to believe that market forces will not guarantee that only efficient terms will appear in the market and (b) the judge has reason to believe that the challenged term is, in fact, inefficient. Traditional law-and-economics analysis concludes that the former condition will not be met absent extreme circumstances, so courts seldom need to concern themselves with the latter condition. A behavioral law-and-economics approach identifies reasons to believe that the first condition will be met not infrequently, thus justifying more careful judicial consideration of the second and, ultimately, more frequent judicial intrusion into the private contracting process.

Some students will contend that the law-and-economics emphasis on whether a term is efficient from an ex ante perspective is inconsistent with the term "unconscionability," which itself seems to have a moral connotation absent from any analysis of ex ante efficiency. But in the context of unconscionability, a distinction between moral and economic considerations is not so obvious. Consider the following propositions:

(1) It *is not* unconscionable for Walker-Thomas to include a cross-collateralization clause in its standard form contract if the resulting market-driven price/term combination makes buyers as a class better off than they otherwise would be, even if the term imposes a hardship ex post on some particular buyers, like Williams, who default.

(2) It *is* unconscionable, on the other hand, for Walker-Thomas to include a cross-collateralization clause in its standard form contract if the resulting market-driven price/term combination makes buyers as a class worse off than they otherwise would be.

Outsider Jurisprudence and the "Unthinkable" Tale: Spousal Abuse and the Doctrine of Duress

Deborah Waire Post *

I. INTRODUCTION

I am tempted to refer to 2003 as the Year of the Voice, or perhaps the Year of Voice Revisited. In February, the women law students at New York University School of Law sponsored a conference on voice in the classroom (inspired by Carol Gilligan, a recent addition to the faculty at NYU).[1] In May of 2003, Harvard Law School hosted Celebration 50, Fifty Years of Women Graduates (if not faculty) at Harvard.[2] In June of 2003, the Association of American Law Schools midyear conference was aptly titled Taking Stock: Women of All Colors in Law School.[3]

This issue of the Hawaii Law Review features a symposium on contracts law with papers presented at the January 2004 Annual Meeting of the American Association of Law Schools ("AALS"). While the topic of that section meeting was not "voice," the presentations offered a sampling of the different perspectives that have transformed the way contracts is taught

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* Professor at Touro College Jacob D. Fuchsberg School of Law. I would like to thank Maureen Quinn, my research assistant, Stephanie Shaw, whom I met as a fellow at the Center for the Advanced Study in the Behavioral Sciences, and the faculties of St. Thomas Law School and Florida International University College of Law who listened and provided helpful comments when this article was in its early stages.

[1] The NYU conference was called *Paths to Success: The Diversification of Voice and Style in Law School and the Legal Profession*, February 27, 2003, the name echoing the title of Gilligan's influential classic. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Harvard Univ. Press, 1982). I was on a panel devoted to "voice in the classroom."

[2] If we were being accurate, women have been at Harvard 53 years, but as the name of the celebration suggests, this is not a school that takes any chances. Women were counted only after they graduated, not when they arrived. The event was also an inaugural event for the new dean, Elena Kagan, class of '86. One of the break-out panels was called "*Making a Difference in the Law School Classroom.*" I moderated a spirited panel discussion of the significance of gender in the classroom with participants Lynn Blais, Rieko Nishikawa, Radhika D. Rao, Joan C. Williams and Patricia Williams. For articles describing Celebration 50, listing distinguished alumna, and discussing the situation of women on the faculty at Harvard Law School, *see* HARVARD LAW BULLETIN, Summer 2003, *available at* http://www.law.harvard.edu/alunmi/bulletin/2003/summer.

[3] Joint AALS/ABA Workshop, *Taking Stock: Women of All Colors in Law School*, June 15-17, 2003.

including insights gained from critical race and feminist theories. What we make note of and celebrate in this collection of articles from the section meeting, therefore, is the importance of voice in scholarship and the classroom, and the remarkable transformation of the academy in the relatively recent past, much of which I witnessed in the twenty years I have been teaching contracts.

The case I have chosen to discuss in this essay, *United States ex. rel. Trane Co. v. Bond*,[4] will lead some readers to conclude that the theory and perspective featured in this article is feminist. I don't object to this characterization, although it is incomplete and so inaccurate. As a practitioner of feminist theory,[5] I am heir to a tradition that was considered radical as recently as ten years or so ago. I was sitting in the audience at the 1989 "shadow" contracts section meeting organized by the Section on Women and Legal Education of the AALS and the Society of American Law Teachers.[6] Certainly I would be proud to include in the provenance of Contracting Law[7] the inspiration gained from the Mary Joe Frug's feminist reading of a contracts casebook.[8] Contracting Law, the contracts casebook I wrote with Amy Kastely and Sharon Hom, is an attempt to achieve the goals articulated by those feminist contracts scholars in 1989, an important part of which was to consider the way the canon could be changed.[9] It is also an attempt to expand on this principle —to make visible the way the law affects other subordinated communities.

It was in furtherance of this project, I confess, that I unilaterally changed the terms of the bargain proposed in the e-mail from Professor Beh announcing the topic for the 2004 contracts section meeting. Having *volunteered* to participate

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[4] 586 A.2d 734 (Md. 1991).

[5] Deborah W. Post, *Which Wave are You? Comments on the Collected Essays from the Seminar "To Do Feminist Theory,"* 9 CARDOZO WOMEN'S L.J. 471 (2003). Of course, one of the places where theory is put into practice is the classroom. *See, e.g.*, Maria Grahn Farley, *Forward: To Do Feminist Theory,* 9 CARDOZO WOMEN'S L.J. 197 (2003).

[6] The controversy that inspired the section meeting is recounted in Mary Joe Frug, *Essay: Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992). The meeting was prompted by a comment by the then chair of the contracts section that feminist theory had nothing to contribute to contract jurisprudence since male bias "had not had important consequences for contract law."

[7] AMY KASTELY ET AL., CONTRACTING LAW (2d Ed. Carolina Academic Press, 2000).

[8] Mary Joe Frug, *A Symposium of Critical Legal Study: Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

[9] The program was described in the schedule in the following way:

> In this program feminist legal scholars who teach and write about contracts will explore the implications of feminist theory for contract doctrine. We have two goals. One is to identify contracts issues of particular interest to women *which are often overlooked by the traditional contracts canon*; the other is to suggest ways in which feminist theory can illuminate contract doctrine's treatment of these issues.

Proceedings of the Annual Meeting, 1989 ASS'N. OF AM. LAW SCH. 21.

on a panel, in what might legitimately be considered a consummate act of ingratitude, I immediately rejected the proposal that we all choose a case from the canon and teach it using a different voice, theory or perspective.[10] Admittedly, it would have been a daunting exercise to teach other contracts teachers from a critical race or feminist perspective, but I was fortunate to have a justification, for my rejection of this format. Critical theories and critical perspectives require more than reflection on the content of the canon.[11] Critical perspectives require us to reconceive and reconstruct the canon.

There are two concepts that are central to critical perspectives and these are "voice" and "stories" or "narrative." This is not something that should be relegated, as Professor Beh has stated, to a note after a case.[12] Voice does not refer simply to my presence in the front of the classroom. There will be no appreciable shift in our students' understanding of how the law operates as long as the materials we use in the classroom, against which my "voice" is heard as a contrapuntal, omit the stories of Outsiders. Voice, my individual voice, is seen as just that—idiosyncratic, personal, anecdotal, unscientific.

Before Amy Kastely, Sharon Hom and I began writing our casebook, we read an essay, *What Was Penelope Unweaving?* from Carolyn Heilbrun's book, *Hamlet's Mother and Other Women*.[13] Heilbrun concludes that Penelope was doing something that had not been done before. She was "writing her own story." This imagery seemed particularly apt for three women

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[10] E-mail from Hazel Beh, Chair, Contracts section, to the AALS Contracts Listserv (January 17, 2003) ("My idea, for example, is to invite a contracts teacher with an economic perspective to demonstrate how (by more or less conducting a mini-class and providing participants with teaching notes to introduce economics concepts into our classes—*using a case we generally know*)" (emphasis added)).

[11] The shared work is to recover other traditions—women who have written, spoken, acted, claimed, judged. The shared work is to uncover and admit the complexities of making "women's" claims, the comforting moments of recognition and commonality, the pleasures and risks of essentialism, the pain and necessity of age, class and racial division, the tensions generated from a diverse set of perspectives, all spoken with women's voices. The shared work is to explore texts other than those already read, to learn narratives other than those already told, and to understand more about the function of the canonical works. Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L. J. 1913, 1919 (1990).

I have heard colleagues, mostly women, talk about the fact that they teach against the casebook. I do not consider that an effective pedagogical strategy, if, as Professor Beh put it so eloquently in her description of the panel, the point is to give students the knowledge they need to work to "achieve justice." E-mail from Hazel Beh, Chair, Contracts section, to the AALS Contracts Listserv (January 17, 2003).

[12] *Id.*

[13] CAROLYN G. HEILBRUN, *What was Penelope Unweaving, in* HAMLET'S MOTHER AND OTHER WOMEN 103-111 (Columbia University Press, 1990).

writers, two women of color, entering a market dominated by white men. Heilbrun cautioned us:

> [O]ne cannot make up stories: one can only retell in new ways the stories one has already heard. Let us agree on this: that we live our lives through texts. These may be read, or chanted, or experienced electronically, or come to us like the murmurings of our mothers, telling us what conventions demand. Whatever their form or medium, these stories are what have formed us all, they are what we must use to make our new fictions.[14]

A casebook might not be the "murmuring of our mothers" but it is certainly a text. It is the text that tells our students what legal conventions demand. Traditional texts "silenced" Outsiders.[15] The task for us, as we wrote our own story, women law professors challenging patriarchy and the hegemony which made us "Other," was to give voice to those whose stories are missing or peripheral in the traditional law school setting, in the usual law school casebook.[16]

We used fiction and poetry because sometimes in fiction the voices are stronger, the grievance more clearly stated. In some cases we "recovered" stories that seemed to be forgotten, stories that recall a tradition within the dominant culture of resistance or opposition to oppression.[17] This is the advantage of an interdisciplinary approach; provided that those who use it are cognizant of the exclusionary practices at work in the construction of canons in other disciplines.[18] Excerpts from novels, short stories and poetry, properly selected, enhance efforts to teach students to be good lawyers,[19] and they can, as I have discussed elsewhere, reveal the normative assumptions that are implicit in many appellate decisions.[20]

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[14] *Id.* at 109.

[15] In 1989 an article, Mari Matsuda described "outsider jurisprudence" as a methodology that consults "sources often ignored" to describe a social reality, that of oppressed people, missing in most legal scholarship. *See* Mari J. Matsuda, *Public Response to Racist Speech; Considering the Victims's Story,* 87 MICH. L. REV. 7320 (1989).

[16] I want to qualify this statement to make it clear that I am not accusing all white male writers of contracts casebooks of "silencing" outsiders. Even before we wrote our book, several books were conscientious about including cases that introduced issues of race, gender and class in contracts. Since our book was written, women and people of color have been added as co-authors on contracts casebooks.

[17] *See, e.g.*, excerpts from JOHN STEINBECK, THE GRAPES OF WRATH; ARTHUR MILLER, DEATH OF A SALESMAN; CHARLES DICKENS, BLEAK HOUSE IN CONTRACTING LAW, *supra* note 7 at 74, 118 and 1033, respectively.

[18] *See* Heilbrun & Resnik, *supra* note 11, at 1930.

[19] *See* Robin West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1188 (1996) (describing the good lawyer as one who is "humanistic and literary rather than either autonomously professional or tied to scientific or economic ideals").

[20] *See generally* Deborah Waire Post, *Approaches to Teaching Contracts: Teaching Interdisciplinary: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247 (2000).

Most important to a casebook, though, are cases where the stories of women and other Outsiders are central to the story of the law. These cases illustrate what it means to apply a neutral rule in a world where power and resources are distributed unevenly and inequitably. As distorted as appellate decisions are—stripping from the stories of human conflict the passions that motivated the contestants; substituting in their place a passion for rules, reason or logic[21]—it is sometimes still possible for students to hear a voice or voices demanding justice.

The case nominated for addition to the canon to illustrate this perspective as pedagogical strategy is *United States ex. Rel. Trane Co. v. Bond*, a duress case decided in 1991 by the Maryland Court of Appeals.[22] I also recommend an excerpt from *All God's Dangers: The Life of Nate Shaw*, by Theodore Rosengarten[23] and a *Note on Wife Beating, Financing Practices and Third Party Duress*,[24] which we include in our casebook. It is possible using these materials to cover the doctrine of duress, to raise issues about the effect of a neutral rule on a particular class of individuals, to illustrate Outsider jurisprudence or the jurisprudential method called "multiple consciousness" advocated by Mari Matsuda,[25] and to engage in what has been called "reconstructive jurisprudence,"[26] engaging students in the process of imagining a revised version of the duress doctrine.

II. THE DOCTRINE OF DURESS: A STUDY IN LEGAL EVOLUTION AND LIBERALIZATION

In *Bond*, a woman claims that her husband forced her to sign a surety agreement so that he could get a government contract. The case lays out the doc-

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[21] *See generally* the discussion of a secular-rational model of the law in HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION, (Abingdon Press, 1974). "The legal man, like his brother economic man, is conceived as one who uses his head and suppresses his dreams, his convictions, his passions, his concern with ultimate purposes." *Id.* at 27.

[22] United States *ex rel.* Trane Co. v. Bond, 586 A.2d 734 (Md. 1991) (clarifying the doctrine of duress in Maryland for a federal district court).

[23] THEODORE ROSENGARTEN, ALL GOD'S DANGERS, THE LIFE OF NATE SHAW 31-32 (Alfred A. Knopf 1974) excerpted in KASTELY ET AL., *supra* note 7 at 560-61. Nate Shaw is the pseudonym for Ned Cobb, a tenant farmer living in Tallapoosa County, Alabama, who joined the Sharecroppers Union, an organization organized in 1931 to oppose the mass evictions and the injustices that were suffered by tenant farmers, sharecroppers and agricultural workers. All God's Dangers is an oral history compiled by Theodore Rosengarten from interviews with Cobb.

[24] KASTELY ET AL., *supra* note 7 at 561-63.

[25] *See* Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RIGHTS L. REP. 7 (1989).

[26] *See* Angela Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994).

trine of duress in a very thorough way. It cites to sections 174 and 175 of the *Restatement (Second) of Contracts*,[27] as well as the predecessor version of the rule in the *Restatement (First) of Contracts*. It includes quotes from *Blackstone's Commentaries*[28] as well as citations to and quotations from an early decision written by Oliver Wendell Holmes, *Fairbanks v. Snow*.[29]

Most casebooks include one or more cases to explain and illustrate the doctrine of duress. The common law dichotomy between duress by physical compulsion and duress by wrongful threat, between void contracts and voidable contracts, is easy enough to teach, especially when we throw in a little history. In the past, we say, the defense of duress was narrowly circumscribed, available only to those victims who could show physical compulsion of such magnitude that the victim was no more than "a mere mechanical instrument."[30] This is language that appears in both Restatements, First and Second, inspired, no doubt, by the example of duress by physical compulsion used by Holmes in *Fairbanks*. Holmes wrote, "No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, the signature would not have been her act."[31] The instrument or document would be signed

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[27] Recently there have been discussions and admonitions among contracts faculty about the risks of teaching students from the Restatement. A quick survey of the case law on duress supported my assumption that the Restatement is a text that is often cited and discussed by courts, even when they do not explicitly adopt the rule contained in a particular section. It is useful to think of the Restatement in this way, as an authoritative text to which scholars, practitioners and judges refer in interpreting and applying the law.

[28] The excerpt from Blackstone's Commentaries which is cited most frequently in duress cases makes a distinction between the justifiable fear an individual has when "mayhem" is threatened, a threat to "life and limb", which will make a contract void for duress, and a situation where there is simply "a fear of battery or being beaten . . . which is no duress." Nor is a threat to burn a home or destroy or take property from the victim sufficient to establish duress "because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb." SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69 (1938).

[29] 13 N.E. 596 (Mass. 1887).

[30] RESTATEMENT (FIRST) OF CONTRACTS § 494(b) (1932) ("[I]f the party under compulsion . . . is a mere mechanical instrument without directing will in performing the acts apparently manifesting assent" the contract was void."). This reference to a "mechanical instrument" is not present in Restatement (Second) of Contracts § 174 but is included in Comment A of that section.

[31] *Fairbanks*, 13 N.E. at 598. This is, in fact, an illustration used in the Second Restatement.

> A presents to B, who is physically weaker than A, a written contract prepared for B's signature and demands that B sign it. B refuses. A grasps B's hand and compels B by physical force to write his name. B's signature is not effective as a manifestation of his assent, and there is no contract.

RESTATEMENT (SECOND) OF CONTRACTS, § 174 illus. 1 (1981).

by a person who had been transformed, metaphorically speaking, into an inanimate object is not a contract.

In *Blackstone's Commentaries*, the distinction drawn between threats of battery or property destruction and threats to life and limb is logically dependent on two assumptions: the efficacy of legal remedies in the former case and the belief that the person threatened with "slight injury to the person or with loss of property, ought to have the resolution to resist such a threat."[32] It is often suggested that the Restatements First and Second have rejected this distinction since the doctrine of duress is no longer restricted to those cases where there is fear of loss of life, loss of limb, mayhem and imprisonment. Instead a more liberal and expansive description of duress refers to a "wrongful threat."[33] The distinction is preserved, in the requirement that the will of the victim be overborne, in the requirement that the victim show that an action for breach of contract would not be adequate remedy, and most importantly, in the creation of two kinds of duress: one which results in a void contract, and one which makes a contract voidable.[34] The person whose will has been overborne, not out of moral weakness but because of physical compulsion, is void, unenforceable by either the party who exerted force or, more importantly for the purposes of this discussion, by an innocent party to the contract even if he or she or it gave "value or materially relie[d] on the transaction." In contrast, when the will has been overcome not by physical compulsion but by a threat of violence, then the contract is only voidable, not void, and duress is no defense against the claims of an innocent party to the contract.[35]

All law students learn to live with dichotomies, and the doctrine of duress is no exception. They accept such distinctions without probing too deeply into

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[32] United States *ex rel.* Trane Co. v. Bond, 586 A.2d 734, 737-38 (Md. 1991) (quoting Brown v. Pierce, 74 U.S. 205, 215-16 (1868)). *See also* Blackstone, Commentaries, *supra* note 28.

[33] *See e.g.* Fox v. Piercey, Chief of the Fire Department, 227 P.2d 763 (Utah 1951) (comparing the 20th century version of duress with that described by Lord Coke in the 17th Century and Blackstone in the 18th Century "The doctrine of duress has developed through certain distinct steps since the time above referred to. A broader and more liberal view allowed the defense where other acts and threats than those specified by Lord Coke could constitute duress. . . .").

[34] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 174 (When Duress by Physical Compulsion Prevents Formation of a Contract) and 175 (When Duress by Threat Makes A Contract Voidable).

[35] *Bond*, 586 A.2d at 737-38 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981)). The doctrine of duress is no defense where the duress was exerted by one "who is not a party to the transaction." In the case of Lorna Bond, both she and her husband were parties to the contracts in question but it was the third party who sought to enforce the contract against Lorna Bond. The innocent party to the contract, one who had no "reason to know" of the coercion, may recover if he gave "value or relies materially on the transaction." *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981)).

the justification for them. If students wonder, occasionally, why the law requires that a victim have sufficient will to withstand a threat to burn down his house or punch her in the face, or why a person so threatened would be happy with money damages if the threat were carried out, they simply dismiss such misgivings and soldier on.

We encourage this uncritical attitude. Law professors play an important role in constructing and in instructing our students in a narrative about doctrinal history. The duress doctrine has a long and venerable tradition and the authority of the authors, in this instance Holmes and Blackstone, their prestige and status, lend weight to arguments that do not seem logical or even accurate when compared with what we know of human nature or human relationships. Certainly, no reasonable human being would be comforted by the idea that a lawsuit might bring him or her recompense for lost property or physical injury. The only explanation we offer them is our assurances that although the categories appear to remain intact and the language we use is remarkably similar, the law is very different today. We now have the doctrine of economic duress.

Duress is most often taught using a case illustrating economic duress, like *Austin Instrument, Inc. v. Loral Corp.*[36] There is a threat, not to property or physical integrity, but a threat that puts a business in jeopardy. The business might lose money and/or contracts. This kind of threat, the court tells us, "preclude[s] the exercise of free will."[37] The court in *Austin Instrument* also concludes that "the ordinary remedy of an action for breach of contract would not be adequate."[38]

"Will" is featured prominently in the doctrine of duress. Anyone who seeks to use this defense must show that his or her will was "overborne." I have always been troubled by this conception of free will, especially when its invocation deprives the person who is supposed to have "free will" of the right to a remedy for a wrongful act by the other party to the contract. Of the two parties to a transaction where there has been duress, the greater sin is to be weak-willed.

If there is some comfort in *Austin Instrument*, and in the *Restatement (Second)*, it is in their more modest expectations and the more realistic view of human nature. The court in *Austin Instrument* is not holding the victim to a very high standard with respect to its ability to resist the threat. The lowering of expectations—me might see this as further evidence of a general moral decline in the United States, but I do not—moved gradually from that of a "constant and courageous man" to a man of "ordinary firmness" to what

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[36] 272 N.E. 2d 533 (N.Y. 1971).

[37] *Id.* at 535.

[38] *Id.*

courts now refer to as a subjective test—was this victim unable to resist the threats.[39]

The commentary to the current *Restatement* abandons the reference to will, substituting a standard that asks whether there was a reasonable alternative available to the person who claims duress.[40] The reference to will is rejected as vague and impracticable,[41] but that has not discouraged courts, which continue to use it.[42]

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[39] In 1936, the Supreme Court of Virginia in *Ellis v. The Peoples National Bank*, 186 S.E. 9 (Va. 1936), traced the changes in the doctrine of duress with respect to the standard to which the victim was held. The "three well defined periods of development" in the doctrine began with "ancient authorities" that held the victim to the standard of a "constant and courageous man of his free will." *Id.* at 10. This was followed by a standard that referred to "a person of ordinary firmness or courage." *Id.* Finally, all standards were abandoned and the question was simply whether the will of the victim was actually overcome. *Id.*

[40] RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. b (1981).

[41] *Id.*

[42] New York, the jurisdiction which decided *Austin Instruments*, has seen considerable retrenchment with respect to the issue of will, or the lack of it, at least on the part of the federal courts. *See, e.g.*, Davis & Assoc. Inc. v. Health Management Services Inc., 168 F. Supp. 2d 109 (S.D.N.Y. 2001) (sophisticated commercial actors "can avoid a contract on the basis of duress only in "extreme and extraordinary cases." Plaintiff must show that the defendant's wrongful act deprived him of his free will. To prove "preclusion of free will" the party claiming duress must show "irreparable harm "—there are no "adequate remedies at law."). *See also* Theissen v. Gen. Elec. Capital Corp., 232 F. Supp. 2d 1230 (D. Kan. 2002) (Federal court applying Kansas law held that releases of age discrimination claims were not void because of economic duress. The employees who signed the releases had not been threatened and financial distress on the part of the employees would not be sufficient to overcome the will of person of ordinary firmness.); BSI Rentals Inc. v. Wendt, 2004 Ala. Civ. App. Lexis 36 (2004) (Defendant who was sued by a car rental company for damages to a car she rented did not prove duress. "Wendt failed to submit any evidence that indicated that Valieant (sales agent) exerted such pressure as to overcome her will and thereby coerce her into signing the contract."); Singh v. Batta Env't Assoc. Inc. 2003 Del. Ch. LEXIS 59 (Del. Ch. 2003) (The Delaware court held that a contract with a non-compete clause was not voidable because the employee could not prove duress. There had been no "wrongful act that overcame the will" of the employee and there was no evidence that "he lacked adequate means to protect himself from exploitation."); Lundy v. Airtouch Communications Inc., 81 F. Supp. 2d 962 (D. Ariz. 1999) (release signed at time of resignation by an employee alleging retaliatory discharge was not signed under duress because plaintiff was "sophisticated" and had extensive business experience. The threat to fire him if he did not resign, which would have caused him to lose stock options, was not sufficient to "preclude the exercise by him of his free will and judgment").

The cases most like Trane involve women who allege that their husbands previously beat them and then threatened them with physical harm to get them to sign a contract. *See, e.g.*, Brown v. Brown, 863 S.W.2d 432, 434 (Tenn. Ct. App. 1993) (Marriage dissolution agreement was not voidable because husband "had been violent at times during the marriage and she (the wife) was afraid not to sign the documents." There was no duress because there was no "overt threat of present harm." Duress requires proof of a "coercive event . . . of such severity, either threatened, impending or actually inflicted, so as to overcome the mind and will of a person of

In a manner consistent with the "dominant legal tradition" as Robert Gordon has described it, history provides a backdrop in duress cases, a point of reference that makes it clear that the law has changed or "evolved."[43] Science, technology and the law march forward in an inexorable linear progression towards perfection. Alternatively, we have a story about the law and its responsiveness to social change.[44] We cite sections 175 and 176 of the *Restatement (Second) of Contracts*, more expansive and more liberal in its definition of a "wrongful threat," a change meant to reform the common law rules that produced inequitable and unfair results.

III. THE "UNTHINKABLE STORIES" IN THE HISTORY OF DURESS

This history of duress is, of course, incomplete. As a teacher, a person of African descent, a woman, I think we should consider Carolyn Heilbrun's admonition. "[W]e must begin to tell the truth, in groups, to one another.

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ordinary firmness." *Compare* Intravia v. Intravia, 2003 Conn. Super. LEXIS 2805 (Conn. Super. 2003) (the test for duress in domestic relations matters is that the person claiming duress must show that she was induced to sign the contract "not as an exercise of her own free will, but because she had no reasonable alternative in light of the circumstances as she perceived them."). *See also* Jenks. v. Jenks, 657 A.2d 1107 (Conn. 1995).

Duress is most likely to be found in cases where there is a "hold up" in the sense that gave rise to the problematic and over-inclusive "pre-existing duty rule." Kapila v. Guiseppe Am. Inc., 817 So. 2d 866 (Fla. Dist. Ct. App. 2002) (Accountant hired to act as expert in litigation submitted an extraordinarily high bill to the client and refused to testify on its behalf, warning that he had been subpoenaed by the opposing side, until the bill had been paid. Court held that although the contract gave him the right to refuse to testify unless his bills had been paid, the size of the bill combined with the client's imminent trial meant that the threat not to appear was sufficient to "overcome the mind and will of a person of ordinary firmness." The plaintiff's payment of the bill was not "voluntary because the "threatened exercise of power" by the defendant left the plaintiff with "no means of immediate relief other than making the payment."); Mason v. Arizona Loan Marketing Assistance Corp., 300 B.R. 160, (B. Court D. Conn. 2003)(relying on the RESTATEMENT (FIRST) OF CONTRACTS 492(b) (1932) court held that threat by collection agency that debtor would be "subject to arrest and federal incarceration" if she did not sign loan consolidation agreement was sufficient to create "such fear as precludes" the exercise of "free will and judgment." The contract was void *ab initio* and the test for duress was subjective. Citing the commentary to the RESTATEMENT (SECOND) OF CONTRACTS, the court writes: "The fundamental question is whether the threat actually induced assent, not whether succumbing to the threat was objectively reasonable.").

Even if the idea of "will" is not introduced, the concept of "voluntariness" is at the heart of most explanations of the duress doctrine. *See* Richards v. Allianz Life Ins. Co. of N. Am., 62 P.3d 320 (N.M. Ct. App. 2002) (Judge Bustamonte writes that the "fundamental issue in duress cases is whether the statement which induced the agreement is of the type of offer to deal that the law should discourage as oppressive and improper." He reminds the lower court that duress must be "wrongful" so as not to make "hard but truly voluntary bargains" voidable).

[43] Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 61-66 (1984).

[44] *Id.*

Modern feminism," she reminds us, "began that way, and we have lost, through shame or fear of ridicule, that important collective phenomenon."[45] If Carolyn Heilbrun and the other feminists are right, "power consists to a large extent in deciding what stories will be told . . . [and] male power has made certain stories unthinkable."[46] For those who subscribe to the principle that half-truths are not truth at all; that material omissions make what has been said misleading, it may be important to revisit and "reinscribe" this tale. As law professors, we should begin by examining the story Oliver Wendell Holmes did not tell when he wrote the decision in *Fairbanks v. Snow*.[47]

Fairbanks was a suit by a creditor against a woman who claimed as a defense that her husband threatened her and forced her to sign the promissory note the plaintiff sought to enforce. The history that Holmes decided to ignore, distinguishing *Loomis v. Ruck*,[48] a New York case to which I will return to a little later, is discussed in some detail in *Bond*.[49] It is a different history from the history that is told when we assign and teach cases on economic duress or even cases involving prenuptial agreements. It is a history of the struggle by women to gain civil status and control over their own property. It is a story about marital status and the law of coverture,[50] an idea that was and is a site of cultural, political and economic contestation.[51] The narratives in these stories, the cases that record the struggle to establish a "public policy" consistent with the "natural laws" that governed the relationship of husband and wife, feature husbands that are "feckless and unlucky," "stingy and cruel," "impecunious and opportunistic, seductive manipulators and/or brutal tyrants."[52] Marriage might mean the unity of man and woman, but the law, often at the behest of fathers of married women, recognized that this

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[45] CAROLYN G. HEILBRUN, WRITING A WOMAN'S LIFE 45 (1988).

[46] *Id.* at 43-44.

[47] 153 N.E. 596 (Mass. 1887)

[48] 56 N.Y. 462 (1874).

[49] United States *ex rel.* Trane Co. v. Bond, 586 A.2d 734 (Md. 1991).

[50] For a list of sources on coverture *see generally* Claudia Zaher, *When A Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002).

[51] The fathers of daughters and the men they married struggled over the married woman's separate property. While coverture reigned, this battle produced inconsistent rules with respect to the ability of the wife to manage and alienate her own property—personal as well as real—with courts siding sometimes with the father and sometimes with the creditors. *Id.* at 459-63. The seventeenth and eighteenth century courts constructed doctrines that enforced contractual agreements transferring income or property to wives, but limited the ability of women to enforce the contracts; to retain the property or to alienate it if they wished. *See* SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660–1833 (1990). For a discussion of this struggle in the United States, *see* PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION (Paul L. Murphy ed., 1980).

[52] STAVES, *supra* note 51, at 133-45.

affinal relationship was unequal, and that it could be and often was exploitive or at least adversarial. The nineteenth century saw the enactment of Married Women's Property Acts which were explicit: the "real and personal property of any female who shall hereafter marry . . . shall be protected from the debts of the husband and not in any way be liable for the payment thereof."[53]

The Maryland court (or counsel for Lorna Bond) retrieved this story from the not so distant past. The court discussed the extraordinary lengths to which legislatures and some courts went to protect women from husbands acting out of a sense of entitlement unaltered by the enactment of legislation. At one point, however short-lived, legislation in Maryland required an acknowledgement that the wife signed voluntarily and freely, and still an early Maryland court found this protection insufficient, the expression of will it considered suspect. If a wife could be forced to co-sign a loan or put her property up as security, she could be forced to sign an acknowledgment that said she was acting freely and voluntarily.[54]

Whether legislative creations such as special acknowledgements or the oversight of courts deterred husbands or merely gave legitimacy to the contracts they forced their wives to sign, is hard to say. Whether courts were conscientious in the enforcement of the letter and the spirit of the law might depend on the judge's political sensibilities and his attitude towards the redistribution of power promoted by such legislation. But in Maryland, there were at least three early cases in which courts dismissed the claims of a husband's creditors against a wife when she claimed that she had been forced by her husband to enter into a contract with the plaintiff.[55]

Bond, and its precedent, the common law cases on which the court relies, are problematic because they are third party duress cases. The one part of the duress doctrine that seems logical or intuitively correct is the treatment of parties to the contract who played no part in acts of coercion or force. Students agree on the innocence of the banker, the buyer, the service provider, and the fact of his injury. In the moral language of contemporary contract law, the plaintiff relied on the promise of the defendant in giving value according to the terms of the contract. The innocent party to the contract cannot and should not be held responsible for the acts of any third person. If he is not allowed to recover, there might be a problem with unjust enrichment, a

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[53] Acts 1841, 1853, Md. Code Ann. Art 45 § 1 and the Maryland Constitution protect the property of married women from the debts of the husband. A description of the "liberation" of married women from the "strictures of the common law" is described in Joyce v. Joyce, 276 A.2d 692, 694 n.4 (Md. Ct. Spec. App. 1970)

[54] United States *ex rel.* Trane Co. v. Bond, 586 A.2d 734, 736 (Md. 1991) (citing Central Bank of Frederick v. Copeland, 18 Md. 305, 318 (1862)).

[55] *See Copeland*, 18 Md. 305; Whitridge v. Barry, 42 Md. 140 (1875); First Nat'l Bank v. Eccleston, 48 Md. 145 (1878).

windfall or unearned benefit. As Holmes put it, "[a] party to a contract has no concern with the motives of the other party for making it, if he neither knows them nor is responsible for their existence."[56]

It is this riff on duress, this variation on the basic facts of duress, eminently fair in its balancing of the interests of two parties, neither of whom has done anything wrong, that is at issue in *Bond*.[57] The United States District Court for the District of Columbia certified the following question to the Court of Appeals of Maryland: "Whether a party whose consent to entering a contract is coerced may assert the defense of duress against a party who neither knew of nor participated in the infliction of the coercive acts."[58]

Lorna Bond's story is familiar. She said her husband Albert "physically threatened her and abused her to coerce her to sign a number of documents, including the payment bond, and would not answer her questions regarding their content."[59] In affidavits submitted in two other suits brought by surety companies for indemnity on bonds issued on behalf of Mech-Con Corporation, a construction company owned by Albert Bond, Lorna Bond stated that her husband threatened her. "If I didn't move fast enough or do as he said, he would physically attack me, break up household items, threaten to throw me out of the house."

While most courts honor and confirm the common law distinctions, now restated in *Restatement (Second) of Contracts* sections 174 and 175, between physical duress and duress by wrongful threat, the Maryland court used women's history to erase this distinction in *Bond*, a case where the wife/ woman argued that she had been the victim of domestic violence. The court discussed and then rejected the rules in *Restatement (Second) of Contracts* sections 174 and 175. The distinction between physical compulsion and wrongful threat is explicitly rejected as unnecessarily inflexible. Instead the court adopted the following rule:

> [A] contract may be held void where, in addition to actual physical compulsion, a threat of imminent physical violence is exerted upon the victim of such magnitude as to cause a reasonable person, in the circumstances, to fear loss of life, or serious physical injury, or actual imprisonment for refusal to sign the document.[60]

This is reducible to a two part test: (1) the threat must be one of imminent physical force; and (2) the victim's fear of imminent physical harm must be reasonable.

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[56] Fairbanks v. Snow, N.E. 596, 598-99 (Mass. 1887).

[57] *See Bond*, 586 A.2d at 734.

[58] *Id.* at 735.

[59] *Id.*

[60] *Id.* at 740.

The Maryland court concludes, erroneously, that the Restatement (Second) has abandoned a subjective test that focuses on the fear experienced by the person who has been threatened. While there is no reference to overcoming the will of the person claiming duress, the issues of character and perception have been folded into the requirement of inducement. [61] In contrast, the test constructed by the Maryland court may appear to be a subjective test because it focuses on the perception or state of mind of the victim, but the perception must be "reasonable." Focusing attention on the experience of the victim of duress and denominating it a "subjective test" does not necessarily advance the interests of women. There is a basis for Holmes' comment that "older writers likened duress to infancy."[62] In earlier cases, in order to prove that her will was overborne, a woman would have to argue that she was physically incapacitated by the duress or that her mind was weakened as she was driven to distraction by the abusive husband.

My argument is not with the focus on what women experience but with our pretense that it is entirely individual and personal or that differences between individuals are simply a matter of character, rather than position or power.[63] The test is only subjective if we assume that those who are powerful do not understand or appreciate the effect of their actions on those who are subordinate to them or that they do not intend their behavior to have that effect. That would make oppression an accident rather than an instrument employed by those who use force and threats in order to maintain or retain power. It perpetuates a vision of the law expressed in the commentary to the *Restatement (Second) of Contracts* § 175, that an "under the circumstances" test is appropriate because "[p]ersons of a weaker or cowardly nature are the very ones that need protection."[64]

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[61] RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. a (1981).

[62] Fairbanks v. Snow, 13 N.E. 596, 598 (Mass. 1887).

[63] The focus on character is amply illustrated by the comment to the section on duress by wrongful threats.

> Threats that would suffice to induce assent by one person may not suffice to induce assent by another. All attendant circumstances must be considered, including such matters as the age, background and relationship of the parties. Persons of a weak or cowardly nature are the very ones that need protection; the courageous can usually protect themselves. Timid and inexperienced persons are particularly subject to threats, and it does not lie in the mouths of the unscrupulous to excuse their imposition on such persons on the ground of their victims infirmities.

RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. c.

[64] *Id.* This same language also appears in RESTATEMENT (FIRST) OF CONTRACTS § 492 cmt. a (1932). If an objective test is applied, if the standard is that of a reasonable person, there is no reason why the reasonableness of any perception should not take into consideration the dominant position of an aggressor and the subordinate status of the victim.

Our students find it hard to use the word "oppression." It does not come naturally to them. That is the advantage of using a case like *Bond*. When we focus on economic duress, we lose a valuable opportunity to explore the meaning of oppression; the social, political and economic aspects of oppression; and the connection between status or position and oppression. The economic exigencies that arise in the performance of a contract invite predatory behavior, but this is exploitation, not oppression. When we discuss only economic duress, we direct our students' attention away from acts of oppression the law sanctions by its silence. We direct our students' attention away from the role law plays in creating and maintaining structures of subordination. We do not give them the chance to consider how the law might look if we were serious about creating a law of contracts that grapples with inequalities that exist—not just between individuals, but between groups or classes of people.

The economic duress cases, and the use of *Restatement (Second) of Contracts* section 176(2) in recent cases, flirt with the idea of power. Duress is normative, tainted by tort, and ridiculed by those who believe that behavior in the realm of economic exchange can and should be negotiated or, for those who control the terms of the "bargain" with standard form contracts, a matter of self-regulation.

IV. OUTSIDER JURISPRUDENCE AS A WAY OF KNOWING

According to the lawyer who represented Ms. Bond in this lawsuit, the decision in *Bond* apparently caused a stir in academic circles, particularly among scholars who are concerned with the rights of creditors. Attitudes towards creditors, as a class, vary. The attitude has varied over time and by region. Sometimes it is appropriate to remind students that not everyone sees the actions of creditors or business people as self-interested and rational economic choice.

Critical theory, femcrit and racecrit offer a methodology that is explicitly political. Critical methodology examines the law from the perspective of those who are least powerful in society—the Outsiders who have or had little to do with the creation of legal rules that affect their lives. Some might be tempted to dismiss the *Bond* case as essentialist, which is why we pair it with an excerpt from the autobiography of Nate Shaw that challenges these assumptions about creditors.

As Shaw points out, creditors certainly know their rights. The bankers with whom he dealt were not like the black sharecroppers at the turn of the century, like Nate Shaw, for whom the law was, as Shaw describes it, "a great, dark secret."[65] What Shaw has to tell us about the behavior of creditors he learned

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[65] ROSENGARTEN, *supra* note 23, at 32.

Ned Cobb a.k.a. Nate Shaw: a constant and courageous man
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from experience, his father's, his own and the experience of the other sharecroppers around him. The banks and the planters who provided the seed and furnishings for sharecroppers always wanted the signature of their wives on the notes. "Well, what was that for?" he asks.[66]

If we look at the behavior of creditors from the perspective of Nate Shaw, we might ask the same question. Why do creditors today routinely ask for the signature of the wife on loan documents and guarantees?[67] Or we might also ask why any man would want to put his wife's income and property at risk

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[66] *Id.*

[67] The battle over the use of a wife's property and earning capacity as security for a husband's debts now is fought out in terms of the statutory protection afforded women under the Fair Credit Opportunity Act. A wife can avoid liability if she can show that her husband was creditworthy. This protection obviously does not help the wife with an impecunious and improvident husband. It is also not a defense that can be raised in a suit by a surety company on a personal guarantee. It would not have helped Lorna Bond. *See generally* Andrea Michele Farley, *Note: The Spousal Defense—A Ploy to Escape Payment or Simple Application of the Equal Credit Opportunity Act*, 49 VAND. L. REV. 1287 (1996).

along with his own after we hear Nate Shaw explain why he refused this demand on the part of his creditors. He knew that if his wife signed, it would give the creditor the right to "go in the house and get her (his wife's) stuff."[68] Nate Shaw understood that his wife's property was her own because he understood the connection between property and human dignity.

This is not a line of reasoning that students, men and women, understand. As they see it, the family is an economic unit, a partnership, the wife benefits in a form of domestic trickle down economics from the husband's business. He supports her and so it is perfectly appropriate for her to co-sign when he negotiates a loan for his business.[69] This is, I believe, an example of the law of unintended consequences. When we argue that marriage is a partnership, in an attempt to promote the idea that a woman's work in the home has value, do we undermine her ability to protect her own property and her own income from her husband's creditors?

Banks and other creditors argue that the protections afforded the spouse of a debtor under tenancy by the entirety make the signature of a spouse who has no interest in a business necessary even though there has been some erosion recently of those protections.[70] A judgment against the spouse who does not have an interest in the business much more than the right to foreclose on jointly owned property. It gives creditors like those in *Bond* a judgment that may be satisfied by out of separate property and future wages of the non-owner, non-debtor spouse.

Now here is where the facts in *Bond* come into play. Lorna Bond was sued separately and individually on the contract. She was sued by Wausau for $171,316.50 already paid out on an indemnity contract and for $193,106.50 that Wausau set up in a reserve to cover future losses under its bonds.[71] She was also the defendant in a suit, *United States ex rel. H.G. Kogok Co. v. Bond*.[72] The Trane Company was the third company to sue Lorna Bond. The amount of money at stake here was substantial.

Or we could ask a related but different question about creditors. What do banks know about the risk of violence when a man must have his wife's

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[68] *Id.*

[69] Their intuition, or rather the meaning they assign to marriage as a social institution, is consistent with the practices of judges and the policies advocated by some bankruptcy judges. *See, e.g.*, A. Mechele Dickerson, *To Love, Honor and (Oh!) Pay: Should Spouses be Forced to Pay Each Others Debts?* 78 B.U. L. REV. 961 (1998) and the criticism of this theory which invokes coverture, Robert B. Chapman, *Coverture and Cooperation: the Firm, The Market, and The Substantive Consolidation of Married Debtors*, 17 BANKR. DEV. J. 105 (2000).

[70] *See* Amy B. Broockerd, *United States v. Craft: Pulling the Stakes Out from Under Tenancy By the Entirety*, 71 UMKC L. REV. 731 (2003).

[71] Employers Ins. of Wausau v. Bond, CIV.A.HAR-90-1139, 1991 U.S. Dist. LEXIS 951, at *2 (D. Md. Jan. 25, 1991).

[72] *Id.* at *8 n.7.

signature in order to get a loan or a surety bond? Feminists have been successful in changing public perceptions of domestic violence in part because they have been able to tell this story and to document the prevalence of the problem. We use an excerpt from Congressional hearings[73] but you can also take students to the reports issued by the Bureau of Justice Statistics.[74] The numbers have been declining since 1993, but still the numbers are significant. Excluding homicide, there were about 900,000 violent offenses against women in 1998. About half of these involved a physical injury and forty percent required medical treatment. The rate in 1998 was about 621 women per 100,000 suffering simple or aggravated assault. In 2001 the total number of violent offenses against women declined to 600,000. Of that number 500,000 reported simple or aggravated assault. The rates of violence were significantly lower, for suburban dwellers and for persons with incomes over $50,000 a year. Given what we have learned about violence against women from these statistics and from other sources, the question we might want to ask is whether the behavior of creditors creates a substantial risk of domestic violence.[75]

V. OUTSIDER JURISPRUDENCE AND REFORM OF THE DOCTRINE OF DURESS

A class that features the stories of Others and the jurisprudence of Others should probably end with a question. Is it possible to imagine a rule that: (1) does not violate the ideal of autonomy and freedom of contract; (2) pays sufficient attention to the history of domination and subordination in this society while promoting the dignity of those who have experienced oppression; and (3) removes incentives for overreaching, exploitive or oppressive behavior.

We could remind our students that they have a number of tools to work with: presumptions, law and economics and the "rational economic actor," and the doctrine of consideration. I mention consideration because, in *Loomis v. Ruck*,[76] the court held that the plaintiff creditor, a holder in due course, could not recover on a note executed by a wife when her husband "intimidated her into signing it, by threats of personal violence,"[77] and where the note was

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[73] KASTELY ET AL., *supra* note 7, at 583-85.

[74] CALLIE MARIE RENNISON, PH.D & SARAH WELCHANS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, INTIMATE PARTNER VIOLENCE (2000); BUREAU OF JUSTICE STATISTIC, CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003).

[75] *See* David L. Littleton, *Survey: Developments in Maryland Law, 1990-91*, 51 MD. L. REV. 571, 577 (1992) ("Lorna Bond can be perceived as a spousal abuse victim and a person of limited means, being pursued by the United States government for a debt incurred by her husband's business. When the defendant is described in these terms, the result reached in Bond appears to be just.").

[76] 56 N.Y. 462 (1874).

[77] *Id.* at 464.

neither for "the benefit of her separate estate,"[78] nor did it represent a debt incurred by her "in the course of any separate business carried on by her."[79]

VI. CONCLUSION

Part of the project of those who bring new voices, perspectives and theories into the classroom is to stimulate students to think creatively and imaginatively. We ask them to listen to the stories they may not have heard in the past, to think of these stories as their own, not just those of someone who is an Other, and to imagine a just society and the role the law can play in creating that just society. To that end, we need new voices, new people in teaching or old teachers speaking with a new voice, and we need to reconsider the content of the canons of contracts law.

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[78] *Id.*

[79] *Id.*

Contracts Teaching: A Bibliography

Rachel Arnow-Richman*

The following bibliography was developed on behalf of the American Association of Law Schools ("AALS") Section on Contracts.[1] It consists of sources that section members found helpful when they began teaching, including resources on contract doctrine, reviews of casebooks, articles on contracts theory, and other materials, which will hopefully assist those new to the course in tackling the subject matter.

To those who are also new to the Academy, the section membership wishes you a special welcome. You are fortunate to have the most exciting and interesting course of the first-year curriculum as part of your teaching package.[2] Right now, of course, you are probably not thinking about the joys of contract law. More likely you are frantically coordinating a long-distance move, tying up loose ends at your current job, and preparing for a new career, while simultaneously being haunted by nightmares of your own first-year contracts class.[3] Fortunately, the AALS Contracts Section is here to help.

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* Assistant Professor, Denver University College of Law. This bibliography is the result of a group effort by the AALS Contracts Section membership. Thank you to the many individuals who submitted citations and suggestions. Special thanks to Hazel Beh (Chair, 2003) and the Executive Committee.

[1] The AALS is a non-profit association of 166 American law schools whose goal is "the improvement of the legal profession through legal education." AALS, *What is the AALS?*, at http://www.aals.org/about.html. (last visited Mar. 14, 2004). It serves as a learned society for law teachers and is legal education's principal representative to the government and other higher education organizations and societies. *Id.* The Section on Contracts is one of 78 AALS sections composed of members of the faculty and administration of member schools. *See* AALS, *AALS Section on Contracts*, *at* http://www.aalscontracts.org/index.html (last visited Mar. 14, 2004).

[2] If you were not aware, or are not convinced, that contracts is the best course to teach in the first year of law school, if not in the entire law school curriculum, *see* Robert A. Hillman & Robert S. Summers, *The Best Law School Subject*, 21 SEATTLE U. L. REV. 735, 735 (1998), who make the following observations about the first year contracts course:

> What other subject contains such a wealth of theory, doctrine, and substantive reasoning? What other subject focuses so clearly on essential components of economic and other organization in our society, namely private agreements and exchange transactions? What subject better exemplifies the power of general theory, the functions and limits of the common law, the rise of statutory law, the interaction of right and remedy, and the role of various legal actors in our system?

[3] If it is any consolation, know that many of the most accomplished legal academics and practitioners similarly find themselves unable to overcome such unpleasant memories. *See* Panel Discussion, *The Future of Airline Travel*, 67 J. AIR. L. & COM. 29, 31 (2002), in which decorated Air Force pilot and best-selling author John Nance remarked, on the occasion of moderating a panel at his Alma Mater, Southern Methodist University, Dedman School of Law, "It's always wonderful to be back in my law school here. And Dean, this time I have read the case. I still have nightmares about being unprepared in my law school [classes]." *Id.*

In addition to this bibliography, the AALS Contracts Section offers an array of other resources for both entering and experienced contracts teachers. Many of these are available on the Section website, which includes visual aids for teaching, archived information about cases, links to other websites, and instructions on how to subscribe to the Section listserv.[4] On the listserv, you are invited to ask questions about contract law or teaching to faculty all over the country and abroad. To be sure, none of their responses are likely to agree with each other, but dialogue and debate are the bread and butter of our profession.

A few disclaimers are in order.[5] First, this bibliography aims to provide a manageable list of resources that will be helpful to a new teacher with limited time. Therefore, it does not purport to be comprehensive. An extensive bibliography of contracts scholarship is available on the Section website.[6] Second, the groupings that follow are less than discrete, and many of the resources listed could fairly be categorized under several different headings. Finally, the Section disclaims any responsibility for how your first time teaching contracts actually goes.[7]

Good luck.

Selecting a casebook

Sidney W. Delong *An Agnostic's Bible,* 20 SEATTLE U. L. REV. 295 (1997) (reviewing ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE (3d ed. 1996)).

Michael B. Kelly, *Reflection on Barnett's Contracts, Cases and Doctrine*, 20 SEATTLE U. L. REV. 343 (1997) (reviewing RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE (1995)).

Lenora Ledwon, *Storytelling and Contracts*, 13 YALE J. L. & FEMINISM 117 (2001) (reviewing AMY HILSMAN KASTELY, DEBORAH WAIRE POST & SHARON KANG HOM, CONTRACTING LAW (2d ed. 2000)).

Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEGAL EDUC. 557 (1995).

Kellye Y. Testy, *Intention in Tension,* 20 SEATTLE U. L. REV. 319 (1997) (reviewing RANDY E. BARNETT, CONTRACTS, CASES AND DOCTRINE (1995)).

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[4] *See* AALS, AALS Section on Contracts, *at* http://www.aalscontracts.org. (last visited Mar. 14, 2004).

[5] Would this be a Contracts Section publication without a few disclaimers?

[6] *See* AALS, AALS Section on Contracts, *at* http://www.aalscontracts.org/Scholarship/bibliographytoc.htm. (last visited Mar. 14, 2004).

[7] Only kidding—it will be great!

Geoffrey R. Watson, *A Casebook for all Seasons?*, 20 SEATTLE U. L. REV. 277 (1997) (reviewing ALLAN E. FARNSWORTH & WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS (5th ed. 1995)).

William J. Woodward, Jr., *Clearing the Underbrush for Real-Life Contracting*, 24 L. & SOC. INQUIRY *99* (1999) (reviewing STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD, AND MARK GALANTER, CONTRACTS: LAW IN ACTION (1995)).

Learning the doctrine and its history

E. ALLAN FARNSWORTH, CONTRACTS (2d ed. 1990).

MORTON HORWITZ, *The Triumph of Contract* in THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991).

William S. Dodge, *Teaching the CISG in Contracts*, 50 J. LEGAL. EDUC. 72 (2000).

Joel K. Goldstein, *The Legal Duty Rule and Learning About Rules: A Case Study*, 44 ST. LOUIS U. L.J. 1333 (2000).

James D. Gordon, III, *Teaching Parol Evidence*, 1990 BYU L. REV. 647 (1990).

Peter Linzer, *Consider Consideration*, 44 ST. LOUIS U. L.J. 1317 (2000).

Ian R. Macneil, *Time of Acceptance: Too Many Problems for a Single Rule*, 112 U. PA. L. REV. 947 (1964).

Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565 (2001).

Acquainting yourself with contracts theory and scholarship

P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

RANDY E. BARNETT, PERSPECTIVES ON CONTRACT LAW (2001).

PETER BENSON, THE THEORY OF CONTRACT LAW (2001).

DAVID CAMPBELL, RELATIONAL CONTRACT THEORY: SELECTED WORKS OF IAN MACNEIL (2001).

ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (3d ed. 1999).

RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW (1994).

ROBERT HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997).

PETER LINZER, A CONTRACTS ANTHOLOGY (1995).

MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993).

Jay Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).

L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936).

Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

Developing teaching techniques

Caroline N. Brown, *Teaching Good Faith*, 44 ST. LOUIS U. L.J. 1377 (2000).

Scott J. Burnham, *Drafting in the Contracts Class*, 44 ST. LOUIS U. L.J. 1535 (2000).

Carol Chomsky & Maury Landsman, *Introducing Negotiation and Drafting into the Contracts Classroom*, 44 ST. LOUIS U. L.J. 1545 (2000).

H. Miles Foy III, *Legislation and Pedagogy in Contracts* 101, 44 ST. LOUIS U. L.J. 1273 (2000).

Christopher W. Frost, *Reconsidering the Reliance Interest*, 44 ST. LOUIS U. L.J. 1361 (2000).

Robert A. Hillman, *Enriching Case Reports*, 44 ST. LOUIS U. L.J. 1197 (2000).

Vincent C. Immel, *Use of the Contracts Courses As a Vehicle For Teaching Problem Solving*, 44 ST. LOUIS U. L.J. 1205 (2000).

John Kidwell, *Ruminations on Teaching the Statute of Frauds*, 44 ST. LOUIS U. L.J. 1427 (2000).

Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the Casefile Method*, 44 ST. LOUIS U. L.J. 1289 (2000).

Peter Linzer, *AALS Contracts Transcripts: Teaching Contracts Transactionally*, 34 U. TOL. L. REV. 685 (2003).

Julie Macfarlane & John Manwaring, *Using Problem-Based Learning to Teach First Year Contracts*, 16 J. OF PROF. LEGAL EDUC. 271 (1998). Mark Pettit, Jr., *Exercising with Neri v. Retail Marine Corp.*, 44 ST. LOUIS U. L.J. 1487 (2000).

Peter W. Salsich Jr., *A Property Law Instructor Looks at the Contract Law Course*, 44 ST. LOUIS U. L.J. 1215 (2000).

Edith R. Warkentine, *Kingsfield Doesn't Teach My Contracts Class: Using Contracts to Teach Contracts*, 50 J. LEGAL EDUC. 112 (2000).

Incorporating policy and inter-disciplinary issues

Scott J. Burnham, *Teaching Legal Ethics in Contracts*, 41 J. LEGAL EDUC. 105 (1991).

Christopher L. Eisgruber, *Teaching Law Through Contracts and Cardozo*, 44 ST. LOUIS U. L.J. 1511 (2000).

Susan A. Fitzgibbon, *Teaching Unconscionability Through Agreements to Arbitrate Employment Claims*, 44 ST. LOUIS U. L.J. 1401 (2000).

Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook* 34 AM. U. L. REV. 1065 (1985).

Victor P. Goldberg, *In Search of Best Efforts: Reinterpreting* Bloor v. Falstaff, 44 ST. LOUIS U. L.J. 1465 (2000).

Jeffrey L. Harrison, *Teaching Contracts From a Socioeconomic Perspective*, 44 ST. LOUIS U. L.J. 1233 (2000).

Judith L. Maute, Peevyhouse v. Garland Coal & Mining Co. *Revisited: The Ballad of Willie and Lucille*, 89 N.W. U. L. REV. 1341 (1995).

Deborah Waire Post, *Approaches to Teaching Contracts: Teaching Interdisciplinarily: Law and Literature as Cultural Critique*, 44 ST. LOUIS U. L.J. 1247 (2000).

Carol Sanger, *Great Contracts Cases: (Baby) M is for the Many Things: Why I Start With M*, 44 ST. LOUIS U. L.J. 1443 (2000).

Muriel Morisey Spence, *Teaching* Williams v. Walker-Thomas Furniture Co., 3 TEMP. POL. & CIV. RTS. L. REV. 89 (Fall 1993/Spring 1994).

Miscellany

STEVEN FRIEDLAND & GERALD HESS, TEACHING THE LAW SCHOOL CURRICULUM (2003).

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Clark Byse, *Introductory Comments to the First-Year Class in Contracts*, 78 B.U. L. REV. 59 (1998).

E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406 (1987).

A. W. B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

Judicial Enforcement of "Official" Indigenous Languages: A Comparative Analysis of the Māori and Hawaiian Struggles for Cultural Language Rights

I ka ʻōlelo no ke ola; I ka ʻōlelo no ka make.
In the language rests life; In the language rests death.[1]
Ka ngaro te reo, ka ngaro taua, pera i te ngaro o te Moa.
(If the language be lost, man will be lost, as dead as the moa.)[2]

I. INTRODUCTION

In his 1993 federal employment discrimination lawsuit, Native Hawaiian attorney William E.H. Tagupa, although fluent in the English language, chose to give his deposition in ʻŌlelo Hawaiʻi.[3] He knew this choice was *pono*[4] and viewed it as an opportunity to make a political statement: "To remind the judges who I am and who they are."[5] Moreover, he believed the law was on his side—both state and federal law. The Hawai'i Constitution recognizes ʻŌlelo Hawaiʻi as an official language of the State.[6] Tagupa argued that this constitutional provision conferred upon him the right to speak ʻŌlelo Hawaiʻi in court proceedings.[7] Tagupa also asserted a federally protected language

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[1] MARY KAWENA PŪKUʻI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 129 (Bishop Museum Press, 1997). This Hawaiian proverb literally translates as, "Life is in speech; death is in speech," but figuratively translates as, "Words can heal; words can destroy." *Id.*

[2] Traditional Māori proverb. WAITANGI TRIBUNAL, DEP'T OF JUSTICE, REPORT OF THE WAITANGI TRIBUNAL ON THE TE REO MAORI CLAIM (WAI 11) § 3.1.4 (1986) (N.Z.), *at* http://wai8155s1.Verdi.2day.com/reports/generic/wai01100101.asp [hereinafter TE REO REPORT].

[3] Tagupa v. Odo, 843 F. Supp. 630 (D. Haw. 1994) (affirming the Magistrate's protective order). Defendants moved for summary judgment on the discrimination claim, but the district court denied the motion. The Ninth Circuit reversed the district court's denial of summary judgment. Tagupa v. Odo, 1996 U.S. App. LEXIS 20489. Tagupa did not appeal to the Ninth Circuit on the language claim because of the mootness doctrine. Telephone Interview with William E.H. Tagupa (Apr. 11, 2003). "ʻŌlelo Hawaiʻi" and "Hawaiian language" are used interchangeably throughout this Article. The author did not apply the proper diacritical marks in "Hawai'i" and "Māori" if the source, such as the Maori Language Act and the Hawaii Constitution, did not use them.

[4] Upright, just, virtuous, fair; necessary. HAWAIIAN DICTIONARY HAWAIIAN-ENGLISH, ENGLISH-HAWAIIAN 340 (rev. and enlarged ed. 1986).

[5] Telephone Interview with William E.H. Tagupa (Apr. 11, 2003). Mr. Tagupa simply wanted to use the language: "If Hawaiians [are] not going [to] use it, who will?" *Id.*

[6] HAW. CONST. art. XV, § 4.

[7] *Tagupa*, 843 F. Supp. at 631.

right under the Native American Languages Act of 1990 ("NALA"), which states that the use of the Hawaiian language "shall not be restricted in *any public proceeding*."[8] Despite the official recognition by the Hawai'i Constitution and the clear language of NALA, Magistrate Judge Francis Yamashita ordered Tagupa to respond in English at his deposition.[9] Tagupa appealed.[10]

District court Judge Alan Kay affirmed Judge Yamashita's order.[11] Judge Kay declined to recognize a Hawaiian language right because (1) Tagupa could speak English and (2) requiring an interpreter would cause needless delay and expense.[12] From the court's perspective, ordering Tagupa to give deposition testimony in English would promote judicial efficiency without violating any right to self-expression or a fair hearing.[13]

Fourteen years earlier and thousands of miles away in Aotearoa, Te Ringa Mangu Mihaka ("Mihaka") applied to the Court of Appeal, Wellington for leave to appeal two criminal convictions.[14] Like Tagupa, Mihaka argued that New Zealand law recognized Te Reo Māori as an official language of the country, which gave him the right to Māori language translation in court.[15] He argued that two New Zealand Magistrate Court judges wrongly refused his applications for proceedings to be conducted in Te Reo Māori.[16] Like Judge Kay, New Zealand Court of Appeal Judge Richardson found that Mihaka's English proficiency demonstrated that "he had suffered *no injustice* as a result of the proceedings being conducted in English."[17] Accordingly, Judge Richardson dismissed Mihaka's applications for special leave to appeal.[18]

Tagupa v. Odo[19] and *Mihaka v. Police*[20] are parallel decisions. Both convey judicial reluctance to recognize and enforce an indigenous language

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[8] *Id.* at 632 (emphasis added); 25 U.S.C. § 2903 (2003).

[9] *Tagupa*, 843 F. Supp. at 631.

[10] *Id.*

[11] *Id.* at 633.

[12] *Id.*

[13] *Id.* "[P]ermitting Mr. Tagupa to give his deposition in Hawaiian would only add needless delays and costs to this dispute since Hawaiian language testimony would require the parties to find (and pay) a qualified interpreter whose services were acceptable to both parties." *Id.* Judge Kay emphasized the fact that Tagupa was proficient in English and was a member of the Hawai'i bar. *Id.*

[14] Mihaka v. Police, [1980] 1 N.Z.L.R. 460. For a description of the judicial hierarchy in New Zealand, *see infra* note 69. The Court of Appeal is New Zealand's second highest court. Aotearoa is the Māori name for New Zealand.

[15] Maori Affairs Act, § 77A 1953 (N.Z.). "Te Reo Māori" and "Māori language" are used interchangeably throughout this Article.

[16] *Mihaka*, 1 N.Z.L.R. at 460.

[17] *Id.* at 462 (emphasis added).

[18] *Id.* at 463.

[19] 843 F. Supp. 630 (D. Haw. 1994).

[20] [1980] 1 N.Z.L.R. 460.

right.[21] A comparative analysis of the language laws leading up to the two decisions reveals that this judicial reluctance stemmed from the concept that language is a right of the individual as opposed to a cultural right. Although *Tagupa* and *Mihaka* developed from comparable systems and conceptions of language laws in Hawai'i and New Zealand, the two decisions also mark the point of divergence between the two systems. *Tagupa* did not spur legislative action and continues to be the only opinion addressing Hawaiian language rights. In contrast, *Mihaka* is no longer the authority on a Māori language right. The legal status of Te Reo Māori has undergone a metamorphosis from mere "official recognition" to the right to use the Māori language in "any legal proceeding."[22] This evolution of an indigenous language right in New Zealand resulted from the resurfacing of the 1840 Treaty of Waitangi, now regarded as a pact that obligates the New Zealand Crown to preserve certain Māori *taonga,* or cultural treasures, including language.[23] This obligation has forced the New Zealand courts to shift their perception of the Māori language from an individual to a cultural right. Hawai'i, on the other hand, has yet to address the existence of a *cultural* language right. In part, this Article explores state and federal legislation, searching for a similar commitment to the preservation of 'Ōlelo Hawai'i.

Part II of this Article examines the legal status of both Te Reo Māori and 'Ōlelo Hawai'i and the courts' perception of language as an individual right by comparing New Zealand and Hawai'i language law up to the parallel decisions of *Mihaka* and *Tagupa.* Part III explores the emergence of a cultural language right in New Zealand as a model for Hawai'i by contrasting the two legal systems after *Mihaka* and *Tagupa.* In Hawai'i, state and federal laws may provide the legal foundation necessary to sustain an obligation to

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[21] The United Nations Working Group on Indigenous Peoples ("WGIP") has recognized language as an indigenous right in the Draft Declaration of the Rights of Indigenous Peoples:

> Indigenous peoples have the right to revitalize, *use*, develop and transmit to future generations their histories, *languages*, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places, and persons.
>
> States shall take effective measures, whenever any right of indigenous peoples may be threatened to ensure this *right* is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/SUB.2/1994/2Add.1 (1994) (Article 14) (emphasis added). *See* Catherine J. Iorns, *The Draft Declaration on the Rights of Indigenous Peoples,* MURDOCH U. ELEC. J.L., Vol. 1, No. 1 (1993), *at* http://www.murdoch.edu.au/elaw/issues/v1n1/iorns2.html (last visited Apr. 27, 2003) (discussing the history of the WGIP's development of the Draft and commenting upon individual provisions).

[22] Maori Affairs Act, § 77A, 1974 (N.Z.).

[23] *See infra* text accompanying notes 122-25.

preserve 'Ōlelo Hawai'i. Part IV offers, then critiques, a proposal for the Hawai'i Legislature to recognize a cultural right to use 'Ōlelo Hawai'i in the courts. Part V concludes that a comparative analysis of the legal histories of Te Reo Māori and 'Ōlelo Hawai'i justifies judicial enforcement of 'Ōlelo Hawai'i to make the language truly official and fulfill Hawai'i's duty to encourage use of the language.

There are some, like Tagupa himself, who believe that the official status of Te Reo Māori and 'Ōlelo Hawai'i cannot be compared because of the disparate political contexts in which they operate.[24] Although Tagupa believes that the same political impetus for enforcing an indigenous language right in New Zealand does not exist in Hawai'i, this Article will focus on the similarities between New Zealand and Hawai'i language *law*, and ultimately conclude that Hawai'i must follow the path taken by the Māori.

II. TWIN HISTORIES: LANGUAGE LAWS IN NEW ZEALAND AND HAWAI'I UP TO *MIHAKA V. POLICE* AND *TAGUPA V. ODO*

A. Paths to Extinction: The Decline and Rebirth of Te Reo Māori and 'Ōlelo Hawai'i

Throughout the nineteenth and most of the twentieth centuries, 'Ōlelo Hawai'i and Te Reo Māori shared similar fates. Both languages were on paths to extinction. The rapid decline of the indigenous languages began when missionaries introduced the English language to Hawai'i and New Zealand and put the indigenous languages to written form in the 1800s.[25] Ironically, literacy among the Native Hawaiians and Māori was high[26] while laws prohibiting the use of 'Ōlelo Hawai'i and Te Reo Māori in the schools

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[24] Telephone Interview with William E.H. Tagupa (Apr. 11, 2003).

[25] Even before the overthrow of the Kingdom of Hawai'i, Calvinist missionaries of New England put the oral language to written form using the Latin alphabet. The missionaries applied the Latin alphabet without attention to the intricate difference between English sounds and Hawaiian sounds. RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 104 (U. Haw. P. 1957). This was only one difficulty with transforming an oral culture into a written one. When King Kamehameha II, Liholiho, saw his name in print for the first time, he said, "This does not look like me, nor like any other man." Goldie Morgentaler, *Will it be Aloha or Goodbye for Hawaiian?*, MONTREAL GAZETTE, Jan. 3, 1998, at H4.

[26] Hawaiian language newspapers fluorished in the late 1800s. Sam L. Nō'eau Warner, *The Movement to Revitalize Hawaiian Language and Culture*, *in* THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 133, 134 (Leanne Hinton & Ken Hale eds., 2001). *See* Jeanette King, *Te Kōhanga Reo: Māori Language Revitalization*, *in* THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE, *supra*, at 120 fig. 11.1 (showing the decrease of Te Reo Māori use in letters written by Māori and government officials following the Native Schools Act of 1867).

accelerated English dominance.[27] Native children were punished and humiliated in Hawai'i and New Zealand for speaking their native languages.[28]

Colonization also contributed to the decline of the Māori and Hawaiian languages. For the Māori, massive urban migration following World War II increased the distance between the Māori and the *marae*.[29] Many viewed English as the language of prosperity and wanted their children to speak English to advance in society.[30] For the Native Hawaiians, the United States-aided illegal overthrow of the Hawaiian monarchy in 1893 led to United States "annexation" and, in turn, the Organic Act of 1900, which mandated that all government business be conducted in English.[31]

Both languages were labeled endangered by the mid-1900s, but by the 1970s, growing political and cultural renaissances among the Native Hawaiians and Māori sparked the revitalization of their indigenous languages.[32] Realizing that few children were being raised speaking Te Reo Māori, in 1981, Māori parents developed Te Kōhanga Reo, an early-childhood language immersion program.[33] These "language nests" provided an environment for Māori children to hear only Te Reo Māori so that they would become fluent Te Reo Māori speakers.[34] By 1998, there were 600 Te Kōhanga Reo operating throughout New Zealand.[35]

In Hawai'i, the renaissance led to Hawaiian language classes at the University of Hawai'i.[36] In 1978, the year Hawai'i recognized 'Ōlelo Hawai'i

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[27] *See infra* notes 43-46 and accompanying text.

[28] *See infra* note 43 and accompanying text.

[29] Tribunal community meeting place. King, *supra* note 26, at 127.

[30] Māori parents "saw the schools as a means of restoring Māori mana by enabling Māori people to acquire the language of the Pakeha (English) and thereby the knowledge which had enabled the newcomers to dominate New Zealand life." RICHARD A. BENTON, LANGUAGE POLICY IN NEW ZEALAND: 1840-1982, Te Wahanga Māori Occasional Paper No. 9, 9 (Te Runanga Whakawa Matauranga o Aotearoa 1982).

[31] Warner, *supra* note 26 at 134-35 (addressing other factors for language decimation, including the effects of tourism). The Organic Act and subsequent laws of the U.S. Territory of Hawai'i required that English be the language of the schools for at least 50% of the day. By the 1900s, no school was taught in Hawaiian. *Id.*

[32] *Id.* The Hawaiian cultural renaissance began in the late 1960s as Native Hawaiian youth became interested in singing traditional Hawaiian songs and learning traditional forms of *hula* (dance). *Id.* at 135. *See also* 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 40 (2000) (providing a synopsis of the Native Hawaiian cultural renaissance and self-determination movement).

[33] King, *supra* note 26, at 119. Translated literally, Te Kōhanga Reo means "the language nest." *Id.*

[34] *Id.*

[35] *Id.*

[36] Warner, *supra* note 26 at 135.

as a co-official language of the state, there were only 2,000 Hawaiian native speakers remaining.[37] In response to the poor condition of the Hawaiian language, Native Hawaiian parents adopted the Māori "language nest" theory and set out to form Punana Leo, total immersion preschools for children between two and five years of age.[38] The first Punana Leo center opened in 1984 with two more following in 1985.[39] The concept of Punana Leo was to recreate an environment where Hawaiian language and culture were conveyed in the home as in earlier generations.[40] Te Kōhanga Reo and Punana Leo led to follow-up immersion programs.[41]

Despite revitalization efforts by the native peoples, the legal contexts in which they operated had not evolved alongside them. Although Te Reo Māori and 'Ōlelo Hawai'i had been recognized as "official" languages, the cases of *Mihaka* and *Tagupa* illustrate that they did not enjoy official *status*. For Native Hawaiians, *Tagupa* closes the door to any future Punana Leo graduate, proficient in English and the Hawaiian language, who choose to speak 'Ōlelo Hawai'i in the courts. Without further legislation, language revitalization and perpetuation efforts end in the schools and homes, with no place in government and the courts.

B. Language as an Individual Right: The Legal Status of Te Reo Māori and 'Ōlelo Hawai'i Prior to Mihaka *and* Tagupa

Before discussing the legal frameworks underpinning *Mihaka* and *Tagupa*, it is important to emphasize that the law contributed to the decimation of both indigenous languages.[42] In New Zealand, the 1867 Native Schools Act

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[37] *Id.* at 135-36.

[38] *Id.* at 136.

[39] *Id.*

[40] *Id.* at 137.

[41] In 1986, the first Punana Leo preschool class was ready to enter kindergarten. LOIS A. YAMAUCHI, THE SOCIOCULTURAL CONTEXT OF HAWAIIAN LANGUAGE REVIVAL AND LEARNING FINAL REPORT: PROJECT 1.6, CTR. FOR RESEARCH ON EDUC., DIVERSITY & EXCELLENCE (2001), *at* http://www.crede.ucsc.edu/research/llaa/1.6_final.html (last visited Apr. 27, 2003). Punana Leo supporters began to lobby the Hawai'i Board of Education ("BOE") to establish a Hawaiian immersion program in the public schools. The parents faced much resistance from the BOE, but finally, in July of 1987, the Board passed a resolution approving the Kula Kaiapuni program as a pilot kindergarten to first-grade project. *Id.* These "magnet" schools are now housed on existing elementary school campuses. *Id.* In New Zealand, the Māori parents pushed for Kura Kaupapa Māori, follow-up schools to Te Kōhanga Reo, in which students not only receive Te Reo Māori-exclusive instruction, but also learn within a Māori philosophical orientation and curricular framework. King, *supra* note 26 at 122.

[42] Many indigenous peoples have felt the effects of colonial eradication of their languages. It was once the unwritten policy of the United States government to reprimand children for speaking their own languages in school. They were made to feel like foreigners in

replaced Te Reo Māori with English as the language of literacy in the classroom.[43] Likewise, in Hawai'i, an 1896 law prohibited the use of the Hawaiian language in public and private schools.[44] Physical punishment and humiliation accompanied these laws, thereby accelerating the eradication of Te Reo Māori and 'Ōlelo Hawai'i.[45]

Following abolition in the schools, there were only a handful of laws pertaining to the indigenous languages up until the late 1900s, an indication that lawmakers in New Zealand and Hawai'i were indifferent to the drastic decline of Te Reo Māori and 'Ōlelo Hawai'i. Both legal systems eventually granted official recognition to the languages and afforded limited rights to interpretation in the courts.[46] But, as *Mihaka* and *Tagupa* soon revealed, these language laws approached the indigenous languages as solely individual rights as opposed to cultural rights, a perspective that caused the courts to overlook the cultural significance behind official recognition.

In both New Zealand and the United States, language, even indigenous language, has been viewed as a right belonging to the individual. This is a predictable result considering both governments are constitutional democracies that preserve individual rights, as opposed to group or cultural rights.[47] New Zealand and United States lawmakers did not notice the intimate

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their classrooms, and, worse, in their own homelands. Children were thus rendered incapable of forging a connection between two worlds which seemed so different from one another, yet which would have to be reconciled as it came time to choose future paths.

S. REP. NO. 101-250, at 2 (1990).

[43] Native Schools Act, 1867 (N.Z.). King, *supra* note 26, at 120.

[44] Brief of Amici Curiae Hawai'i Civil Rights Commission et al. at 13, Arizonans For Official English v. Arizona, 520 U.S. 43 (1995) (No. 95-974) (citing Rev. L. Haw. §211, at 156 (1905)). The Republic of Hawai'i law strictly forbade the Hawaiian language in the schools: "[t]he English language shall be the medium and basis of instruction in all public and private schools . . . . Any schools that shall not conform to the provisions of this section shall not be recognized by the department." *Id.* Ninety years passed before the Hawai'i Legislature amended the law to reintroduce the Hawaiian language to the public schools. *Id.* at 22; HAW. REV. STAT. § 298-2(b) (1993).

[45] Brief of Amici, *supra* note 45, at 13-14. As a direct result of the 1896 law, the number of schools conducted in Hawaiian dropped from 150 in 1880 to zero in 1902. *Id.* at 18 (citing ALBERT J. SCHUTZ, THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES 352 (1994)). Amici argued that "early exclusionary language policy in Hawai'i reflected differentiation and denigration of Hawaiian culture as a means for excluding Hawaiians from the polity." *Id.* at 11. *See* RACHAEL SELBY, STILL BEING PUNISHED (1999) (discussing Māori education policies throughout the 1900s and sharing five personal accounts of being punished for speaking Te Reo Māori in the classroom). *See also* Warner, *supra* note 26, at 134-35.

[46] *See supra* text accompanying notes 6 and 22. *See also infra* Part II.B.

[47] For example, the Framers added the Bill of Rights to the U.S. Constitution to protect specific rights of the individual. The First Amendment free speech guarantee is of special import in the discussion of any language right.

connection between language and culture, a principle well accepted by sociologists and linguists: "to destroy the language of a group is to destroy its culture."[48]

Both legal systems contained "custom and usage" laws that integrated Māori and Hawaiian laws and customs into the newly formed New Zealand and Hawai'i governments. In New Zealand, the New Zealand Constitution Act of 1852 authorized the Crown to legally recognize "Māori laws, customs, or usages" among the Māori people as a whole or within particular districts.[49] At the time of the Act's passage, Te Reo Māori was employed in Native Land Court proceedings and records, Māori members of the New Zealand Parliament were still addressing the House of Representatives in their native language, and acts of Parliament were available in Māori translation.[50] Despite Te Reo Māori's viability in the legislative and judicial branches of government into the early part of the twentieth century, Parliament never implemented the custom and usage law to recognize a right to officially use Te Reo Māori.[51]

Hawai'i's counterpart to New Zealand's custom and usage law, now codified as Hawaii Revised Statute ("HRS") § 1-1, established English common law in Hawai'i in 1892, but made a special exception for existing Hawaiian judicial precedent or usage. [52] The law subordinated English and American common law to traditional and customary Hawaiian practices.[53] Native Hawaiians have used this statute extensively to enforce customary and traditional Hawaiian rights, especially rights inconsistent with Western concepts of land ownership.[54] But like New Zealand, Hawai'i never utilized

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[48] Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 666 (1992).

[49] BENTON, *supra* note 30, at 6 (quoting New Zealand Constitution Act, § 71 1852 (N.Z.)).

[50] *Id.*

[51] *Id.* "The primacy of the Māori language, or at least its equality with English in the public domain, might well be one of these customs or usages." *Id.*

[52] HAW. REV. STAT. § 1-1 (1993).

[53] D. Kapua Sproat, Comment, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, 330 (1998).

[54] *See* Public Access Shoreline Haw. v. Haw. County Planning Comm'n ("*PASH*"), 79 Hawai'i 425, 903 P.2d 1246 (1995). PASH held that Hawaii Revised Statute § 1-1 and the Hawaii Constitution, article XII, § 7 obligate the State to protect Hawaiian customary rights and hence "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.* at 437, 447, 903 P.2d at 1258, 1268. Section 7 of the Hawaii Constitution reaffirms that "the State 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." HAW. CONST. art. XII, § 7. *See also* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982) (holding that Haw. Rev. Stat. § 1-1 "may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others").

HRS § 1-1 to enforce official recognition of its indigenous language. Hence, within these two legal systems, language was never considered a "custom or usage" belonging to the native peoples. It was not deemed worthy of protection.

The perception of language as an individual right linked to the right of self-expression prevailed for most of the twentieth century. Te Reo Māori and 'Ōlelo Hawai'i speakers, like all minority language speakers, enjoyed a limited right to translation of legal transactions. For instance, in New Zealand, the Summary Proceedings Act of 1957 entitled Māori language speakers to a translation of government documents, provided they followed the proper procedure designated in Court Rule 346.[55] Combined, these laws gave the courts power to order a translation be served or either adjourn or schedule a rehearing in the interest of justice.[56] Consistent with New Zealand's language policy at the time, the court rule viewed the Māori person's right to a Māori translation of legal documents as one rooted in the notions of fairness and justice to the individual.

By the latter part of the twentieth century, however, both languages obtained "official" recognition through the Maori Affairs Act of 1953 and the Official Languages Amendment to the Hawaii Constitution in 1978.[57] The Maori Affairs Act gave Te Reo Māori just that, "official" recognition. The Act merely stated, "Official recognition is hereby given to the Maori language of New Zealand in its various dialects and idioms as the ancestral tongue of that portion of the population of New Zealand of Maori descent."[58] This provision refrained from giving the ancestral tongue the force and effect of a truly official language of the nation.[59] Furthermore, it granted discretion to the Minister to determine when Te Reo Māori should be used in government.[60]

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[55] Summary Proceedings Act, § 30 1957 (N.Z.). Section 30, entitled "Translation of documents into Māori language," made Rule 346 of the District Courts Rules 1948 applicable to court documents. D. CT. R. 346 (N.Z. 1948). As a result, section 30 entitled a Māori person to receive a translation of any document served upon him/her if he/she made a request for the translation to the Registrar within three days of service of the document. *See id.*

[56] D. CT. R. 346 (N.Z. 1948).

[57] Maori Affairs Act, 1953 (N.Z.); HAW. CONST. art. XV, § 4.

[58] Maori Affairs Act, 1953 § 77A(1) (N.Z.).

[59] *Id.*

[60] *Id.*

(2) The Minister may from time to time take such steps as he deems appropriate for the encouragement of the learning and use of the Maori language (in its recognised dialects and variants), both within and without the Department and in particular for the extension to Government Departments and other institutions of information concerning and translations from or into the Maori language.

Id.

Similarly, the Official Languages Amendment of the Hawaii Constitution merely granted official recognition and did not provide a definition of a language right or mechanisms for enforcement: "English and Hawaiian shall be official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."[61] Enforcement of this "official" recognition was contingent upon further action by the Hawai'i Legislature just as enforcement of Māori official recognition was left to the discretion of the Minister.

D. L. Bates, Barrister of Hamilton, New Zealand, noted in a recent New Zealand Law Journal article that the language provision of the Maori Affairs Act "was an 'encouraging' provision, 'recognising' the desirability of use, teaching and preservation of the language. But, it did not enable its use in the justice system."[62] The same could be said about the Hawaii Constitution's official language provision. Both the New Zealand Parliament and the 1978 Hawaii Constitutional Convention were simply acknowledging their indigenous languages, but left the enforcement of the recognition of the "official" languages with another branch of government.

Alternatively, the fact that both legal systems passed official recognition laws suggests that lawmakers were beginning to recognize the cultural significance of indigenous languages.[63] For example, one of the 1978 Hawaii Constitutional Convention delegates proclaimed the Hawaiian language to be "the rich cultural inheritance that Hawaiians have given to all ethnic groups of the State."[64] Another delegate remarked, "Language is essential to gain insight into the feel of the culture; through language we realize the innuendos and beauty of a culture."[65] At the federal level, Congress had passed the Native American Languages Act ("NALA") to promote the use of Native American languages, including 'Ōlelo Hawai'i, after the Senate determined

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[61] HAW. CONST. art. XV, § 4.

[62] D.L. Bates, *Māori Language: Some Observations Upon its Use in Criminal Proceedings*, 1991 Feb. N.Z. LAW J. 55, 56.

[63] *Id.*

> Clearly, the Legislature had at some stage turned its mind to *some* use of the Māori language in judicial proceedings, albeit a very limited use. It would have been a very simple and sensible matter in the 1953 statute [Maori Affairs Act] to not only officially recogni[s]e the language but to have extended the breadth of statutory authority for a more general use of the language in judicial proceedings.

Id.

[64] COMMITTEE OF THE WHOLE DEBATES, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Vol. II, at 426 (statement of Del. Adelaide De Soto, Member, Comm. of the Whole).

[65] COMMITTEE OF THE WHOLE DEBATES, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Vol. II, at 428 (statement of Del. Patricia P. Nozaki, Member, Comm. of the Whole).

that "language . . . must be fostered if the culture is to survive."[66] Thus, lawmakers had planted the seed for an indigenous language right, to be later cultivated in the courts.

C. Parallel Decisions: Mihaka v. Police *and* Tagupa v. Odo

Two courts, one in New Zealand in 1980, and one in Hawai'i in 1994, tested the legitimacy of official recognition. The outcomes of these two cases, *Mihaka* and *Tagupa*, are, not surprisingly, similar. Both decisions convey judicial reluctance to recognize and enforce an indigenous language right based upon the premise that the right to choose one's language is only enforceable insofar as necessary to express oneself and obtain a fair hearing.

1. Mihaka v. Police

Mihaka was the first appellate case in New Zealand to determine the existence of a right to speak Te Reo Māori in the courts.[67] The case was a consolidation of Te Ringa Mangu Mihaka's two applications for special leave to appeal to the Court of Appeal, Wellington after the Supreme Court ("High Court") had denied his original applications for leave to appeal.[68] The first case arose from proceedings in the Magistrates' Court of Auckland and the second case arose from proceedings in the Magistrates' Court at Tokoroa.[69]

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[66] S. REP. NO. 102-343, at 2956 (1992). As a result of public testimony, the Senate acknowledged the intimate connection between language and culture:

> Language is the basis of culture. History, religion, values, feelings, ideas and the way of seeing and interpreting events are expressed and understood through language.... When a language is lost or forgotten, the integrity and identity of the group is diminished. The perpetuation of native languages is thus an integral part in the continued existence of Native American cultures, heritages and identities.

Id.

[67] Mihaka v. Police, [1980] 1 N.Z.L.R. 460.

[68] MORAG MCDOWELL & DUNCAN WEBB, THE NEW ZEALAND LEGAL SYSTEM: STRUCTURES, PROCESSES, AND LEGAL THEORY 263 (2d ed. 1998). New Zealand's judicial hierarchy is comprised of four tiers. The bottom tier consists of Administrative Tribunals, District Courts, Youth Courts, Family Courts, the Māori Appellate Court and Māori Land Court, and the Employment Court and Employment Tribunal. *Id.* All of these courts may appeal to the High Court, except for the Employment Court, which may appeal directly to the highest court in New Zealand. *Id.* High Court decisions are then appealed to the Court of Appeal. *Id.* After the Court of Appeal, decisions may reach the highest court in New Zealand, the Judicial Committee of the Privy Council, whose decisions are binding on all New Zealand courts. *Id.* Although the *Mihaka* opinion refers to the appellate court below as the "Supreme Court," to avoid confusion with the United States Supreme Court, this Article will refer to the New Zealand Supreme Court by its new name, "High Court."

[69] *Mihaka*, 1 N.Z.L.R. at 460.

The Court of Appeal addressed the Auckland case first. Mihaka raised three grounds for appeal, but the only one of concern for this Article is Mihaka's claim that the Aukland Magistrates' Court breached section 30 of the Summary Proceedings Act.[70] Mihaka argued that the Magistrates' Court erred when, after he requested to hear the prosecutions against him in the Māori language, the Magistrate refused to order a translation of all appropriate documents and did not grant an adjournment so that the translations could be made and served.[71] Although the High Court acknowledged "that the translation of documents into the Maori language [was] a matter of public importance in the administration of justice," it refused to grant Mihaka leave to appeal because Mihaka did not make his request to the Registrar in accordance with the proper procedure.[72] The High Court also held that the Magistrate's refusal to grant an adjournment was justifiably within its discretion in light of the fact that Mihaka had "full command of the English language."[73] In making its decision, the High Court framed the translation issue as "whether the particular case had been fairly and properly determined."[74] It regarded the right afforded by the Summary Proceedings Act as one limited by fairness and justice to the *individual*. Accordingly, the High Court placed great emphasis on Mihaka as an individual:

> In the present case it must have been apparent to the Magistrate, as it is to me, that Mr. Mihaka is a highly intelligent man, fluent in the English language and capable of presenting his arguments to a degree which surpasses quite a few counsel. I adhere to the view which I formed on the earlier hearing that Mr. Mihaka suffered no injustice as the result of the Magistrate proceeding . . . without ordering translations and without seeking the services of a Maori interpreter.[75]

Convinced that there had not been a "miscarriage of justice," the Court of Appeal accepted the High Court's rationale and denied Mihaka's application for special leave to appeal his Auckland conviction.[76] The Court of Appeal

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[70] *Id.* at 461. In addition to his Te Reo Māori claim, Mihaka argued:
> the Magistrate wrongly failed to accede to a request by the applicant to have the charges expressed under the Crimes Act 1961 so he could elect trial by jury; and . . . that the Magistrate wrongly refused the applicant an adjournment so that he could discuss factual matters with the witnesses subpoenaed by him.

Id. The High Court rejected all three of Mihaka's arguments. *Id.* The Court of Appeal limited its consideration of Mihaka's case to his Te Reo Māori claim.

[71] *Id.*

[72] *Id.* D. CT. R. 346 (N.Z. 1948).

[73] *Mihaka*, 1 N.Z.L.R. at 461.

[74] *Id.*

[75] *Id.* at 461-62.

[76] *Id.* at 462.

then considered the Tokoroa case, which addressed the Māori Affairs Act of 1953.[77] In this case, Mihaka received a translation of the court summons, but the hearing proceeded in English after the Tokoroa Magistrate refused Mihaka's application for proceedings to be conducted in Te Reo Māori.[78] The High Court again acknowledged that Mihaka "had not been disadvantaged in any way."[79] This time, it also declared English dominance in the courts: "English is the language of the Courts in New Zealand."[80]

Mihaka argued that official recognition of the Māori language in the Māori Affairs Act meant that the courts should afford translation upon request by any person of Māori descent.[81] The High Court rejected Mihaka's argument and set out to define the limits of section 77A of the Māori Affairs Act:

> There is no provision to that effect in that section or elsewhere in our laws and any extension of the official use of the Maori language is a matter for the legislature, not for the Courts. English has been the customary language of the Courts in New Zealand from the earliest colonial days. It is the only language of most of our people.[82]

The High Court again emphasized the role that Mihaka's English proficiency played in its decision: "any Court will, of course, satisfy itself that, where a party or a witness does not appear to be proficient in the English language, appropriate steps are taken by the use of interpreters or otherwise to ensure that he is not disadvantaged."[83] As in the Auckland case, the Court of Appeal affirmed the High Court's decision and dismissed Mihaka's application for special leave to appeal his Tokoroa conviction.

The *Mihaka* decision illustrates the ineffectiveness of New Zealand's language laws at the time of the case. Although the Maori Affairs Act of 1953 recognized Te Reo Māori as an official language, the courts refused to enforce such recognition. The New Zealand courts consistently viewed Mihaka's asserted language right as limited by the boundaries of self-expression and individual justice. As long as Mihaka could understand English, his rights had not been violated. The New Zealand courts did not inquire into the cultural nuances of that right. More than ten years later in Hawai'i, Judge Kay, in *Tagupa v. Odo*, would employ the very same reasoning.

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[77] *Id.* at 462-63.

[78] *Id.* at 462.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 463. The opinion suggests that Mihaka additionally referred to the Treaty of Waitangi to support his Te Reo Māori claim, but the Court of Appeal responded that the Treaty did "not deal with the legal point now in issue." *Id.* at 462.

2. Tagupa v. Odo

In April 1993, Tagupa brought an employment discrimination suit in Hawai'i state court against the University of Hawai'i Board of Regents.[84] The defendants removed the case to federal district court where it was assigned to Judge Alan C. Kay and Magistrate Judge Francis Yamashita.[85] In December 1993, Tagupa, fluent in both the English and Hawaiian languages, attempted to respond in Hawaiian at his oral deposition.[86] Magistrate Judge Yamashita granted the defendants a protective order requiring Tagupa to respond in English.[87] In his interlocutory appeal to the district court, Tagupa claimed that the magistrate judge's ruling was clearly erroneous and contrary to article XV, section 4 of the Hawaii Constitution and the Native American Languages Act of 1990.[88]

Judge Alan Kay began his brief opinion by noting that Tagupa's case was one of "first impression:" "At issue is whether an individual of 'Native Hawaiian' ancestry has a right to use the Hawaiian language in a civil judicial proceedings [sic] regardless of their proficiency in English."[89] Judge Kay first addressed the state constitutional claim, then the federal statute, and concluded with an analysis of the federal rule.

Judge Kay first noted that the language of article XV, section 4 of the Hawaii Constitution "provides little guidance regarding whether an American citizen of Native Hawaiian ancestry residing in Hawaii can assert, as a matter of right, the privilege of giving oral deposition testimony in the Hawaiian language when he or she is fluent in the English language."[90] Judge Kay accepted the defendants's argument that Tagupa's request for a Hawaiian language interpreter at his deposition would create "an unnecessary expense

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[84] Tagupa v. Odo, 1996 U.S. App. LEXIS 20489, *3 (containing the background of Tagupa's action). In 1991, William E.H. Tagupa, a male of Filipino, Hawaiian, and Caucasian descent, applied for a full-time, tenure track assistant professorship with the University of Hawai'i's Ethnic Studies Program. *Id.* at 2. Franklin Odo, Director of the Program, chaired the selection committee. *Id.* The selection committee also interviewed Marion Kelly, a female of Polynesian and Caucasian ancestry, and Robert Morris, a male of Caucasian ancestry. *Id.* The selection committee hired Kelly. *Id.* "In July 1991, Tagupa filed a complaint with the Office of Federal Contract Compliance Programs ("OFCCP"), alleging that the selection committee had discriminated against him on the basis of race and gender." *Id.* In March 1992, the OFCCP concluded that the selection committee had not discriminated against Tagupa. *Id.* This Article is concerned with only Tagupa's interlocutory appeal on the language right claim. Tagupa v. Odo, 843 F. Supp. 630 (D. Haw. 1994).

[85] *Tagupa*, 1996 U.S. App. LEXIS 20489, at *3.

[86] *Tagupa*, 843 F. Supp. at 631.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

that would needlessly complicate and delay the deposition process."[91] Due to the "practical realities of this dispute," Judge Kay held that Magistrate Judge Yamashita's order was not "clearly erroneous or contrary to the law," and consequently rejected Tagupa's constitutional claim.[92]

After dismissing the state constitutional claim, Judge Kay addressed the federal NALA claim. He began by quoting relevant sections of the federal act:

> 25 U.S.C. § 2903 of the Native American Language Act declares "it is the policy of the United States to . . . preserve, protect, and promote the rights of Native Americans to use, practice, and develop Native American languages." Moreover, § 2904 provides that the rights of "Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs."[93]

Judge Kay then examined the congressional intent behind NALA. He inferred that "Congress did not . . . intend to extend [NALA] to judicial proceedings in federal courts" because the Act "deals almost exclusively with increasing the use of Native languages in the education and instruction of Native Americans."[94] The court noted that the only clause unrelated to education "is directed towards preserving the right of Native American groups to conduct and manage their own affairs using their particular Native American language."[95] According to Judge Kay, Tagupa's case did not raise this concern because "[n]either the case itself nor, more importantly, the language in which he gives his depositions implicates the rights of Native Hawaiians to maintain their culture and preserve the use of their language."[96] Like the New Zealand Court of Appeal in *Mihaka*, the district court failed to emphasize the importance of judicial enforcement in language perpetuation. Instead, it re-emphasized the "practical realities" raised in his constitutional analysis and concluded that Tagupa's NALA claim was "without merit."[97]

Judge Kay went beyond the two claims that Tagupa asserted to justify his ruling. He looked to Federal Rules of Civil Procedure ("FRCP") Rule 1, which states that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action," and declared that permitting Tagupa to use Hawaiian at his deposition "would have the exact opposite

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[91] *Id.*

[92] *Id.* Judge Kay did, however, recognize his limitations on interpreting a state constitutional provision, conceding that "a definitive judicial determination of this issue is better left to the Hawaii state courts." *Id.*

[93] *Id.* at 631-32.

[94] *Id.* at 632.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 631, 633.

effect."[98] In Judge Kay's opinion, the costs and delay that would come with permitting Tagupa to use Hawaiian would, on a larger scale, "impede access to the courts and make it more difficult for aggrieved parties to obtain proper and timely judicial relief or, in some cases, to obtain any relief at all."[99] Ultimately, Judge Kay affirmed Magistrate Judge Yamashita's protective order and Tagupa was forced to respond in English at his oral deposition.[100]

III. SEPARATE FATES: LANGUAGE LAWS IN NEW ZEALAND AND HAWAI'I POST *MIHAKA V. POLICE* AND *TAGUPA V. ODO*

In New Zealand, the renewed deference to the Treaty of Waitangi prompted a shift in the New Zealand attitude toward the indigenous language right. Because of the Crown's 1840 promise to preserve Māori cultural treasures, including language, the New Zealand government was obligated to take affirmative steps to ensure that Te Reo Māori could be used in legal proceedings. Despite the absence of a treaty between Native Hawaiians and the United States, an obligation to perpetuate and encourage the use of the Hawaiian language exists in state and federal laws. This obligation therefore establishes a basis for Hawai'i to create an indigenous language right, comparable to the Māori language right, for Native Hawaiians.

A. Language as a Cultural Right: Te Reo Māori Returns to Legal Proceedings

The *Mihaka* decision is no longer followed in New Zealand. What transpired following the Court of Appeal's decision transformed the way New Zealand courts now approach the indigenous language right. Three years prior to *Mihaka*, Parliament passed the Treaty of Waitangi Act of 1975.[101] This Act gave new meaning to the Treaty of Waitangi, the "constitutional" document by which Māori tribes arguably ceded sovereignty to the British Crown in 1840.[102] The Act revived the Treaty from its period of dormancy as a fruitless

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[98] *Id.* He cited to the Civil Justice Reform Act of 1990 to support his concern for "fairness of the civil justice system and its ability to render justice." *Id.*

[99] *Id.*

[100] With respect to Tagupa's employment discrimination action, Judge Kay denied the defendant's motion for summary judgment on qualified immunity grounds. *Tagupa v. Odo*, 1996 U.S. App. LEXIS 20489, at *1. The Ninth Circuit reversed his decision. *Id.* Tagupa did not appeal to the Ninth Circuit on the language claim because of the mootness doctrine. Telephone Interview with William E. H. Tagupa (Apr. 11, 2003).

[101] Treaty of Waitangi Act, 1975 (N.Z.).

[102] New Zealand does not have a written constitution like the United States and Hawai'i, but operates under a constitutional framework composed of legislation, common law, conventions, rules of law, the Letters Patent, and the 1840 Treaty of Waitangi. MCDOWELL & WEBB, *supra*

source of Māori rights. During the 1980s, Māori perception of the Treaty went from contempt to pious respect.[103] Suddenly, in correspondence with the Māori political and cultural renaissance that birthed the *Kōhanga* Reo immersion program in the educational setting, the Māori people were hopeful that the Crown might begin to fulfill its Treaty obligations from 1840.[104]

Parliament passed the Treaty of Waitangi Act of 1975 in response to the fluctuating state of Māori reparations law.[105] The Act is most notable for creating the Waitangi Tribunal and vesting it with the authority to investigate Māori claims under the Treaty of Waitangi.[106] The Tribunal now makes recommendations to Parliament on policies concerning the Māori people.[107]

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note 69, at 97-98. The British Crown commissioned Captain William Hobson to establish British sovereignty in New Zealand. *Id.* at 102. He, along with a few other men who lacked experience in treaty negotiation, drafted the Treaty of Waitangi. *Id.* at 193. Reverend Henry Williams, who lacked linguistic skill, then translated the document into Te Reo Māori. *Id.* Hobson arranged for a *hui*, or gathering, of Māori tribal leaders in Waitangi on February 6, 1840 to solicit signatures and circulated the Treaty across New Zealand for further signatures. *Id.* at 103. Reverend Williams's participation may have been deliberate, a tactic to "sell" the Treaty to the Māori people. *Id.* at 194. As a result, two contradictory versions of the Treaty exist, causing textual interpretation problems that still persist. The English version ceded sovereignty to the British. The Māori text, however, retains Māori sovereignty over *taonga* or cultural treasures. *Id.* at 198. *See* ANDREW SHARP, JUSTICE AND THE MĀORI: MĀORI CLAIMS IN NEW ZEALAND POLITICAL ARGUMENT IN THE 1980S 73 (1990) (discussing contemporary Māori attitude toward the Treaty, viewing it as a "sacred contract, the clauses of which defined their rights").

[103] Throughout the 1970s and early 1980s [the Treaty] continued to be regarded by protesting Māori as hardly worth the paper it was written on . . . . The Treaty was 'a fraud' and a 'con job'. . . . This was the message of the protesters at Waitangi each February until 1984. And these arguments for rejecting the Treaty as worthless were still being heard well afterwards. Even in 1989, the slogan 'The Treaty is a Fraud' can be seen, newly-sprayed, on the concrete block walls and corrugated iron fences of Auckland . . . . Such cynicism was to be overcome by a new wave of pious respect for the Treaty by the mid-1980s.

Id. at 87.

[104] *See* King, *supra* note 26, at 121-26 (detailing the history and operation of the Māori immersion school program).

[105] Prior to the 1975 Act, Māori petitions and protests "fell on deaf ears." WAITANGI TRIBUNAL, INFORMATION FOR SCHOOLS 1, *at* http://www.waitangi-tribunal.govt.nz/forschools/ (last visited Apr. 27, 2003). One judge even declared the Treaty a "nullity" in 1877. *Id.*

[106] Treaty of Waitangi Act, 1975 § 5 (N.Z.).

[107] *Id.* One such instruction reads:

5. Functions of Tribunal—(1) The functions of the Tribunal shall be—(a) To inquire into and make recommendations upon, in accordance with section 6 of this Act, any claim submitted to the Tribunal under that section; (b) To examine and report on, in accordance with section 8 of this Act, any proposed legislation referred to the Tribunal under that section. (2) In exercising any of its functions under this section the Tribunal shall have regard to the *2 texts* of the Treaty set out in the First Schedule to this Act and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect

The Act gave the Tribunal the role of interpreting the "principles of the Treaty and . . . determine its meaning and effect and whether certain matters are inconsistent with those principles."[108] The Tribunal's role was meant to be that of a forward-looking inquisitor, rather than as an adversary, which prevented the Tribunal from addressing claims prior to 1975.[109] In 1985, however, Parliament passed the Treaty of Waitangi Amendment Act, which allowed the Tribunal to investigate claims back to the time of the Treaty in 1840.[110] This opened the door to a multitude of claims, one of which concerned Te Reo Māori.[111]

In 1986, the Waitangi Tribunal published Wai 11: Te Reo Māori Claim ("Te Reo Report"), a report determining whether the New Zealand Crown had an obligation to preserve Te Reo Māori under the Treaty of Waitangi.[112] The claimants, Huirangi Waikerepuru and Nga Kaiwhakapumau I te Reo, Inc., claimed that the Treaty mandated official recognition of the Māori language "for all purposes enabling its use as of right in Parliament, the Courts, Government Departments, local authorities and public bodies."[113] The Tribunal heard testimony from people and organizations from within New Zealand and abroad.[114] They heard from linguists like Dr. Richard Benton of the New Zealand Council for Educational Research, who called for urgent action to repair the decline of Te Reo Māori due to "urbanization, improved communications, industrialization, consolidation of rural schools, and internal migra-

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of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.

Id. (emphasis added).

[108] Treaty of Waitangi Act, 1975 pmbl. (N.Z.).

[109] Some criticized the Tribunal for taking on "the role of an advocate on its clients' behalf and left it to the Government to mediate between the demands of the tribes and a hostile public opinion." SHARP, *supra* note 103, at 147.

[110] Treaty of Waitangi Amendment Act, 1985 (N.Z.).

[111] The Tribunal has completed 70 reports on claims spanning a range of issues from language to fisheries. The New Zealand Government has implemented many of the recommendations contained within these reports. *See* WAITANGI TRIBUNAL, INFORMATION FOR SCHOOLS 1, *at* http://www.waitangi-tribunal.govt.nz/forschools/ (last visited Apr. 27, 2003).

[112] *Id.* The "Wai number" is the number assigned to each claim for identification purposes. *Id.*

[113] TE REO REPORT, *supra* note 2, § 2. The claimants sought a range of language-related reparations, including interpretation of all official documents into Te Reo Māori, the establishment of Te Reo Māori radio stations, the appointment of Māori-speaking health workers in all hospitals, and full translation into Te Reo Māori of all court proceedings. *See id.* § 3.1.5. The claimants challenged the Māori Affairs Act of 1953 and three other New Zealand acts as being inconsistent with the Treaty of Waitangi, thereby prejudicing them and other Māori. *See id.* § 4.2.2.

[114] *See id.* § 2 (naming testifiers and parties involved in the claim). The Te Reo Māori hearings lasted four weeks, longer than any other Tribunal hearing up to 1986. *See id.* § 3.1.1.

tion."[115] The Tribunal also heard from private parties such as Sir James Henare, a distinguished Māori leader and former Commander of the Māori Batallion, who recalled how a school inspector told him "English is the bread-and-butter language, and if you want to earn your bread and butter you must speak English."[116] In addition, four governmental departments submitted testimony: the Departments of Justice, Education, Health, and Māori Affairs.[117] None of these departments opposed official recognition of Te Reo Māori, but were sympathetic instead.[118] Stanley James Callaghan, Secretary for Justice and head of the Justice Department commented upon the distressing state of language laws in New Zealand:

> While the present arrangements may provide for justice to be done in a strict, legalistic sense, a Maori may have an overwhelming sense of grievance and loss of dignity felt through being unable, because of fluency in English, to speak Maori in a court in his own land. That may give rise to such a deep-seated sense of injustice as to prejudice the standing of the courts in some Maori eyes. It seems to us that despite the strict logic of the present situation the time is now appropriate to consider change. Certainly the present situation is at odds with our bicultural foundation at Waitangi in 1840.[119]

As part of its investigation, the Tribunal considered both the English and Māori versions of the Treaty.[120] The Tribunal centered its attention on Article II of the Māori version, particularly the phrase, "o ratou taonga katoa," translated as "all their valued customs and possessions."[121] The paramount issue before the Tribunal was whether Te Reo Māori constituted one of the *taonga* the Crown was obligated to preserve:

> When the question for decision is whether te reo Maori is a "taonga" which the Crown is obliged to recognise we conclude that there can be only one answer.

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[115] *See id.* § 3.3.4.

[116] *See id.* § 3.2.6. Sir James also shared about how he was sent into the bush to cut down a piece of supplejack to be used against him as punishment for speaking Te Reo Māori at school. *See id.* § 3.2.6. When the Tribunal told him that the Education Department would deny ever having an official policy prohibiting the use of Te Reo Māori in the classroom, he responded emphatically, "[t]he facts are incontrovertible. If there was no such policy there was an extremely effective gentlemen's agreement!" *See id.* § 3.2.6. Sir James's experiences were not uncommon.

[117] *See id.* § 8.2.1.

[118] *See id.* § 8.2.2.

[119] *See id.* § 8.2.3.

[120] *See* WAITANGI TRIBUNAL, MEANING OF THE TREATY, *at* http://www.waitangi-tribunal.govt.nz/about/treatyofwaitangi/treaty_meaning.asp (last visited Apr. 27, 2003) (interpreting the two versions of the Treaty).

[121] TE REO REPORT, *supra* note 2, § 4.2.3.

> It is plain that the language is an essential part of the culture and must be regarded as a "valued possession."[122]

The Tribunal also addressed the guarantees given in the English text of the Treaty and concluded that the Crown's duty "means more than merely leaving the Maori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture."[123] Thus, not only did the Crown have an obligation to preserve Te Reo Māori, it had to take affirmative steps toward preservation. The Tribunal further supported its interpretation of the Crown's obligation to the preservation of Te Reo Māori by looking to the general principles behind the Treaty; to recognize, from the Māori perspective, the importance of language in their culture.[124]

After determining that Te Reo Māori constituted *taonga* protected by the Treaty and that the Crown had breached its obligation to protect the language under Article II, the Tribunal addressed objections to, and advantages of, official recognition of the Māori language.[125] Finally, it gave its recommendation for the New Zealand Parliament, which stressed that official recognition should stand for more than "mere tokenism. Official recognition must be seen to be real and significant which means that those who want to use our official language on any public occasion or when dealing with any public authority ought to be able to do so."[126] After discussing various types of official use of the language, the Tribunal made two recommendations for future legisla-

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[122] *See id.* § 4.2.4.

[123] *See id.* § 4.2.7. Article II is the most problematic section of the Treaty. The English version of Article II states:

> Her Majesty the Queen of England confirms and *guarantees* to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their *Lands and Estates Forests Fisheries and other properties* which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

TREATY OF WAITANGI art. II, 1840 (N.Z.) (emphasis added). The Tribunal had to determine whether the guarantee in Article II related to "Lands, Estates, Forests, Fisheries, and other properties." *Id.* But by adhering to the Treaty of Waitangi Act of 1975, which required the Tribunal to consider both texts of the Treaty, the Tribunal ultimately concluded that the guarantee extended to intangible as well as tangible things. TE REO REPORT, *supra* note 2, § 4.2.3.

[124] *See id.* § 4.2.8.

[125] *See id.* § 9.1.5.

[126] *See* id. § 8.2.8.

tion.[127] First, it urged the creation of a Māori Language Commission to act as a supervisory body to set standards for the use of Te Reo Māori and to foster its development.[128] Second, it recommended that the official language right extend to use of Te Reo Māori on any public occasion.[129]

The Waitangi Tribunal issued the Te Reo Report in 1986. The New Zealand Parliament immediately responded with the Māori Language Act of 1987.[130] This momentous legislation marked the shift from viewing an indigenous language right as an individual right, embedded in notions of justice and fairness for the individual, to a cultural right with preservation as its main objective. The Māori Language Act extended the official recognition of the Maori Affairs Act by expressly declaring a right to speak Māori in legal proceedings.[131] Section 4 of the Act grants speakers the right to use Te Reo Māori in *any* legal proceeding, without regard to the speaker's English proficiency.[132] The right extends to any member of the court, any party or witness, any counsel, and any other person with permission of the presiding officer.[133] Section 4 also expressly limits the Māori right, stating that the right conferred "does not entitle any person . . . to insist on being addressed or answered in Maori" or "require that the proceedings . . . be recorded in Māori."[134] The provision also directs the presiding officer to "ensure that a competent interpreter is available."[135] Furthermore, the presiding officer has the discretion to resolve interpretation conflicts between Te Reo Māori and English.[136]

Subsections (5) and (6) place limitations on the speaker's exercise of the right. Subsection (5) authorizes the courts to create procedural rules that require a person intending to speak Te Reo Māori to give "reasonable notice of that intention."[137] But subsection (6) is clear: "any such Rules of Court or other appropriate rules of procedure may make failure to give the required notice a relevant consideration in relation to an award of costs, but *no person shall be denied the right to speak Maori in any legal proceedings because of any such failure.*"[138]

The Maori Language Act generated four noteworthy decisions. The first decision in 1989, *R. v. Hillman*, is the seminal decision on New Zealand's

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[127] *See id.* § 8.2.12-13.
[128] *See id.* § 8.2.12.
[129] *See id.* § 8.2.13.
[130] Maori Language Act, 1987 (N.Z.).
[131] *Id.*
[132] *See id.* § 4(1).
[133] *See id.* § 4(1)(d).
[134] *See id.* § 4(2)(a)-(b).
[135] *See id.* § 4(3).
[136] *See id.* § 4(4).
[137] *See id.* § 4(5).
[138] *See id.* § 4(6)(emphasis added).

indigenous language right.[139] Hillman and four other men of Māori descent protested Māori land claims affecting a particular sub-tribe by occupying the new Civic Centre building in Tauranga City.[140] The five men were indicted on counts including breaking and entering, willfully setting fire to property, willful damage, and assault.[141] Hillman's first language was Te Reo Māori.[142] He exercised his right to speak Te Reo Māori under § 4 of the Māori Language Act and specifically asked the Tauranga District Court to translate questions put to him under cross-examination into Te Reo Māori.[143] District Court Judge Richardson, thus, had to determine whether the Māori Language Act included a right to have questions translated into the Māori language.[144] The Crown opposed Hillman's request, arguing that section 4(2) of the Act specifically stated that the right did not extend to having questions translated into Te Reo Māori.[145] District Court Judge Richardson granted Hillman's request, ruling that "all questions in cross-examination should be put first in English, then translated to the accused in Māori. His reply in Māori should then be translated back into English."[146]

The Crown's objections, reminiscent of *Mihaka*, were that Hillman was only delaying the proceedings and had no right because of his English proficiency.[147] District Court Judge Richardson disagreed and stated that "any such objections are clearly outweighed in the interests of justice to this accused."[148] The court held that the "spirit and intent of the Act" required that Hillman "also have a *choice* of electing to have questions put to him translated into the same language."[149] The *Hillman* decision transcended *Mihaka* because, for the first time, a New Zealand court was viewing official recognition as a means toward preserving the native language and thereby conveying a cultural right:

> In my opinion the Act as a whole intended to *foster* the use of Māori in legal proceedings as a step towards the *preservation of the taonga*. Whilst its use in such legal proceedings must of necessity be tempered at present by the knowledge that few of the inhabitants of New Zealand can speak the language, the use of Māori can be further advanced where requested by permitting questions put to an

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[139] Bates, *supra* note 63, at 58 (citing R. v. Hillman, T 2/89 (Tauranga D. Ct. March 12, 1989) (Richardson, J., presiding)).

[140] *See id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

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

> accused and cross-examination to be translated into Māori and to which the accused can reply in the same language.[150]

Although District Court Judge Richardson's holding and rationale seemed to be a clear departure from *Mihaka*, he refused to acknowledge Te Reo Māori as an official language of the *courts*: "Since the passing of the Māori Language Act in 1987[,] here in New Zealand we have two languages of equal standing, both official languages (English and Māori) but the English language remains the official language for use in our courts."[151] *Hillman* continues to play an important role in advancing the indigenous language right in New Zealand, but the decision also exposes remnants of judicial reluctance to enforce official recognition of Te Reo Māori in the courts.

In 1990, the High Court, Rotorua, independently arrived at the same conclusion as District Judge Richardson in *Hillman*.[152] In *R. v. Hohua*, Judge Fisher held that the accused was entitled to a two-way translation due to the unique objective of the Act: "[T]he new right to speak Māori did not spring from functional necessity but was designed to promote the use of Māori as an end in itself."[153] Judge Fisher determined that refusing the accused's request would "be a curiously grudging way in which to treat an official language."[154]

Although the *Hillman* and *Hohua* courts viewed official recognition as a means toward language perpetuation, the lower court's subsequent decision of *R. v. Cooper* in 1997 revealed that not every court had adjusted its perception of the language right as having greater implications than self-expression and fair hearing.[155] Cooper applied for a Te Reo Māori interpreter at his trial for possession of cannabis for supply before the District Court, Whangarei.[156] He had not previously indicated that he needed an interpreter, although he had been before the court on numerous prior occasions.[157] The Crown opposed his request, arguing that it was a "delaying tactic."[158] District Court Judge Moore, however, granted Cooper's belated request based upon the New Zealand Bill of Rights Act of 1990 and the Māori Language Act of 1987.[159] District Judge Moore relied more upon the Bill of Rights Act than upon the Māori Language Act. The bulk of his opinion dealt with the language right given to *any person*

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[150] *Id.* at 58-59 (emphasis added).

[151] *Id.* at 59.

[152] A.L. Mikaere & D.V. Williams, *Māori Issues*, 1991 N.Z. RECENT L. REV. 161 (citing R. v. Hohua, T 13/90, (H.C. Rotorua July 24, 1990)).

[153] *Id.*

[154] *Id.*

[155] R. v. Cooper [1997] D.C.R. 632.

[156] *Id.* at 636.

[157] *Id.*

[158] *Id.* at 637.

[159] *Id.* at 639-40.

who is not competent in English: "Section 24(g) of the New Zealand Bill of Rights Act 1990 enacts that everyone who is charged with an offence 'shall have the right to have the free assistance of an interpreter if the person cannot understand or speak the language used in the Court.'"[160]

The *Cooper* court resorted back to *Mihaka*-type rhetoric to address Cooper's language claim, viewing the right as a subset of the overall "right to a fair hearing."[161] According to this Bill of Rights analysis of Cooper's language right, if English, rather than Te Reo Māori had been his first language, the court may have had to address the more difficult issue. But being a lower court, it employed the conservative argument, viewing the language right as an extension of the individual right to a fair hearing.

The most recent interpretation of the Māori Language Act came in 2002, with the High Court decision, *Wharepapa v. Police*.[162] Wharepapa was driving his car at 1:35 a.m. in April 2001 when he was stopped by police.[163] The police asked him for his driver's license and then for his name and address.[164] Wharepapa replied in Te Reo Māori and continued to speak in Te Reo Māori after several police warnings.[165] Wharepapa eventually replied in English at the police station, stating that "it was not his fault that everyone did not speak Māori."[166] He was convicted of failing to supply his name and address on demand to a law enforcement officer.[167]

The issue presented to Judge Priestly was whether Wharepapa had the right to answer a police officer in Te Reo Māori although he could speak English and *knew* that the police officer could not speak Te Reo Māori. Unlike District Judge Moore in *Cooper,* Judge Priestly acknowledged the true objective behind the Māori Language Act: "In my opinion[,] the Act as a whole is intended to foster the use of Māori in legal proceedings as a step towards the preservation of the taonga."[168] He held that a person responding to a police officer in Te Reo Māori should not be *ipso facto* obstructive or uncooperative: "[a] person in the appellant's situation ought not to be presumed to have committed an offence merely because he is speaking a language other than English, particularly when the language being spoken is an official language of New Zealand."[169] Accordingly, the High Court set aside Wharepapa's con-

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[160] *Id.* at 639.

[161] District Judge Moore compared the Māori language right to other minority language rights, pointing to New Zealand's pool of Samoan and Tongan interpreters. *Id.* at 640.

[162] Wharepapa v. Police [2002] N.Z.L.R. 611.

[163] *Id.* at 614.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 616.

[169] *Id.* at 617.

viction.[170] Although Judge Priestly sided with the accused on the language claim, he did not extend the scope of the language right to all police interrogations because of public safety concerns.

These four cases represent the overall positive effect of the Māori Language Act on New Zealand language laws. The Act forced *Hillman* and its progeny to view Te Reo Māori as a cultural treasure and to embrace the court's role in protecting that treasure.

B. Hawai'i in Limbo: A Place for 'Ōlelo Hawai'i in the Courts?

The evolution of a Te Reo Māori right—from individual right to cultural right—serves as a model for Hawaiian language policy. The fact that Native Hawaiians do not have a "Treaty of Waitangi" should not foreclose the possibility of a state and federal obligation toward Native Hawaiian cultural treasures such as 'Ōlelo Hawai'i. Congress is currently considering the Akaka Bill, which would give federal recognition to Native Hawaiians as a "unique and distinct, indigenous, native people, with whom the United States has a political and legal relationship."[171] This "special trust relationship" would require the United States to promote the welfare of Native Hawaiians.[172] If such legislation were to pass, the federal government would conceivably have an express obligation to aid in the restoration of the Hawaiian language. Like the Māori situation, the existence of an obligation would require Hawai'i courts to view the Hawaiian language right as a cultural right, and in turn, keep the courts from settling on the usual self-expression and fair hearing standards. But Native Hawaiians need not wait for passage of the Akaka Bill to perpetuate the Hawaiian language in official transactions and proceedings.

The state and federal governments have already expressly and impliedly acknowledged an obligation to restore 'Ōlelo Hawai'i. This obligation is demonstrated by the federal Apology Resolution, NALA, the Native Hawaiian Education Act, and the Hawaii Constitutional Convention proceedings relating to Hawaiian Affairs,[173] which create a basis for Hawai'i to pass a law comparable to the Māori Language Act.

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[170] *Id.* at 618.

[171] Native Hawaiian Recognition Act of 2003 (Akaka Bill), S. 344, 108th Cong. § 3(a)(1) (2003).

[172] *Id.* § 3(a)(2).

[173] Overthrow of Hawaii (Apology Resolution), S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993); Native American Languages Act, 25 U.S.C. §§ 2901-06 (2002); Native Hawaiian Education Act, 20 U.S.C. § 7201 (1994) (current version at 20 U.S.C.A. § 7512 (West Supp. 2003)); COMMITTEE OF THE WHOLE DEBATES, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Vol. II, at 425-32.

In 1993, through the efforts of the Hawai'i congressional delegation, Congress passed a joint resolution "[t]o acknowledge the 100th anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii."[174] In this resolution, now referred to as the Apology Resolution, Congress recognized the United States's role in the illegal overthrow of the Hawaiian monarchy and "expresse[d] its commitment to acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people."[175] The Apology Resolution is a catalyst for the reconciliation process between Native Hawaiians and the United States.

Federal apology for the illegal overthrow of the Hawaiian monarchy impliedly concedes that the United States is obligated to repair the century-old wrong. The illegal overthrow accelerated western colonization of the Hawaiian people, which led to the promulgation of laws banning the use of 'Ōlelo Hawai'i in government and in the schools.[176] Legal prohibition of the native language, thus, is a part of the ultimate wrong—illegal overthrow of the monarchy—which Congress apologized for in the Apology Resolution. Therefore, the Resolution enables federal restoration and preservation of the Hawaiian language.

Congress has passed over 150 laws addressing the condition of Native Hawaiians, of which, at least two specifically deal with the Hawaiian language.[177] For example, Congress passed the Native Hawaiian Education Act in 1994 in response to the poor educational performance among Native Hawaiian schoolchildren.[178] The Education Act authorizes the funding of organizations "developing or operating Native Hawaiian programs or programs of instruction conducted in the Native Hawaiian language."[179] It directs the Secretary of Education to give priority to projects addressing the use of Hawaiian

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[174] Apology Resolution, 107 Stat. at 1510.

[175] *Id.*

[176] *See supra* notes 45 and 46 and accompanying text.

[177] *See* Native Hawaiian Education Act, 20 U.S.C. § 7201 (1994); Native American Languages Act, 25 U.S.C. §§ 2901-06 (2002).

[178] 20 U.S.C. § 7202(14).

In 1981, the Senate instructed the Office of Education to submit to the Congress a comprehensive report on Native Hawaiian education. The report, entitled the "Native Hawaiian Educational Assessment Project", was released in 1983 and documented that Native Hawaiians scored below parity with national norms on standardized achievement tests, were disproportionately represented in many negative social and physical statistics, indicative of special educational needs, and had educational needs which were related to their unique cultural situation, such as different learning styles and low self-image.

Id.

[179] *See id.* § 7205(1).

language in instruction when administering grants.[180] Activities covered under the Act include programs that enhance beginning reading and literacy in the Hawaiian language and programs for the professional development of Native Hawaiian language educators.[181] The Native Hawaiian Education Act exemplifies federal commitment toward helping Native Hawaiians use their indigenous language.

In addition, when Congress passed NALA in 1990, it explicitly embraced a duty to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages."[182] Congress also recognized that the lack of a consistent federal policy on native languages resulted in "acts of suppression and extermination" of the languages and their respective cultures.[183] Like William Tagupa, Congress acknowledged that language is an important political tool with value beyond individual self-expression; "Languages are the means of communication for the full range of human experiences and are *critical to the survival of cultural and political integrity of any people*."[184]

Still, critics of NALA, including former President Bush who signed the Act into passage, maintain that it is merely a declaration of policy to encourage the use of native languages in the educational setting and does not create an enforceable right.[185] When President Bush signed the Act, he construed it to be "a statement of general policy and [did] not understand it to confer a private right of action on any individual or group."[186] In 1996, the United States District Court for the District of Hawai'i agreed with the President in *Office of Hawaiian Affairs v. Department of Education*, another opinion by Hawai'i's Judge Kay.[187] Judge Kay concluded that NALA did not intend to create a private cause of action against states and that, at most, it prohibits the state from barring the use of the Hawaiian language in schools.[188] Judge Kay denied the private cause of action despite a peculiar provision in the Act that also served as the basis for Tagupa's NALA claim: "The right of Native Americans to express themselves through the use of Native American languages shall not be restricted in *any public proceeding*, including publicly supported education programs."[189] Judge Kay dismissed this provision

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[180] *See id.* § 7205(a)(2).

[181] *See id.* § 7205(a)(3).

[182] Native American Languages Act, 25 U.S.C. § 2903(1).

[183] *See id.* § 2901(5).

[184] *See id.* § 2901(9) (emphasis added).

[185] Statement by President George Bush Upon Signing S. 2167, 26 WEEKLY COMP. PRES. DOC. 1703 (Nov. 5, 1990).

[186] *Id.*

[187] Office of Hawaiian Affairs v. Dep't of Educ., 951 F. Supp. 1484 (D. Haw. 1996).

[188] *Id.* at 1495.

[189] 25 U.S.C. § 2904 (2002) (emphasis added).

because NALA mainly addressed language preservation in the educational context.[190]

This post-*Tagupa* decision reaffirms federal judicial reluctance to enforce the official status of 'Ōlelo Hawai'i and recognize an indigenous language right. Regardless, the language of and legislative intent behind NALA should serve as proof of Congress's commitment to encouraging the use of native languages.[191] Therefore, when read in the aggregate among other federal and state legislation and policy, NALA may form a basis upon which to construct an indigenous language right for 'Ōlelo Hawai'i speakers.

In addition to federal proclamations, state constitutional proceedings convey a commitment to promoting the use of the Hawaiian language. In 1978, Hawai'i passed several constitutional amendments related to Hawaiian affairs, including the Official Languages Amendment.[192] The Native Hawaiian delegates to the Constitutional Convention, who drafted and debated the Amendment, spoke candidly about their own personal experiences and the demise of the Hawaiian language.[193] Although the proceedings suggest that the delegates merely wanted to give due recognition to 'Ōlelo Hawai'i as the indigenous language of the State, their discussions also reveal the emergence of an obligation to revitalize the language. The delegates were cognizant of the practical and fiscal ramifications of official recognition, but they also recognized the State's obligation to the Hawaiian people and their culture: "It is the *duty and responsibility* of this State to preserve all aspects of Hawaiiana in education, for it is this State which is the home of the Hawaiian people. Where else are we going to perpetuate it? We must do it here in its home

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[190] Despite the clear "any public proceeding" provision, Judge Kay adopted President Bush's interpretation of the Act as only articulating policy and not conferring a right. *Office of Hawaiian Affairs*, 951 F. Supp. at 1494.

[191] Although President Bush did not envision an indigenous language right, legislative history reveals that Congress was establishing "the *right* of Native Americans . . . to preserve, practice and develop their indigenous languages." S. REP. NO. 101-371, at 1 (1990) (emphasis added).

[192] HAW. CONST. art. XV, § 4.

[193] Delegate Kekoa D. Kaapu, a Native Hawaiian, testified in favor of the Hawaiian affairs amendments. COMMITTEE OF THE WHOLE DEBATES, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Vol. II, at 429-30 (statement of Del. Kekoa D. Kaapu, Member, Comm. of the Whole). Delegate Kaapu shared how his father had to pull weeds in school when he was caught speaking the Hawaiian language. *Id.* at 429. He talked about attending the premiere school for Hawaiians, Kamehameha Schools, yet not learning the Hawaiian language because the school did not offer it. *Id.* Finally, Kaapu shared how his son had just boarded a plane for Harvard with a Hawaiian language book in hand: Kaapu's son was fluent in Japanese after seven years of Japanese classes in a Hawai'i public school, but he was only beginning to learn Hawaiian as he headed off to college. *Id.* at 430.

State."[194] This perceived obligation also led to the passage of the Hawaiian Education Program Amendment, which mandates the study of Hawaiian culture, history, and language in the public schools.[195]

These federal and state laws pertaining to ʻŌlelo Hawaiʻi represent the divide between lawmakers and the courts in constructing indigenous language policy. Although both Congress and the 1978 Hawaiʻi Constitutional Convention expressed a commitment toward revitalizing the Hawaiian language, *Tagupa* and *OHA* suggest that the federal courts are more persuaded by the constraints of judicial efficiency and economy. The beginnings of a Hawaiian language right permeate these laws, but judicial reluctance to enforce the right necessitates additional legislation, comparable to the Maori Language Act, to confer explicitly a right upon ʻŌlelo Hawaiʻi speakers.

IV. PROPOSAL: THE OFFICIAL USE OF ʻŌLELO HAWAIʻI IN HAWAIʻI STATE COURTS

A. An Official Language Proposal for the Hawai'i Legislature

A proposal for a genuinely official recognition of ʻŌlelo Hawaiʻi requires an explicit act that defines the parameters of the indigenous language right and provides guidelines for judicial enforcement. The State is in the best position to enforce the right and has an obligation to preserve ʻŌlelo Hawaiʻi because of its vested interest in the perpetuation of the Hawaiian culture.

1. Framing the proposal: why state courts?

While federal recognition of the Native Hawaiian people as a political (rather than racial) group via the Akaka Bill would explicitly create a trust relationship between the United States and Native Hawaiians, as well as acknowledge an obligation to preserve Hawaiian culture comparable to New Zealand's obligation to preserve Māori cultural treasures, official recognition

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[194] *Id.* at 428 (statement of Del. Patricia P. Nozaki, Member, Comm. of the Whole) (emphasis added). The Committee deferred to the legislature to determine the scope of official recognition:

> The committee feared that all official acts and transactions might have to be in Hawaiian, such as statutes, proceedings of the legislature and judicial decisions. At this point in history, it might be too expensive and impractical to require both languages in these situations. The committee decided that it would be more sensible to delegate discretion to the legislature in determining the appropriate documents and acts to be in both languages.

STANDING COMMITTEE REPORT NO. 57, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAIʻI OF 1978, Vol. I, at 638.

[195] HAW. CONST. art. XV, § 5.

of 'Ōlelo Hawai'i need not wait for Congress to pass the Akaka Bill.[196] The State of Hawai'i, rather than the United States government, is the preferable sovereign to promote the right to indigenous language use for non-legal, but logical reasons. 'Ōlelo Hawai'i is indigenous to the Hawaiian Islands. The language thrived within the state boundaries as a living language a little over a century ago. Efforts by linguists to revitalize the language in the educational setting is concentrated in Hawai'i, particularly in Hawai'i's immersion programs and at the University of Hawai'i.[197]

Furthermore, Hawai'i residents have a reason to be committed to the perpetuation of Hawaiian cultural practices, either because they feel indebted to and appreciate the host culture or because they know that the state economy depends upon it.[198] Simply put, the State of Hawai'i has a greater stake in the preservation of 'Ōlelo Hawai'i than the United States, which translates to a greater obligation. Therefore, it is only appropriate that the Hawai'i Legislature be the first entity to pave the way toward the preservation of the language of its indigenous peoples.[199] A Hawaiian language proposal for the State of Hawai'i is a necessary beginning, but in no way diminishes the need for recognition at the Congressional level.

The indigenous language right can take many forms, from restricted to unlimited use in government transactions and/or proceedings. Identifying three categories among a vast array of possibilities helps to determine the most appropriate form for 'Ōlelo Hawai'i. The first category is a restrictive variation of the language right. This could include the right to speak 'Ōlelo Hawai'i in court, the right to have court proceedings translated back to the speaker in 'Ōlelo Hawai'i, or both. The second category further extends the right, entitling the speaker to use 'Ōlelo Hawai'i in *all* legal proceedings, legislative and executive as well as judicial. This is the form chosen by New Zealand in the Māori Language Act of 1987. Finally, the third category is the comprehensive form, giving speakers the right to use 'Ōlelo Hawai'i in all

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[196] *See supra* text accompanying note 172.

[197] *See supra* notes 32-40 and accompanying text.

[198] Tagupa suggests that the real reason behind official recognition is tied to land ownership disputes. Land grants of the 1800s were written in the Hawaiian language. In order to make these grants admissible in court, the Hawaiian language had to be officially recognized. Telephone Interview with William E.H. Tagupa (Apr. 11, 2003). *See* McCandless v. Waiahole Water Co., 35 Haw. 314 (1940) (holding that "the Hawaiian language is not to be regarded as a foreign language, but as one of which the courts and judges must take judicial notice") (quoting Hapai v. Brown, 21 Haw. 499 (Haw. Terr. 1913)).

[199] Recall Delegate Nozaki's comments about Hawai'i's special duty to the perpetuation of Native Hawaiian culture. *See supra* note 195 and accompanying text.

governmental proceedings and transactions, from court testimony to driver's license applications.[200]

Picturing these categories along a spectrum of language right variations also helps to understand the differing benefits and challenges to each form of the right.[201] For instance, movement along the spectrum toward the comprehensive form may increase the vigor of language preservation, but it also increases the *cost* of preservation. In its tailoring of the 'Ōlelo Hawai'i right, state lawmakers should consider several factors including cost, necessity, and feasibility.[202]

For purposes of this Article, the following proposal adopts the first, more restrictive form of an indigenous language right. It proposes that the "officialness" of the Hawaiian language extend to, and end in, the courtroom. Even though language perpetuation might have a greater success rate if the right were broader (at the extreme end of the spectrum), the courts present an ideal starting point. As the Waitangi Tribunal noted in the Te Reo Report, judicial enforcement of the language right greatly assists in rehabilitating the language back to the official, dignified, and commonplace status it enjoyed prior to English language dominance.[203] Additionally, in any democratic form of government, the courts are viewed as the symbol of justice, the final and sometimes only avenue for redress. 'Ōlelo Hawai'i speakers have had greater success in the executive and legislative branches of government where the indigenous language is welcomed in *pule*, speeches, or testimony.[204] *Tagupa* revealed that the judicial branch is not as welcoming, but rather reluctant to enforce use of the "official" language because of efficiency, cost, and individual rights arguments. The federal courts will not enforce an indigneous language right without specific legislation recognizing and defining the right. All of these reasons demonstrate the need for an act that creates a language right for use in the courts.

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[200] *See* Welsh Language Act, 1993, c. 38 (Eng.) (providing an example of an expansive form of an indigenous right that gives Welsh speakers access to all public services in Welsh). *See also* The Welsh Language Act (discussing the plight of the Welsh language and the practical effects of the Welsh Language Act) *available at* http://faculty.ed.umuc.edu/~jmatthew/articles/welsch.html (last visited Apr. 27, 2003).

[201] The spectrum model has been used to offer a more "functional approach to language discrimination." Christian A. Garza, Note, *Measuring Language Rights Along a Spectrum:* Sandoval v. Hagan, *197 F.3d 484 (11th Cir. 1999), cert. granted sub nom.* Alexander v. Sandoval, *68 U.S.L.W. 3749 (U.S. Sept. 26, 2000) (No. 99-1908)*, 110 YALE L.J. 379, 379-80 (2000). Garza suggested a sliding scale approach: the lesser the English proficiency, the greater the protection required.

[202] See *infra* Part IV.C. for a discussion of these factors.

[203] TE REO REPORT, *supra* note 2, § 8.1.7.

[204] "To pray, worship, say grace, ask a blessing." HAWAIIAN DICTIONARY HAWAIIAN-ENGLISH, ENGLISH-HAWAIIAN 353 (rev. and enlarged ed. 1986).

2. *Proposal: The right to use 'Ōlelo Hawai'i in state courts*

The following is a suggested draft proposal for the Hawai'i Legislature. It is modeled after the Maori Language Act of 1987, but tailored to meet the specific needs of both the Hawaiian language condition and the Hawai'i context—its people and government.[205]

An Act to Confer the Right to Speak 'Ōlelo Hawai'i in Court Proceedings Right to speak 'Ōlelo Hawai'i in court proceedings

(1) The following persons may speak 'Ōlelo Hawai'i, whether or not they are able to understand or communicate in English:
   (a) any member of the court before which the proceedings are being conducted;
   (b) any party or witness;
   (c) any counsel;
   (d) any other person with leave of the presiding judge.

(2) Where any person intends to speak 'Ōlelo in any court proceeding, the presiding judge shall ensure that a competent interpreter is available.

(3) Where, in any proceedings, any question arises as to the accuracy of any interpretation from 'Ōlelo Hawai'i into English or from English into 'Ōlelo Hawai'i, the question shall be determined by the presiding judge as the presiding judge thinks fit.

(4) Where, in a criminal trial, the accused objects to another person's use of 'Ōlelo Hawai'i, the presiding judge shall ensure that the rights of the accused are not violated, which may include ordering the entire trial be conducted in English.

(5) Rules of procedure may be made requiring any person intending to speak 'Ōlelo Hawai'i in any court proceeding to give reasonable notice of that intention, and generally regulating the procedure to be followed where 'Ōlelo Hawai'i is, or is to be, spoken in such proceeding.

(6) Any such rule of procedure may make failure to give the required notice a relevant consideration in relation to an award of costs, but no person shall be denied the right to speak 'Ōlelo Hawai'i in any court proceeding because of any such failure.[206]

B. Reproduction of and Deviation from the Maori Language Act

Unlike the Official Languages Amendment to the Hawaii Constitution, this proposal specifies a right to speak 'Ōlelo Hawai'i in the courts. Moreover, it eradicates the English proficiency argument Judge Kay adopted in *Tagupa* by

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[205] *See infra* Part IV.B.

[206] For a comparison with the Maori Language Act, see *supra* notes 131-39 and accompanying text.

making a person's comprehension and ability to communicate in English irrelevant to the exercise of the right.[207] It also extends the right to any person having an interest or role in the proceeding, without regard to the person's ancestry. Unlike other customary and traditional rights such as gathering rights, non-Native Hawaiians may exercise the language right because of the utility purpose behind it.[208] If preserving the language through practical and official utilization is the goal, then anyone wishing to speak 'Ōlelo Hawai'i should have the right to speak it.[209]

This proposal also places the burden upon the presiding judge to ensure that an interpreter is available for anyone wishing to exercise the Hawaiian language right. But it also places responsibility on the person wishing to exercise the right to give "reasonable notice of that intention." The court has the authority to sanction any person failing to give reasonable notice, but like the Maori Language Act, this proposal is clear that no person shall be denied the Hawaiian language right simply because he/she failed to give notice.

Although this proposal directs the court to enforce official recognition of 'Ōlelo Hawai'i, it also endows the court with great discretionary authority. The court has the power to resolve conflicts over interpretation between English and 'Ōlelo Hawai'i.[210] Unlike the Maori Language Act, this proposal gives the Hawai'i courts the authority to balance the rights of a non-Hawaiian language speaking accused against the right of one exercising the language right. In these circumstances, the judge has the full discretion to order that the proceeding be conducted in English to ensure a fair trial for the accused.

Overall, the main departure from the Maori Language Act is that the Hawaiian language proposal restricts the indigenous language right to the courtroom. This proposal should be viewed as a first step toward officially restoring the indigenous language back to its functional, living language status.

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[207] Tagupa v. Odo, 843 F. Supp. 630, 633 (D. Haw. 1994).

[208] The State of Hawai'i has an affirmative duty to protect traditional and customary Hawaiian rights. *See, e.g.*, HAW. CONST. art. XII, § 7, interpreted in Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982) (holding that lawful occupants of an ahupua'a (traditional land division) may enter undeveloped lands within the ahupua'a to gather items enumerated in § 7-1 for the purposes of practicing Native Hawaiian customs and traditions); Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993) (extending the gathering right beyond the ahupua'a).

[209] But for Native Hawaiians and other indigenous peoples, there are two remaining goals: maintaining cultural identity/unity and political expression.

[210] *Cf.* HAW. REV. STAT. § 1-13 (2002) (mandating that, in cases where "radical and irreconcilable differences between the English and Hawaiian version of any of the laws of the State" exist, "the English version shall be held binding").

C. Five Expected Challenges

When the Waitangi Tribunal considered the Te Reo Māori claim in 1986, many in the New Zealand community raised objections to official recognition of the language. The Tribunal addressed eleven of these objections in the Te Reo Report.[211] Each of these challenges are equally applicable to discourse on official recognition of 'Ōlelo Hawai'i. Four challenges likely to arise in the Hawai'i political context are: (1) no need for recognition because Native Hawaiians speak English anyway;[212] (2) official recognition is too expensive;[213] (3) every other ethnic minority language would have to be recognized as well;[214] and (4) official recognition of the Hawaiian language will cause division in the community.[215] This section will examine these four objections as applied to the Hawaiian language proposal. It will also address a fifth concern not found in the Te Reo Report, but unique to the Hawai'i context: whether official recognition of 'Ōlelo Hawai'i violates United States equal protection.

The first challenge is the English proficiency justification for not recognizing a right to speak 'Ōlelo Hawai'i in the courts. Those who object to the indigenous language right on this ground view the right as a mere subset of the constitutional rights to self-expression and due process just like the *Tagupa* and *Mihaka* courts. It is true that almost all Hawaiian language speakers today, excluding the inhabitants of Ni'ihau and Hawaiian immersion school students, grew up with English as their first language.[216] So by viewing the

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[211] TE REO REPORT, *supra* note 2, § 5. The Waitangi Tribunal addressed eleven commonly expressed exceptions: (1) There is no need for recognition because Māori people can speak English anyway; (2) The Māori language cannot meet the needs of modern society; (3) English is an international language and therefore much more useful than Māori; (4) Most New Zealanders cannot speak or understand Māori; (5) Official recognition will become too expensive; (6) Minority languages die out eventually so why try to save Māori by giving it official recognition; (7) The Māori are only a minority in New Zealand and should not be allowed to force the majority to adopt their standards and values; (8) Official recognition is an empty gesture of no benefit to anyone; (9) There is not enough time available to meet the educational needs of our children; (10) If Māori is to be given official recognition, we will have to recognize other ethnic minority languages as well; (11) If Māori is given official recognition it will cause divisions in the community. *Id.*

[212] *See id.* § 5.02.

[213] *See id.* § 5.16.

[214] *See id.* § 5.11.

[215] *See id.* § 5.12.

[216] In 1978, the year Hawai'i passed the Official Languages Amendment, there were an estimated 2,000 Hawaiian native speakers (elder generation speakers, not including immersion school students, whose first language is 'Ōlelo Hawai'i). Warner, *supra* note 26, at 135-36. Today, the University of Hawai'i Center for Hawaiian Studies estimates that there are less than 500 remaining native speakers. Interview with Lilikalā Kame'eleihiwa, Director, U. Haw. Center for Hawaiian Studies, in Honolulu, Haw. (April 14, 2003).

indigenous language right through the individual rights "lens," this objection is a valid one. But the Hawaiian language right means much more.

The proposal gives 'Ōlelo Hawai'i speakers the right to speak the indigenous language in the courts, not only to recognize a person's right to choose his/her preferred language of communication, but especially for the purpose of utilizing the language for the sake of perpetuation. Recall, Tagupa did not raise the right to speak 'Ōlelo Hawai'i in his deposition because he felt more comfortable with his ancestral language. He did so because he simply wanted to use it and to show that the "language can be used as an instrument of political expression in ordinary life."[217] His comments unveil yet another reason for judicial enforcement of the right: political expression.[218] The English proficiency objection is wholly irrelevant to the goals of political expression and restoration of the indigenous language. Being proficient in English may overcome due process and self-expression concerns, but it does not overcome the equally compelling goals of political expression and language perpetuation. Such an objection also denies the role that English dominance played in the decline of 'Ōlelo Hawai'i. The Waitangi Tribunal put it best:

> It is an important part of this claim that Māori as a language is smothered by the prevalent use of English and is adversely affected as a consequence. To protect the language it must be used. Opportunities for use must be provided. Whether a speaker understands English well or not is a side issue.[219]

The second expected objection to the right to speak the Hawaiian language in the courts is that it would generate enormous cost. The Hawaiian language proposal would require the Hawai'i courts to create and maintain a pool of 'Ōlelo Hawai'i interpreters depending upon the frequency of speakers asserting the right. In the Te Reo Report, the Waitangi Tribunal estimated a $19 million annual expenditure to translate official documents and courtroom

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[217] Telephone Interview with William E.H. Tagupa (Apr. 11, 2003). Likewise, the use of Te Reo Māori is political and a means of making a statement through the courts. Email Interview with Cluny Macpherson, Professor, Auckland (March 27, 2003).

[218] Because indigenous languages are intimately tied to their respective cultures, perpetuating the use of these languages also perpetuates the culture itself. The Secretary of Māori Affairs, Dr. Tamati Muturangi Reedy, acknowledged this causal connection in his testimony to the Waitangi Tribunal:

> Language, Te Reo Māori, is an asset in itself not merely a medium of communication . . . . It is sufficient for me to say that it is inconceivable that Māori people can retain any measure of (their) identity without the language. . . . Clearly, Māori language is being seen by many as a rallying point for a restructuring and piecing together of a much broken and damaged people.

TE REO REPORT, *supra* note 2, §§ 8.1.3, 8.1.4.

[219] *See id.* § 5.2.

proceedings into Te Reo Māori.[220] Whether the Hawai'i cost would approach that amount is speculation, but likely would be less because the Hawai'i proposal restricts the right to use in courts, not all official documents and transactions.

The Waitangi Tribunal agreed that cost was a valid consideration in the shaping of the Māori language right and therefore declined to recommend that the right encompass translation of all official documents into Te Reo Māori.[221] But the Tribunal also engaged in a cost-benefit analysis, ultimately concluding that the need for reviving and maintaining the dying language outweighed the million-dollar cost that accompanied the language right.[222] That same cost-benefit analysis to the Hawaiian language predicament weighs in favor of judicial enforcement of a Hawaiian language right. First, the expense would be lower than the cost of Te Reo Māori because there are less 'Ōlelo Hawai'i speakers to potentially exercise the right. Currently, there are 30,000 native speakers in New Zealand compared to less than 500 native speakers in Hawai'i.[223] The Hawai'i figure does not include future immersion school graduates.[224] The cost would also be lower because the proposal restricts the Hawaiian language right to the courts as opposed to all legal proceedings found in the Māori Language Act.

As for the benefits of the Act, the condition of 'Ōlelo Hawai'i is worse than Te Reo Māori. Again, there are, at most, 500 native speakers in Hawai'i. Recognizing a right to use the dying language in the courts would restore some of the dignity and practicability that the language once enjoyed. Judicial enforcement would aid in changing attitudes that the language is useless in modern society and ineffectual as an official language. It would create a venue beyond the schools in which immersion school graduates could use the language. This is one way that the State can engage in reparations with Native Hawaiians, certainly a less complex and inexpensive avenue when compared to ongoing ceded land disputes between Native Hawaiians and the State.

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[220] *See id.* § 8.2.7.

[221] *See id.* § 3.1.5. The Waitangi Tribunal also refused to expand the scope of official recognition to include requirements that all hospitals have Māori speaking health workers and that all Departmental Heads be bilingual in English and Te Reo Māori within ten years.

[222] *See id.* § 5.6.

[223] Interview with Lilikalā Kame'eleihiwa, Director, U. Haw. Center for Hawaiian Studies, in Honolulu, Haw. (Apr. 14, 2003).

[224] *Id.* There are over 64,000 Māori speakers who speak at, or above, a "fairly well" level of proficiency. STATISTICS NEW ZEALAND, FINAL REPORT ON THE SURVEY ON THE HEALTH OF THE MĀORI LANGUAGE, tbl.1, *at* www.stats.govt.nz/domino/external/web/prod_serv.nsf/Response/Survey+Tables.html. In 1996, 153,669 Māori (29% of the population) indicated that they knew enough Te Reo Māori to hold an everyday conversation. King, *supra* note 26, at 121.

The third obstacle to the proposal is that granting official recognition to ʻŌlelo Hawaiʻi would require similar recognition of other ethnic minority languages. This argument presupposes that official recognition of all languages other than English is undesirable. The earlier objection related to efficiency and expense goes hand in hand with this argument. If all languages enjoy official status, the government would be required to supply interpretations of official documents and court interpreters, thereby driving up costs and creating court delays. Ironically, this objection unearths the inherent difficulty with any kind of official recognition. Recognizing a language as official implies all other languages are inferior. This is the danger posed by English-only legislation.[225] By recognizing English as the official language of the nation, the United States would be making all other languages subordinate.

Official recognition of ʻŌlelo Hawaiʻi is a different case. The unique purpose behind recognizing a Hawaiian language right is to restore the status of a once dominant language in Hawaiʻi and make it useful again. The Hawaiian language proposal also has political and social aims: to give Native Hawaiians a "voice" as a people and to reverse the social effects of colonization.[226] Recognizing ʻŌlelo Hawaiʻi, therefore, would not make other languages subordinate. Furthermore, this argument overlooks the unique status of ʻŌlelo Hawaiʻi as the sole indigenous language of Hawaiʻi. Although all languages are important to their respective cultures and worthy of use and perpetuation, the delicate condition of the Hawaiian language justifies special treatment by the Hawaiʻi Legislature. Furthermore, Native Hawaiians are not like all other ethnic minorities. As discussed above, the United States and Hawaiʻi have demonstrated a unique obligation to Native Hawaiians.[227] Hawaiʻi need not recognize a similar language right for all other minority languages. Indeed, all minority language speakers who are not English-proficient are already entitled to court interpretation in criminal proceedings through due process protection.[228]

The fourth objection to the proposal is that recognizing a Hawaiian language right would cause division in the Hawaiʻi community because speakers would be separated from non-speakers. Essentially, a class of people would have a special right not afforded to those outside the class, thereby causing division. This argument is akin to the rationale behind the English-only movement, which seeks to make English the official language of the United States in the name of uniformity. In 1981, the late Senator S. I.

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[225] *See infra* notes 231-32 and accompanying text.

[226] "Voice" in this context is being used to mean cultural identity.

[227] *See supra* Part III.B.

[228] HAW. R. EVID. 604. *See* Thomas M. Fleming, Annotation, *Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings is Not Proficient in English*, 32 A.L.R. 5th 149 (1995).

Hayakawa (California) introduced the English Language Amendment to the United States Constitution.[229] The measure died in Congress. Two years later, Senator Hayakawa founded U.S. English, Inc., a citizens' action group dedicated to "keeping the nation unified through a common language."[230] U.S. English proponents believe that a country must have one official language or else face division.[231] Therefore, according to this principle, the Hawaiian language proposal would divide the State, and more importantly, the nation.[232]

The uniformity argument against the Hawaiian language proposal assumes that uniformity is a common objective of all United States citizens. Uniformity advocates do not accommodate for the differing histories among ethnic groups and how they became a part of the United States. Legal scholar Robert Blauner drew distinctions between minority groups based upon their introduction into the country.[233] He identified two categories: colonized groups and immigrants.[234] The experiences between these two groups vary because one group entered voluntarily while the other was forced to join.[235] Native Hawaiians, like Native Americans, were colonized and involuntarily brought into the union.[236] The history of native peoples as being coerced into the United States suggests that the uniformity argument would "fall on deaf ears" in Hawai'i. Discourse on Hawaiian sovereignty mounts daily with a faction of Native Hawaiians still adamant on independence from the United States.[237] State lawmakers should consider this history against an objection advocating uniformity.

The policies of U.S. English, Inc. also apply to an analysis of the fifth objection that the Hawaiian language proposal is racial discrimination in violation of equal protection. The pivotal 2000 Supreme Court decision, *Rice*

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[229] Issues in U.S. Language Policy, *The Official English Question*, *at* http://ourworld.compuserv.com/homepages/JWCRAWFORD/ question.htm (last visited April 27, 2003).

[230] U.S. ENGLISH, INC., ABOUT U.S. ENGLISH, *at* http://www.us-english.org/inc/official/about (last visited Apr. 27, 2003). U.S. English believes that English is the single greatest empowering tool that immigrants must have to succeed. *Id.* Its stated goal is to expand opportunities to learn and speak English in the United States. U.S. English is currently working with members of Congress to pass official English legislation. *Id.*

[231] *Id.* Its slogan is "Toward a United America."

[232] *See* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).

[233] Robert Blauner, *Racial Oppression in America*, *in* RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA, 16, 16-17 (Juan F. Perea et al. eds., 2000).

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *See* The Hawaiian Kingdom, *The U.S. Occupation*, *at* http://www.hawaiiankingdom.org/us-occupation.shtml (providing that, based upon the theory that the United States never acquired sovereignty over the Hawaiian Islands, the United States is "occupying" Hawai'i) (last visited April 9, 2004).

v. Cayetano,[238] exposed all Native Hawaiian legislation to equal protection challenges. The facts of *Rice* are simple. In 1978, Hawai'i amended its constitution to establish the Office of Hawaiian Affairs ("OHA"), a public trust entity that would "provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people."[239] OHA was to be overseen by a nine-member board of trustees who are of Hawaiian ancestry and who are elected by voters who are of Hawaiian ancestry.[240] In 1996, Harold Rice, a non-Hawaiian citizen of Hawai'i, registered with the State of Hawai'i to vote in the upcoming OHA election.[241] The State rejected his application because he was not "Hawaiian" as defined by the Hawai'i constitutional provision that created OHA.[242] Rice sued Hawai'i Governor Benjamin Cayetano in the United States District Court for the District of Hawai'i.[243]

The Supreme Court concluded that the OHA voting requirement, based upon ancestry, was the equivalent of an impermissible racial classification in violation of the Fifteenth Amendment.[244] The Court distinguished OHA, a state agency, from quasi-sovereign Native American tribes whose special relationship with the United States permits special "political" rather than "racial" treatment.[245] Although the *Rice* holding was limited to the Fifteenth Amendment, the Court's characterization of the OHA voting requirement as racial, rather than political, subjects all laws pertaining to Native Hawaiians to Fourteenth Amendment equal protection scrutiny. Because of *Rice*, the concept that any legislation geared at improving the Native Hawaiian condition is equivalent to racial discrimination has received growing support,

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[238] 528 U.S. 495 (2000).

[239] *Id.* at 508 (quoting PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII of 1978, Comm. of the Whole Rep. No. 13, p. 1018 (1980)). Office of Hawaiian Affairs ("OHA") was created during the same Constitutional Convention that produced the Official Languages Amendment. HAW. CONST. art. XII.

[240] *Rice*, 528 U.S. at 509.

[241] *Id.* at 510.

[242] *Id.* "'Hawaiian' means any descendent 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." *Id.* at 509 (quoting HAW. REV. STAT. § 10-2). Although he is not Hawaiian, Rice is a descendant of pre-annexation residents of Hawai'i. *Id.* at 510.

[243] *Id.*

[244] *Id.* at 524.

[245] *Id.* at 520-21. Justices Breyer and Souter explicitly stated that "(1) there is no 'trust' for native Hawaiians . . . and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe." *Id.* at 525. (Breyer, J., concurring). *See* Morton v. Mancari, 417 U.S. 535 (1974) (holding that special treatment of Indians will be deemed constitutional as long as it is rationally related to Congress's unique obligation toward Indians).

leaving existing laws created for the betterment of Native Hawaiians in a state of uncertainty.[246] Thus, *Rice* impacts future Native Hawaiian-related laws, as well, including the Hawaiian language proposal.

Opposition to special political status for Native Hawaiians existed before *Rice*.[247] The critical difference with the language proposal, however, is that it allows *anyone*, Native Hawaiian or not, to exercise the right, making it more difficult for *Rice* proponents to establish that the proposal discriminates on the basis of race.[248] The distinction between the Native Hawaiian relationship and Native American relationship with the federal government is critical to what rights are afforded to them. Although the histories of the two groups are parallel, the federal government has not fully extended the same recognition to Native Hawaiians.

U.S. English, Inc. recognizes the unique situation of Native American languages and "fully supports the right of Native Americans to preserve their . . . language" as protected by the United States Constitution and federal and state laws.[249] The citizens' action group maintains that both Official English legislation and Native American language policy can "peacefully coexist": "Just as Native Americans are striving to preserve their historic languages and cultures, U.S. English is trying to preserve the historic language and culture of the United States of America."[250] Again, the widespread attitude that Native Hawaiians do not share the same political status as Native Americans casts doubt on whether U.S. English's stance would support the Hawaiian language proposal.

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[246] *See* Le'a Malia Kanehe, Note, *Misconstruing Laws Reaffirming Native Hawaiian Ancestral Land Rights as Racial Discrimination: The Fundamental Conflicts Between Indigenous Rights and Civil Rights in* Barrett v. State of Hawai'i, on file with the author (2001) (discussing post-*Rice* cases challenging Native Hawaiian entitlements).

[247] For example, President George Bush hesitantly signed Native American Languages Act ("NALA") of 1992 into law because he was wary about providing benefits for Native Hawaiians. Statement by President George Bush Upon Signing S. 2044, Pub. L. No. 102-524, 28 WEEKLY COMP. PRES. DOC. 2133 (Nov. 2, 1992). He expressed his concern that including Native Hawaiians in the Act was tantamount to a race-based classification. *Id.* The President distinguished Native Hawaiians from Native Americans. After approving of NALA's purpose—to provide Native Americans with a sense of identity and pride in their heritage—he declared that providing benefits to "Native Hawaiians" could not "be supported as an exercise of the constitutional authority granted to the Congress to benefit Native Americans as members of tribes." *Id.* In 1992, Congress reassessed NALA of 1990 and determined that it was ineffective because it did not contain authorization for appropriations. Congress passed NALA of 1992 to provide the financial means of effectuating the policies of NALA of 1990.

[248] Rice v. Cayetano, 528 U.S. 495, 514-15 (2000). They would have to argue that language, like ancestry, is a "proxy for race." *Id.* at 514.

[249] U.S. ENGLISH, INC., OFFICIAL ENGLISH: NATIVE AMERICAN LANGUAGES, *supra* note 231.

[250] *Id.*

The Hawaiian language proposal would likely face all of these objections. Regardless, it is a well-balanced model for an indigenous language right in Hawai'i. Overall, the Hawai'i Legislature should consider several guiding principles when constructing a right to officially use 'Ōlelo Hawai'i. It must remember that an indigenous language right has greater dimensions than other language rights. In addition to protecting the individual rights of self-expression and due process, the right aims at perpetuating the threatened language by use in and of itself. It also ensures the use of the language as a cultural means of political expression. Finally, recognition of an indigenous language serves as the catalyst for improving the social status of the indigenous group.[251] These goals must be weighed against the constitutionally protected rights of the individual. Although cost and efficiency are factors in the formation of an indigenous language right, they should not form the basis for rejecting the right altogether as in *Tagupa* and *Mihaka*.

V. CONCLUSION

As expressed in federal and state laws, the United States and the State of Hawai'i have an obligation to encourage official use of 'Ōlelo Hawai'i akin to the New Zealand obligation to preserve Te Reo Māori. "Official recognition" alone has proven to be ineffective in fulfilling this obligation because it does not convey to the courts the cultural significance of an indigenous language right, which encompasses cultural identification, political expression, and language use and perpetuation. New Zealand's Maori Language Act bridged the divide between its government and courts by defining a right to use Te Reo Māori and providing for judicial enforcement. Hawai'i must follow the path paved by the Māori and pass legislation that explicitly defines the scope of the indigenous language right and directs both State and federal courts to enforce that right.

Summer Kupau[252]

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[251] Dr. Tamati Muturangi Reedy acknowledged this greater social purpose in his testimony before the Waitangi Tribunal: An act for official recognition of Te Reo Māori "should be an act that puts the language, and therefore the culture, on to a pedestal so that our children will see 'being Māori' as something to be proud of, not something to be treated as worthless." TE REO REPORT, *supra* note 2, § 8.1.7.

[252] Class of 2004, University of Hawai'i William S. Richardson School of Law. Mahalo to Professor Denise Antolini for her constant guidance and encouragement during her Second-Year Seminar writing course in which this Article was first conceived; Editor Lori Amano; the U.H. Law Review Editorial Board and Staff; and especially Jennifer L. Carpenter for generously devoting her impeccable editing skills not only to this Article, but to much of my work.

Hawai'i's Justiciability Doctrine

I. INTRODUCTION

Justiciability, which encompasses the areas of standing, ripeness, mootness, political questions, and advisory opinions, is essentially concerned with the fitness of a case for adjudication and whether a court can and should resolve a given dispute.[1] Although this doctrine may seem "merely technical, legalistic wrangling,"[2] it ultimately serves as a gatekeeper to the courthouse: only those cases that are deemed fit for adjudication will be granted access. Indeed, justiciability not only determines "whether, when, and by whom important public questions can be adjudicated . . . [it also] affects policy formation, government accountability, and social participation in the passionate issues of the day."[3]

Essentially, the justiciability doctrine derives from the case-or-controversy requirement of Article III,[4] which places "fundamental limits on federal judicial power in our system of government."[5] Although state courts are not bound by the confines of Article III,[6] "[m]any state courts draw heavily from federal justiciability principles"[7] to decide cases while other state courts render advisory opinions, or adjudicate political questions or moot issues.[8] In Hawai'i, the issue of whether the courts stringently apply, or radically depart, from federal justiciability standards has not yet been addressed.

This article strives to fill this perceived gap by providing the first comprehensive analysis of Hawai'i's justiciability doctrine. Part II of this article begins with an overview of the justiciability doctrine, specifically discussing its constitutional and prudential underpinnings. Part III deals with the doctrinal strands of justiciability: advisory opinions, mootness, ripeness, standing, and political questions. Each section begins with an overview of the federal model and thereafter continues with an analysis of Hawai'i's current treatment of that particular strand of justiciability. Part IV of this article advocates that, because Hawai'i is not bound by an Article III cases and

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[1] *See* D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 241 (1986) (defining nonjusticiable as unsuited for adjudication).

[2] *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973).

[3] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1838-39 (2001).

[4] U.S. CONST. art. III, § 2, cl. 1. *See infra* note 11 and accompanying text.

[5] Allen v. Wright, 468 U.S. 737, 750 (1984).

[6] *See* Asarco Inc. v. Kadish, 490 U.S. 605, 617 (1989) (opining that the limitations of Article III are not applicable to state courts).

[7] *See* Hershkoff, *supra* note 3, at 1834.

[8] *See id.* at 1837 (footnotes omitted). *See also infra* note 63 and accompanying text.

controversies requirement, it should not cling inflexibly to federal standards of justiciability.

II. BACKGROUND OF THE JUSTICIABILITY DOCTRINE

A. Federal Interpretation

The United States Constitution distributes power among three branches of government: the legislative,[9] the executive,[10] and the judicial.[11] Legal scholars have described the Framer's creation of a tripartite government as based on two general goals known as separation-of-powers and checks-and-balances.[12] Separation-of-powers serves to separate the departments of government, thus "preclud[ing] a commingling of . . . essentially different powers of government in the same hands."[13] Hence, the ultimate goal is to prevent a situation where one department would be "controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments."[14]

Although the object of the Framers was to "divid[e] and allocat[e] the sovereign power among three co-equal branches . . . the separate powers were not intended to operate with absolute independence."[15] Thus, the second principle of checks-and-balances is equally important insofar as the Constitution "contemplates that practice will integrate the dispersed powers into a workable government . . . [and] . . . enjoins upon its branches separateness but

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[9] U.S. CONST. art. I. § 1. "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." *Id.*

[10] U.S. CONST. art. II § 1, cl. 1. "The executive Power shall be vested in a President of the United States of America." *Id.*

[11] U.S. CONST. art. III § 2, cl. 1 sets forth:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the Unites States shall be a Party;—to Controversies between two or more State; between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

[12] *See infra* notes 13-16 and accompanying text.

[13] O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

[14] *Id.*

[15] United States v. Nixon, 418 U.S. 683, 707 (1974).

interdependence, autonomy but reciprocity."[16] Unfortunately, this blurred rule leaves problems of interpretation, because no set guidelines clearly delineate the authority of each of the three branches. With respect to the judiciary, "[t]he question of how far a judicial inquiry should range has been the most extensive and central debate in constitutional law throughout our country's history."[17]

The ambit of judicial inquiry, however, has been restricted to Article III, Section 2 of the U.S. Constitution,[18] which limits the exercise of federal judicial power to cases and controversies.[19] The phrase *cases and controversies* has subsequently been interpreted as requiring an actual, concrete legal dispute between real adversarial parties that is capable of judicial resolution and relief.[20] A case is considered to be justiciable, and thereby appropriate for judicial review, only if it constitutes a case-or-controversy.

The rationale is that justiciability places "fundamental limits on federal judicial power in our system of government,"[21] ensuring that federal courts do "not intrude into areas committed to the other branches of government."[22] Even in the absence of constitutional restrictions, however, prudential concerns call for judicial self-restraint, as evidenced by Justice Brandeis's famous quote, "[t]he most important thing we do . . . is not doing."[23] To explain, Alexander Bickel argued that the Court's self-restraint is a "passive virtue" and justiciability should be invoked to avoid judicial decision-making where it is more appropriate for another branch of government to act first.[24] The restraints required by the rules of justiciability not only ensure that the adversarial process is maintained, but also that the principle of separation-of-powers is preserved.[25]

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[16] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[17] K. RIPPLE, CONSTITUTIONAL LITIGATION § 3-1, at 87 (1984).

[18] U.S. CONST. art. III, § 2, cl. 1.

[19] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[20] *Id.* at 239-41.

[21] Allen v. Wright, 468 U.S. 737, 750 (1984). *See also* Navegar, Inc. v. United States, F.3d 994, 997-98 (D.C. Cir. 1997) (noting that one of the important functions of Article III justiciability principles is to maintain the limits on judicial power).

[22] Flast v. Cohen, 392 U.S. 83, 95 (1968). The Court explained that "[f]ederal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Id.* at 97.

[23] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71, 112 (1st ed. 1962) (quoting Justice Brandeis).

[24] *See id.* at 111-98.

[25] *Flast*, 392 U.S. at 95. In *Flast*, the Supreme Court opined:

> Embodied in [cases and controversies] . . . are two complementary but somewhat different limitations. [They serve in part to] limit the business of federal courts to questions

Although federal courts "may exercise power only 'in the last resort, and as a necessity,'"[26] most state courts are not bound by the confines of Article III.[27] Indeed, the case-or-controversy requirement "relates only to the jurisdiction of [federal courts] and has no bearing on the jurisdiction of [state] courts."[28] Thus, while the Supreme Court may require federal courts to follow justiciability principles, it has no power to impose them on state courts.[29] Finally, while State judges may elect to follow the Supreme Court's example, "there is no reason why they *must* do so."[30]

B. Hawai'i's Interpretation

Unlike the federal judiciary, "the courts of Hawaii are not subject to a 'cases or controversies' limitation like that imposed . . . by Article III, S[ection] 2 of the United States Constitution . . . [.]"[31] To explain, the Hawai'i Constitution contains no reference to a case-or-controversy requirement and instead simply states:

> 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. The several courts shall have original and appellate jurisdiction as provided by law and shall establish time limits for disposition of cases in accordance with their rules.[32]

Despite this significant constitutional deference, however, the Hawai'i Supreme Court has "taken the teachings of the Supreme Court to heart and

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> presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process . . . [and they] define the role assigned to the judiciary in a tripartite allocation of power to assure that the . . . courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation . . . [.]

Id. at 94-95.

[26] *Allen*, 468 U.S. at 752 (citing Chicago & Grand Trunk Ry. Co. v. Wellman, 143 U.S. 339, 345 (1892)).

[27] *See* Asarco, Inc. v. Kadish, 490 U.S. 605, 617 (1989) (positing that the limitations of Article III are not applicable to state courts).

[28] Sec'y of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 970-71 (1984) (Stevens, J., concurring).

[29] *Id.* at 972.

[30] *Id.* (emphasis addded).

[31] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981). *See also* State v. Fields, 67 Haw. 268, 274, 686 P.2d 1379, 1385 (1984).

[32] HAW. CONST. art. VI, § 1. However, like the federal government, Hawai'i's government is "one in which the sovereign power is divided and allocated among three co-equal branches." Trs. of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170-71, 737 P.2d 446, 456 (1987) (citing HAW. CONST. art. III, V, VI).

adhered to the doctrine that the use of 'judicial power . . . in a system where there is a separation of powers should be limited to those questions capable of judicial resolution and presented in an adversary context.'"[33]

Hawai'i courts acknowledge that the "prudential rules of judicial self-governance" are grounded in the concern of the properly limited role of courts in a democratic society.[34] Thus, despite the lack of constitutional restrictions, Hawai'i courts must "still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government."[35] Hawai'i courts tend to conform the scope of their judicial function to the federal model, but they "will [not] follow every twist or turn"[36] in the development of federal justiciability standards because they do sometimes ignore those restrictions if they determine that a judicial decision is warranted.[37]

III. DOCTRINAL STRANDS OF JUSTICIABILITY

The federal rules governing justiciability are complex, but basically ask whether a case is suitable for adjudication.[38] To ascertain what subcategory of justiciability one is dealing with, it is necessary to first determine the focus of a particular case. When the focus is on a particular party's ability to adequately litigate a particular issue, the courts describe the problem in terms of standing.[39] When the case seems premature, the courts address the justiciability issue as ripeness.[40] When the lawsuit's continued vitality becomes an issue, courts use mootness to explain a suit's nonjusticiability.[41] Finally, when a suit's resolution threatens confrontation with different powers of government, political question is the term used to describe the justiciability

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[33] *Yamasaki*, 69 Haw. at 171, 737 P.2d at 456 (1987) (citations omitted).

[34] *Fields*, 67 Haw. at 274, 686 P.2d at 1385 (citing *Life of the Land*, 63 Haw. at 172, 623 P.2d at 438 (1981)).

[35] *Life of the Land*, 63 Haw. at 172, 623 P.2d at 438.

[36] *Id.* at 176, 623 P.2d at 441.

[37] *See, e.g.*, *infra* text accompanying notes 148-49.

[38] *See* GALLIGAN, *supra* note 1. *See also* Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937). The court explained that:

> A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. (citations omitted).

[39] RIPPLE, *supra* note 17, § 3-2(A), at 88.

[40] *Id.*

[41] *Id.*

problem.[42] Additionally, if a court were to ignore these principles and render a decision—despite the lack of a justiciable case-or-controversy—it would be considered to be a prohibited advisory opinion.[43] Each subcategory of justiciability is discussed separately below.

A. Advisory Opinions

1. Advisory opinions: federal standard

Cases requesting advisory opinions essentially involve hypothetical cases, not involving concrete disputes between genuine adversaries.[44] Therefore, cases calling for an advisory opinion are considered to be nonjusticiable because they do not constitute a viable case-or-controversy.[45] In application, the major problem with the issuance of advisory opinions is that, "the giving of advisory opinions . . . is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority"[46] nor are they "finally decisive."[47]

The ban on advisory opinions seems to stem from the Federal Convention of 1787, where the framers rejected the proposal of conferring Article III judges with the power to render advisory opinions.[48] It is evident, however, that the lack of power to render advisory opinions did not deter others, even the Court, from attempting to elicit or render advisory opinions.[49] A prime

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[42] *Id.*

[43] *See* William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 272 (1990). According to Fletcher, a true advisory opinion is synonymous with providing an:

> answer to a legal question formally posed by a coordinate branch of government. The advisory opinion that has become an issue in the twentieth century is different. This new form of advisory opinion is not given in response to a formal request by a coordinate branch of government; rather, it is an opinion rendered in a litigated dispute in which a party is thought not to have a sufficient, or sufficiently immediate, stake in the matter being litigated to make the court's decision anything but advisory.

Id. at 272.

[44] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[45] *See id.* at 240-41.

[46] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 153 (1893).

[47] BICKEL, *supra* note 23, at 115.

[48] *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 340-41 (Max Farrand, ed., 1937).

[49] *See, e.g.*, H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 79 (1953) (noting that Chief Justice John Jay and a minority of the Justices wrote to President Washington positing that the requirement of circuit riding was unconstitutional); Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 at n.* (1792) (citing letters that two circuit courts wrote to the

example comes from an exchange of correspondence during 1793 between Chief Justice Jay and President George Washington's Secretary of State, Thomas Jefferson.[50] In the Court's letter, Chief Justice Jay declined to answer questions regarding the propriety of a policy of neutrality toward France and concluded that the federal courts may not constitutionally render advisory opinions:

> [T]he lines of separation [are] drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being judges in a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *executive* departments.[51]

The problem with advisory opinions reemerged in *Muskrat v. United States*,[52] which involved a Congressional statute providing for a transfer of Cherokee property from tribal ownership to individual ownership by Cherokee citizens.[53] Later acts, which were the subject of the dispute, sought to increase the permitted number of Cherokee enrollees entitled to participate in the division of the Cherokee lands and funds.[54]

Congress passed a special act authorizing the plaintiffs to bring suit against the United States as a defendant, in the Court of Claims, with the right of appeal to the Supreme Court.[55] The Supreme Court determined that although the government was named as a defendant, it had no interest in the litigation: "[plaintiffs do not] assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part."[56] The Court ascertained that the whole purpose behind the congressional jurisdictional act was to test the "constitutional validity of this class of legislation in a suit not arising between parties concerning a property right necessarily involved in the decision in question . . . [.]"[57] Ultimately, the court concluded that these actions presented a nonjusticiable controversy, and therefore that "judgment could not be executed, [because they] amount[] in fact to no more

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President objecting on constitutional grounds to the provisions of a particular statute).

[50] *See* CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-489 (Henry P. Johnston, ed., 1891).

[51] *Id.* at 489.

[52] 219 U.S. 346 (1911).

[53] *Id.* at 348 (citing Act of June 21, 1906, ch. 1876, 34 Stat. 137 (1906), as amended by ch. 3504, 34 Stat. 325 (1906)).

[54] *Id.* at 348-49 (citing Act of July 1, 1902, ch. 1375, 32 Stat. 716-720, 721, (1902)).

[55] *Id.* at 349-50 (citing Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1028 (1907)).

[56] *Id.* at 361.

[57] *Id.*

than an expression of opinion upon the validity of the acts in question."[58] While *Muskrat* is indicative of the rule that federal courts are preempted from issuing advisory opinions, this restriction has not precluded some states from issuing advisory opinions in their state courts.[59]

2. Advisory opinions: Hawai'i standard

One of the earliest cases that involved the issuance of an advisory opinion can be traced to 1889, when Hawai'i was still a Kingdom. In *In Re Authority of the Cabinet*,[60] the Cabinet requested the Hawai'i Supreme Court to render an opinion explicating the Cabinet's authority and responsibility with respect to King Kalakaua's refusal to accept the Cabinet's statement of principles.[61] The court responded that the Cabinet's principles were in accordance with the Constitution: "[t]here can be no dual Government. There can be no authority without responsibility. The King is without responsibility. The Constitution confers the responsibility of government upon the Cabinet; they therefore, have the authority."[62] Although Hawai'i courts may have historically viewed the issuance of advisory opinions as an inherent grant of power, the current trend is to follow the federal standard because neither the Hawai'i Constitution nor statutory authorization has assigned to the judiciary an advisory function.[63]

While there is no recent case dealing specifically with the issuance of an advisory opinion, the rule was expressly stated in *State v. Fields*.[64] In *Fields*, the Hawai'i Supreme Court briefly described the prohibition on advisory opinions in federal courts: "courts created pursuant to Article III are barred . . . from deciding 'abstract, hypothetical or contingent questions.'"[65] The court then went on to distinguish Article III courts from Hawai'i courts: "[n]othing in Article III of the Federal Constitution prevents [a state appellate court] from rendering an advisory opinion concerning the constitutionality of

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[58] *Id.* at 362.

[59] Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 970-71 (1984).

[60] 7 Haw. 783 (1889).

[61] *Id.* at 783.

[62] *Id.* at 784.

[63] This is notable, considering that "[s]tate constitutions in Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota authorize the judiciary to give advice when the legislature or governor so requests." Hershkoff, *supra* note 3, at 1845. Moreover, in Alabama, Delaware, and Oklahoma the judicial power to render advisory opinions is statutorily assigned. *Id.* at 1845-46.

[64] 67 Haw. 268, 686 P.2d 1379 (1984).

[65] *Id.* at 274, 686 P.2d at 1385 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 52, 56 (1978)).

[state] legislation if it considers it appropriate to do so."[66] Nonetheless, the court ultimately acknowledged that it recognizes "prudential rules of judicial self-governance."[67] The federal rule, as explicated in *Fields*, is expressly adopted in *Trustees of Office of Hawaiian Affairs v. Yamasaki*,[68] which states: "[w]hen confronted with an abstract or hypothetical question, [the Hawai'i Supreme Court] ha[s] addressed the problem in terms of a prohibition against rendering 'advisory opinions.'"[69] In sum, Hawai'i courts have adopted the federal rule, which prohibits the rendering of an advisory opinion.[70]

B. A Matter of Timing: Mootness and Ripeness

Ripeness and mootness essentially address the timeliness of a case.[71] If a case is brought too late, it is considered moot and "there is no subject matter on which the judgment of the court's order can operate."[72] Similarly, if a case is brought prematurely and there is no cognizable injury ready to be addressed by the court, it will be deemed unripe and therefore nonjusticiable.[73]

1. Mootness: the federal standard

The general rule regarding mootness is that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."[74] A case is regarded as moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[75] Additionally, despite the fact "[t]hat the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, [it] cannot substitute for the actual case-or-controversy that an

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[66] *Id.* at 274 n.4 (citation omitted).

[67] *Id.* at 274.

[68] 69 Haw. 154, 737 P.2d 446 (1987).

[69] *Id.* at 171, 737 P.2d at 456.

[70] *See id.* Although arguable, when Hawai'i courts opt to decide cases that Article III courts would be prohibited from deciding, it could be considered an advisory opinion. *See supra*, note 43 and accompanying text.

[71] Fletcher, *supra* note 43, at 296 (explaining that ripeness and mootness are primarily concerned with the timing of the suit rather than the identity of the parties).

[72] *Ex parte* Baez, 177 U.S. 378, 390 (1900) (opining that courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies).

[73] Blanchette v. Connecticut, 419 U.S. 102, 140 (1974) (stating that ripeness is an issue of timeliness).

[74] DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam) (citing North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

[75] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)).

exercise of this Court's jurisdiction requires."[76] A case may be rendered moot for a number of reasons: the passage of time renders the court unable to grant plaintiff the remedy they seek;[77] the purported wrongful act has passed and is reasonably unlikely to recur;[78] or, a law has changed and presently resolves the issue at suit.[79]

A decisive case in the area of mootness is *DeFunis v. Odegaard*,[80] wherein the petitioner Marco DeFunis brought suit for an injunction commanding the University of Washington Law School to admit him based on the grounds that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission.[81] By the time the Supreme Court rendered an opinion in the case, the petitioner was in his final semester of law school and would "receive his diploma regardless of any decision [the] Court might reach on the merits of [the] case."[82] According to the Court, the controversy between the parties had thus ceased to be definite and concrete in that the only remedy DeFunis sought was an injunction commanding admission to the law school.[83] Therefore, "[a] determination by th[e] Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it."[84]

Despite this ruling, the Supreme Court has recognized and applied several exceptions to the mootness doctrine "which operate to mitigate its harshness, to prevent either party from depriving the court of jurisdiction, and to enable

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[76] Honig v. Doe, 484 U.S. 305, 317 (1988).

[77] *See, e.g.*, Atherton Mills v. Johnston, 259 U.S. 13 (1922) (opining that a lapse in time brought the minor to an age which made the applicability of the Child Labor Tax Act ineffectual).

[78] *See, e.g.*, Securities & Exch. Comm'n v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972) (holding that Dow's initial refusal of the shareholders' proxy request became moot when Dow acquiesced in the shareholders' request). *But see infra* text accompanying notes 87-94.

[79] *See, e.g.*, Lewis v. Cont'l Bank Corp., 494 U.S. 472 (1990) (determining that a suit brought by the Illinois Bank Holding Company became moot when Congress enacted changes to the Federal Bank Holding Company Act).

[80] 416 U.S. 312, 312 (1974) (per curiam).

[81] *Id.* at 314.

[82] *Id.* at 317.

[83] *Id.* It is significant that the Court emphasized that DeFunis "did not cast his suit as a class action . . . [.] " *Id.* The reasoning is that a class action suit can serve to insulate lawsuits against mootness problems. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975) (opining that an action still existed between a defendant and a member of the class represented by the plaintiff, even though the claim had become moot); United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (holding that an action brought on behalf of a class does not become moot upon the expiration of a plaintiff's substantive claim despite denial of class certification). *But see* Hall v. Beals, 369 U.S. 45 (1969) (determining that mootness is not precluded merely because the plaintiffs list their suit as a class action).

[84] *Defunis*, 416 U.S. at 317.

certain cases involving controversies of relatively short duration to be heard by the [C]ourt."[85] The two main exceptions are voluntary cessation by the defendant and situations where the controversy is regarded as capable of repetition, yet evading review.[86]

First, there is a "line of decisions . . . standing for the proposition that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'"[87] The rationale is that "if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'"[88] A recent case applying this exception to the mootness doctrine is *Friends of the Earth, Inc. v. Laidlaw Environmental Services.*[89]

In that case, the Supreme Court opined that citizen suits brought under the Clean Water Act were not moot and thus rejected Laidlaw's claim that subsequent and substantial compliance with the National Pollutant Discharge Elimination System permit made the issues on appeal moot.[90] *Friends of the Earth* reiterated the standard—which the Court characterized as stringent[91]—to ascertain whether a case has been mooted by the defendant's voluntary conduct: "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[92] According to one commentator, the decision in *Friends of the Earth* "is not a major deviation from prior Supreme Court precedent with regard to mootness."[93] And indeed, "any standard less than this would allow the defendant to evade review by temporarily ceasing the challenged practice and then restarting the practice at a later time."[94]

Another well-recognized exception to the mootness doctrine are actions that are capable of repetition yet evade review. Under this exception, to avoid

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[85] Gay and Lesbian Students Ass'n v. Gohn, 656 F. Supp. 1045, 1049 (W.D. Ark. 1987) (overruled on other grounds).

[86] *Id.*

[87] *Defunis*, 416 U.S. at 318 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 308-10 (1897); Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944); Gray v. Sanders, 372 U.S. 368, 376 (1963); United States Phosphate Export Ass'n, 393 U.S. 199, 202-03 (1968)).

[88] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

[89] 528 U.S. 167 (2000). *See also infra* text accompanying notes 179, 184.

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

[91] *Id.* at 189.

[92] *Id.* (quotation omitted).

[93] Nicholas J. DeIuliis, Recent Development, *Deterrence Effect of Civil Penalties, Potential Loss of Recreational and Economic Use by Plaintiff Organization's Members, and Absence of a Clear Indication of Eliminating Future Violations Will Meet Article III Mootness and Standing Requirements for Clean Water Act Citizen Suits:* Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 39 DUQ. L. REV. 267, 285 (2000).

[94] *Id.*

being determined moot, there must be a *reasonable expectation* or a *demonstrated probability* that "the same controversy will recur involving the same complaining party."[95] An instructive example of this exception comes from *Roe v. Wade*,[96] wherein the Court posited that "[p]regnancy provides a classic justification for a conclusion of nonmootness . . . [insofar as] [i]t truly could be 'capable of repetition yet evading review.'"[97] To explain, "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."[98] Furthermore, "[p]regnancy often comes more than once to the same woman, and in the general population, if man[kind] is to survive, it will always be with us."[99]

In sum, the federal standard for mootness is relaxed at times so that it is not so rigid as to prevent the review of important constitutional issues.[100] The Hawai'i standard takes a similar stance.

2. Mootness: the Hawai'i standard

As early as 1921, the Hawai'i Supreme Court stated that, "[j]udicial tribunals sit only for the determination of real controversies between parties who have a legal interest of at least technical sufficiency in the subject-matters embraced in the records of causes pending in courts. Merely abstract or moot questions will not be determined on appeal."[101] It is thus the duty of the court "to decide actual controversies . . . and not to give opinions upon moot questions . . . or to declare principles or rules of law which cannot affect the matter in issue in the case before it."[102] Therefore, it is well-established in Hawai'i that a case is moot—thus destroying the justiciability of a suit previously suitable for determination—where the question to be determined is abstract and does not rest on existing facts or rights.[103] The mootness doctrine is properly invoked where "events have so affected the relations

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[95] Murphy v. Hunt, 455 U.S. 478, 482 (1982) (per curiam) (quoting Weinstein v. Bradford, 423 U.S. 149 (1975)). *See also* Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 125 (1974).

[96] 410 U.S. 113 (1973).

[97] *Id.* at 125 (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[98] *Id.*

[99] *Id.*

[100] *Id. But see* DeFunis v. Odegaard, 416 U.S. 312 (1974) (utilizing mootness to avoid answering an important constitutional issue).

[101] Castle v. Irwin, 25 Haw. 786, 792 (1921).

[102] Wong v. Bd. of Regents, Univ. of Hawai'i, 62 Haw. 391, 394, 616 P.2d 201, 204 (1980) (citing Anderson v. Rawley Co., 27 Haw. 150, 152 (1923); Territory v. Damon, 44 Haw. 557, 562, 356 P.2d 386, 390 (1960)).

[103] *In re* Application of Thomas, 73 Haw. 223, 226, 832 P.2d 253, 254 (1992) (citing *Wong*, 62 Haw. at 394, 616 P.2d at 203-04).

between the parties that the two conditions for justiciability relevant on appeal —adverse interest and effective remedy—have been compromised."[104]

Although Hawai'i appellate courts agree on the general premise underlying the mootness doctrine, there is some ambiguity[105] surrounding the two exceptions to the doctrine. This uncertainty was recently addressed in Justice Acoba's concurring opinion in *United Public Workers, AFSCME Local 646, AFL-CIO v. Yogi*.[106] In *Yogi*, Justice Acoba noted that "appellate courts have merged two, sometimes overlapping, yet distinct exceptions to the mootness doctrine: the 'public interest' exception and the 'capable of repetition, yet evading review' exception."[107]

The "public interest" exception[108] first appeared in *Johnston v. Ing*,[109] wherein the Hawai'i Supreme Court adopted the Illinois Supreme Court's ruling in *In re Brooks*.[110] *Johnston*'s approach to the "public interest" exception is worth discussion in that it has been followed in subsequent cases that comprise the mootness doctrinal framework in Hawai'i.[111] In *Johnston*, the court listed the following criteria to be considered in determining whether the requisite degree of public interest exists: "the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the *likelihood of future recurrence of the question*."[112] According to *Johnston*, once it is determined that "the question involved affects the *public interest*, and it is likely in the nature of

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[104] Okada Trucking v. Bd. of Water Supply, 99 Hawai'i 191, 196, 53 P.3d 799, 803-04 (2002) (citations omitted).

[105] Not all exceptions have been the subject of much dispute, for example, "voluntary cessation" has appeared in only one case. *See, e.g.*, Wigninton v. Pac. Credit Corp., 2 Haw. App. 435, 634 P.2d 111 (1981) (holding that voluntary cessation of the illegal activity does not necessarily moot a request for an injunction since wrongful behavior could recur).

[106] 101 Hawai'i 46, 62 P.3d 189 (2002) (Acoba, J., concurring).

[107] *Id.* at 58, 62 P.3d at 201 (Acoba, J., concuring).

[108] Federal courts generally acknowledge that a public interest exception to mootness does not exist. *See, e.g.*, Hickman v. State, 144 F.3d 1141, 1144 (8th Cir. 1998) (positing that although state courts may save a case from mootness based on the public interest exception, federal courts require a litigant's rights to be affected); Campbell Soup Co. v. Martin, 202 F.2d 398, 399 (3d Cir. 1953) (arguing that even if a public interest exception applied, federal courts would preclude it); *In re* Combined Metals Reduction Co., 557 F.2d 179, 191 (9th Cir. 1977) (holding that even if the public interest exception exists in federal courts, a court will not decide a moot case based entirely on public interest). *But see* S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498 (1911) (stating that no rights of the public have been extinguished).

[109] 50 Haw. 379, 441 P.2d 138 (1968).

[110] 205 N.E.2d 435 (Ill. 1965).

[111] *E.g.*, Alfapada v. Richardson, 58 Haw. 276, 277-78, 67 P.2d 1239, 1241 (1977); Wong v. Bd. of Regents, Univ. of Hawai'i, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980); Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 87-88, 734 P.2d 161, 165-66 (1987).

[112] *Johnston*, 50 Haw. at 381, 441 P.2d at 140 (emphasis added).

things that *similar questions arising in the future* would likewise become moot before a needed authoritative determination by an appellate court can be made, the exception is invoked."[113]

In the Illinois case, besides listing the aforementioned criteria,[114] the court, in dicta, observed that "the very urgency which presses for prompt action by public officials makes it probable that *any similar case arising in the future* will likewise become moot by ordinary standards before it can be determined by this court."[115] Essentially, in *Johnston*, the court melded the "public interest" criteria with the observation by the *Brooks* court that a similar case may become moot before review was possible.[116] Clearly, this language sounds very similar to another exception of the mootness doctrine: capable of repetition, yet evading review.

In fact, however, the evading review exception was not expressly stated in any Hawai'i cases until 1978, when it first appeared in *Life of the Land v. Burns*.[117] In *Life of the Land*, the court acknowledged *Johnston*'s rule regarding the public interest exception, but then related that there was a similar exception described as *capable of repetition yet evading review*:

> The phrase, 'capable of repetition yet evading review' means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would *evade full review because of the passage of time would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.*[118]

The evading review exception was further clarified in *Okada Trucking v. Board of Water Supply*,[119] wherein the court explained that the test does not demand certainty, but only the *likelihood* that *similar questions* arising in the future would become moot:

> [T]he exception to the mootness requirement *does not require absolute certainty* that the issue will evade review; all that is required is that 'it is *likely in the nature of things that similar questions arising in the future would likewise*

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

[114] *Brooks*, 205 N.E.2d at 438. The following criteria are considered "in determining the requisite degree of public interest[:] the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." *Id.*

[115] *Id.*

[116] United Pub. Workers, AFSCME Local 646 v. Yogi, 101 Hawai'i 46, 58, 62 P.3d 189, 201 (2002) (Acoba, J. concurring).

[117] 59 Haw. 244, 580 P.2d 405 (1978).

[118] *Id.* at 251, 580 P.2d at 409-10 (citing Valentino v. Howlett, 528 F.2d 975, 979-80 (7th Cir. 1976)) (emphasis added).

[119] 99 Hawai'i 191, 53 P.3d 799 (2002).

> *become moot* before a needed authoritative determination by the appellate court can be made.[120]

Unfortunately, Hawai'i cases have not settled on a concrete application of these two exceptions. According to Justice Acoba, "[w]hile the evading review language has been applied without discussion of a public interest exception,[121] several cases have either treated the public interest exception as part of the 'capable of repetition' exception or have not clarified a distinction between the two."[122] There are also instances where "the public interest language has been utilized without reference to the evading review phrase."[123] Hence, it appears that Hawai'i has, at times, merged two exceptions to the mootness doctrine inasmuch an aspect of the public interest test—which asks whether similar questions arising in the future will become moot before adjudication can be made—has been subsumed by the *capable of repetition yet evading review* exception.[124]

To settle the uncertainty surrounding these mootness exceptions, Justice Acoba advocates "distinguish[ing] between the public interest and the evading review exceptions inasmuch as they encompass different considerations."[125] Further, because Hawai'i is a state court and review of moot cases are "restricted only by self-imposed prudential considerations . . . [there is] no reason why [Hawai'i] mootness exceptions should be stricter than that controlling in the federal courts, which are expressly limited by the [A]rticle III 'case or controversy' requirement in the United States Constitution."[126]

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[120] *Id.* at 198 n.8, 53 P.3d at 806 n.8 (quoting Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968)) (emphases added).

[121] *See, e.g., In re* Application of Thomas, 73 Haw. 223, 227, 832 P.2d 253, 255 (1992); Ariyoshi v. Hawai'i Pub. Employment Relations Bd., 5 Haw. App. 533, 535 n.3, 704 P.2d 917, 921, n.3 (1985).

[122] United Pub. Workers, AFSCME Local 646 v. Yogi, 101 Hawai'i 46, 59, 62 P.3d 189, 202 (2002) (Acoba, J. concurring) (citing Okada Trucking v. Bd. of Water Supply, 99 Hawai'i 191, 196, 53 P.3d 799, 804 (2002); Carl Corp. v. State, 93 Hawai'i 155, 165, 997 P.2d 567, 577 (2000); McCabe Hamilton & Renny Co. v. Chung, 98 Hawai'i 107, 120, 43 P.3d 244, 257 (Haw. Ct. App. 2002)).

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

[124] *Id.* at 59, 62 P.3d at 202. A prime example comes from *Okada Trucking*, where the court held that "we have repeatedly recognized *an exception* to the mootness doctrine in cases involving questions that affect the public interest and are 'capable of repetition yet evading review.'" 99 Hawai'i 191, 196, 53 P.3d 799, 804 (2002) (emphasis added).

[125] *Yogi*, 101 Hawai'i at 60, 62 P.3d at 203 (Acoba, J., concurring). Justice Acoba supports his proposition by citing to other jurisdictions that recognize the public interest test as a separate exception to the general rule regarding mootness. *See id.* at 59, 62 P.3d at 202. Another reason to keep the two exceptions separate is that, "the likelihood of recurrence upon which the public interest exception depends need not involve the same plaintiff." 5 AM. JUR. 2D *Appellate Review* § 648 (2003) (citation omitted).

[126] *Yogi*, 101 Hawai'i at 59, 62 P.3d at 202.

Hence, the court "may decide a case, even though it is moot" in certain limited circumstances.[127]

Hawai'i's inclination to not be bound by Article III limitations can be found in other strands of justiciability, for example, ripeness.

3. Ripeness: the federal standard

The ripeness doctrine has evolved through the years, but the basic rationale, as set forth in *Abbott Laboratories v. Gardner*,[128] is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . "[129] The seminal case often cited to apprise whether a case is ripe for adjudication is *United Public Workers of America v. Mitchell*.[130] In *Mitchell*, government workers, who sought declaratory relief and an injunction against the United States Civil Service Commission, challenged provisions of the Hatch Act, which provided that "no officer or employee in the executive branch of the Federal Government shall take any active part in political management or in political campaigns."[131] The Court ultimately determined that only one employee—the one who had violated the Act—had a ripe claim.[132] As to the plaintiffs who had not been charged with violations and instead merely wished to undertake political activities, they were barred from adjudication.[133] The Court opined that the proper power of judicial review is strictly limited:

> [and] arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough . . . . Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories.[134]

Although *Mitchell* demands actual prosecution rather than a mere hypothetical threat, the Supreme Court has, at times, loosened this standard to adjudicate important constitutional issues.

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[127] *Id.* at 60-61, 62 P.3d at 203-204.

[128] 387 U.S. 136 (1967) *overruled by* Califano v. Sanders, 430 U.S. 99, 105 (1977).

[129] Abbott Laboratories, 387 U.S. at 148-49. *See also* Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954) (stating that the determination of the scope and constitutionality of legislation before its immediate adverse effect is realized involves an inquiry that is too remote and abstract for a proper exercise of judicial function).

[130] 330 U.S. 75 (1947).

[131] *Id.* at 82.

[132] *Id.* at 91-92.

[133] *Id.* at 89, 91.

[134] *Id.* at 89-91.

A good example comes from *Adler v. Board of Education*,[135] where a plurality of the Supreme Court upheld New York's Feinberg law, which mandated the dismissal of any teacher who advocated or belonged to any organization advocating the overthrow of government by force or violence.[136] Although no mention was made regarding ripeness, Justice Frankfurter, in his dissent, posited that the facts in this case, "fall short of those found insufficient in the *Mitchell* case."[137] Hence, in *Adler*, the Court intervened to decide a constitutional issue despite the lack of a concrete situation, such as an actual prosecution.[138]

Despite Justice Frankfurter's strong dissenting opinion in *Adler*, he has also stated that "'[f]inality' is not . . . a principle inflexibly applied."[139] Moreover, "[w]hether 'justiciability' exists . . . has most often turned on evaluating both the appropriateness of the issues for decision by courts and the hardships of denying judicial relief."[140] These exact sentiments were echoed in *Abbott Laboratories*,[141] where the Court considered two elements in the determination of whether an action was ripe for judicial review: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[142] Essentially, while the first prong centers on whether the question presented by the claim is one of law, the second prong focuses on the hardship to the parties if postponement of a decision should occur.[143] According to one commentator, *Abbott Laboratories's* two-pronged formula allows for more flexible results and is still cited by the courts to determine whether a case is ripe for adjudication.[144]

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[135] 342 U.S. 485 (1952).

[136] *Id.* at 490, 496.

[137] *Id.* Indeed, "[t]hese teachers do not allege that they have engaged in proscribed conduct or that they have any intention to do so. They do not suggest that they have been, or are, deterred from supporting causes or from joining organizations . . . except to say generally that the system complained of will have this effect on teachers as a group." *Id.*

[138] *Id. But see* Poe v. Ullman, 367 U.S. 497 (1961). Justice Frankfurter, who wrote the majority opinion, invoked the ripeness doctrine as a means to dismiss a challenge to a Connecticut law that prohibited the sale of contraceptives for use as birth control because the law had not been enforced for more than 75 years. *Id.* at 501. The Court held that in the absence of a serious threat of actual enforcement of the statutes, the case was not ripe. *Id.* at 508.

[139] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 156 (1951).

[140] *Id.*

[141] 387 U.S. 136 (1967).

[142] *Id.* at 149.

[143] *See, e.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983).

[144] *See* Marla Mansfield, *Standing and Ripeness Revisited: The Supreme Court's "Hypothetical" Barriers*, 68 N.D. L. REV. 1, 70 (1992).

Hence, while the federal standard for ripeness is set forth in *Mitchell*, the courts also recognize that this standard need not be inflexible, and thereby also recognize the two-pronged test in *Abbott Laboratories*.

4. Ripeness: the Hawai'i standard

Relatively few Hawai'i cases discuss in detail the ripeness doctrine. One significant case is *State v. Fields*,[145] wherein a criminal defendant, who appealed her sentence, sought a declaration that a condition of her probation violated the Fourth Amendment. The condition mandated that she submit to searches and seizures of her person, property, and residence at any time. According to the Hawai'i Supreme Court, "'Ripeness is peculiarly a question of timing' and the relevant prudential rule deals with 'problems of prematurity and abstractness that may prevent adjudication in all but the exceptional case.'"[146] Further, if the court rules that a case is not ripe, this ordinarily indicates that the court has concluded "a later decision may be more apt or . . . that the matter is not yet appropriate for adjudication."[147]

Nonetheless, the *Fields* court decided the merits of the case despite its determination that, if the precepts of federal ripeness cases "were strictly applied to the situation at hand, we could only conclude that problems of prematurity preclude an adjudication of the issue raised on appeal."[148] The rationale was that the condition "merely pose[d] a nascent threat . . . [and] . . . until a police or probation officer conduct[ed] a warrantless search of her person, property, or place of residence, we would be hard put to say the dispute between the State and the defendant ha[d] ripened into a justiciable controversy."[149]

The court rationalized its decision by first explaining that judicial inquiry was proper in this situation because the court "would not be venturing 'into areas committed to other branches of government.'"[150] Further, the court noted that "important considerations"[151] called for judicial action since "the situation at hand represents the rare case where it 'would not be in the public interest' to compel the issue to 'wend its way through the appellate process.'"[152] Finally, the court posited that "if more than a few probationers are

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[145] 67 Haw. 268, 686 P.2d 1379 (1984).

[146] *Id.* at 274, 686 P.2d at 1385 (citations omitted).

[147] *Id.* at 274–75, 686 P.2 at 1385 (citations omitted).

[148] *Id.* at 275, 686 P.2d at 1386.

[149] *Id.*

[150] *Id.* at 276, 676 P.2d at 1386 (quoting Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172, 623 P.2d 431, 438 (1984)).

[151] *Id.* at 275, 686 P.2d at 1386.

[152] *Id.* at 276, 686 P.2d at 1386 (quoting Gannett Pac. Corp. v. Richardson, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978)).

in constant jeopardy of being divested by judicial fiat of statutory and constitutional protection that should rightfully be theirs, our supervisory duty would render the prevention of such error obligatory, though the prudential rules may counsel against the consideration of [the] appeal."[153]

In sum, the Hawai'i Supreme Court, in *Fields*, opined that a case ripe for adjudication consists of more than a mere "nascent threat."[154] At the same time, the court refused to strictly apply the federal standard, which would ultimately prohibit judicial review, and instead determined that important considerations permit adjudication of the issue at hand.[155] Although *Fields* did not expressly adopt or even quote the *Abbott Laboratories* two-part test, the court nonetheless applied it to some extent. The court first determined that the issue was appropriate for judicial action since it did not venture into areas committed to other branches of the government.[156] Further, the court recognized the hardship of denying judicial relief as it would affect a sizeable group of offenders who would be in constant jeopardy of being divested of statutory and constitutional protection.[157]

Administrative appeals cases often involve ripeness issues. The general rule regarding an administrative action is that it is "not reviewable in a court unless and until such action results in the imposition of an obligation, denial of a right, or fixing of some legal relationship as a consummation of the administrative process."[158] In Hawai'i, recent administrative appeals cases[159] have cited *Abbott Laboratories* to explain the rationale behind the ripeness doctrine:

> The rationale underlying the ripeness doctrine and the traditional reluctance of courts to apply injunctive and declaratory remedies to administrative determinations is 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'"[160]

An important case in this area is *Aged Hawaiians v. Hawaiian Homes Commission*,[161] which involved an action that challenged the administration of

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[153] *Id.* at 277, 686 P.2d at 1387.

[154] *Id.* at 275, 686 P.2d at 1386.

[155] *Id.*

[156] *Id.* at 276, 686 P.2d at 1386.

[157] *Id.* at 276-77, 686 P.2d at 1386-87.

[158] 2 AM. JUR. 2D. *Administrative Law* § 485 (2003).

[159] *See, e.g.*, Grace Bus. Dev. Corp. v. Kamikawa, 92 Hawai'i 608, 994 P.2d 540 (2000); Bremner v. City & County of Honolulu, 96 Hawai'i 134, 28 P.3d 350 (Haw. Ct. App. 2001).

[160] *Kamikawa*, 92 Hawai'i at 612, 994 P.2d at 544 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967)).

[161] 78 Hawai'i. 192, 891 P.2d 279 (1995).

homelands in the pastoral category by the Hawaiian Homes Commission ("HHC").[162] The HHC contended that "because additional procedures [we]re available within the agency to address the Aged Hawaiians' claims for relief"[163] the HHC's rules "le[ft] open the possibility"[164] for recourse. Thus, according to HHC, the Aged Hawaiians' claim had not yet ripened into a justiciable controversy and the lower court's order from which they appealed was not final.[165]

The Hawai'i Supreme Court disagreed, holding that "recourse to an agency's contested case procedures is not required as a prerequisite to an action for declaratory and injunctive relief of a prospective nature."[166] The court accordingly adopted the rationale from *Rogers v. City of Cheyenne*,[167] which held that "federal justiciability standards are inapplicable in state court declaratory judgment actions involving matters of great public importance."[168]

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[162] *Id.* at 195, 891 P.2d at 282.

[163] *Id.* at 203, 891 P.2d at 290.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 204, 891 P.2d at 291. A topic related to justiciability is declaratory judgments—to explain, declaratory judgment actions are *prophylactic* in measure, in that a party can bring a declaratory action once a controversy has arisen, but before the issue has ripened into a major problem. *See* Elizabeth L. Hisserich, Comment, *The Collision of Declaratory Judgments and Res Judicata*, 48 U.C.L.A. L. REV. 159, 162 (2000). Essentially, the purpose of declaratory judgments is "[t]o narrow the issues and, by so doing, to dispose of disputes in their initial stages, before they have become full-grown battles with their accumulation of bitterness and impaired relations." *Id.* at 162-63. Declaratory judgments issued by the federal courts have statutory and constitutional underpinnings. *See* Aetna Life. Ins. Co. v. Haworth, 300 U.S. 227, 239-40 (1937). *See also* Uniform Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1994). Hawai'i has also authorized actions for declaratory judgments. HAW. REV. STAT. § 632-1 (1993), provides as follows:

> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.

Id.

[167] 747 P.2d 1137 (Wyo. 1987).

[168] *Aged Hawaiians*, 78 Hawai'i at 204, 891 P.2d at 291 (citing *Rogers*, 747 P.2d at 1138-39). The court noted that even if this rule did not apply, the doctrine of futility would operate as an exception to the requirement of seeking additional agency action prior to obtaining judicial review:

> [t]here is a cruel irony to the Appellees' claim that the Aged Hawaiians must wait for final agency action given the drawn-out history of homestead awards. When the Commission created the pastoral wait list in 1952, over thirty years after the enactment of the HHCA,

Hence, the court again recognized that when countervailing interests are present, "[s]tate law justiciability policies must be applied as the 'needs of justice' require."[169]

Of particular note, this aforementioned principle is reiterated in Hawai'i cases dealing with standing, which is discussed in the following section.

C. A Matter of Who: Standing

In justiciability language, mootness and ripeness refer to "when" [170] an action may be brought, and standing refers to "who"[171] may bring such an action. Because standing focuses on the "who," it does not deal with "what": to explain, if standing becomes an issue in a case, "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable."[172] As Justice Scalia colloquially explained, "[Standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'"[173]

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it determined that the [N]ative Hawaiians on that list were qualified pastoral homestead applicants. The list included current members of the Aged Hawaiians who, after waiting almost forty years on the list, selected pastoral homestead lots in 1990 rather than wait an additional undetermined period in the hope that the Commission would, of its own accord, reconsider the possibility of awarding larger lots sufficient for commercial ranching. Now it appears that those who seek additional acreage must go to the bottom of the waiting list.

Id. The court noted that the pastoral waiting list contained over 450 names but less than 200 awards had been made. *Id.* Moreover, the court took into account that all of the members of the Aged Hawaiians were over seventy years old, and "[u]nder these circumstances, requiring the Aged Hawaiians to wait at the bottom of the waiting list for additional acreage would be clearly futile." *Id.*

[169] *Id.* at 205, 891 P.2d at 292 (citing Life of the Land v. Land Use Comm'n, 63 Haw. 166, 176, 623 P.2d 431, 439 (1981)).

[170] Fletcher, *supra* note 43, at 294, 296 (stating that ripeness and mootness are concerned with the timing of litigation rather than the identity of who may bring suit).

[171] Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (positing that the standing doctrine defines the "who" inquiry.)

[172] Flast v. Cohen, 392 U.S. 83, 99-100 (1968). *See also* Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 100, 979 P.2d 1120, 1126 (1999) (opining that standing focuses on the party seeking a forum rather than on the issues that he or she wants adjudicated) (citation omitted).

[173] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983).

1. Standing: federal standard

Standing is considered to be an aspect of justiciability that is surrounded with complexities and vagaries because it "serves on occasion as a shorthand expression for all the various elements of justiciability."[174] Despite Justice Douglas's claim that "[g]eneralizations about standing to sue are largely worthless as such,"[175] something must be said about standing, and this section will attempt to provide the rules as stated by the Supreme Court without examining all possible contours or inconsistencies of its application.

The most basic rule associated with standing is that a plaintiff must have "a personal stake in the outcome of a controversy as to assure that concrete adverseness[,] which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[176] More recently, the Court has set forth the following test to ascertain whether a plaintiff has satisfied Article III's standing requirements:[177] "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[178]

Of the three standing requirements, the most complex is *injury in fact* in that the "determination of whether plaintiff has suffered something deemed to be an 'injury' for purposes of the standing requirement has been the subject of much litigation and changing trends in the Supreme Court."[179]

With respect to a showing of injury in fact, the main rule is that it must be *distinct* and *palpable*.[180] A litigant must show "an invasion of a legally protected interest that is concrete and particularized and actual or imminent . . . [since] [a]n interest shared generally with the public at large . . . will not

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[174] *Flast*, 392 U.S. at 98-99.

[175] Ass'n of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 151 (1970).

[176] Baker v. Carr, 369 U.S. 186, 204 (1962).

[177] At its core, standing asks two questions: (1) whether the challenged action has caused the plaintiff injury in fact; and (2) whether the interest sought to be protected is within the zone of interests that was meant to be protected by statutory or constitutional provisions. *See Camp*, 397 U.S. at 152, 153. In *Valley Forge Christian Coll. v. Am. United for Separation of Church and State*, 454 U.S. 464 (1982), the Court determined that the injury in fact requirement had constitutional underpinnings, whereas the zone of interest component was only a prudential concern inspired by Article III. Hence, standing focuses on injury in fact.

[178] Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 180-81 (2000) (internal quotations omitted) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[179] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 6th Ed. § 2.12, at 88 (6th ed. 2000) (citation omitted).

[180] Warth v. Seldin, 422 U.S. 490, 501 (1975).

do."[181] The injury suffered may involve an economic interest, but it need not be substantial.[182] It can also involve aesthetic or environmental interests,[183] or an interest in promoting a racially integrated and nondiscriminatory setting.[184]

A separate but related line of cases that deal with standing involve taxpayers as plaintiffs. Put simply, in taxpayer suits, the Court has formulated tests to "determine when a taxpayer *qua* taxpayer has alleged such a personal stake in the outcome of the suit."[185] According to *Frothingham v. Mellon*,[186] the problem with asserting standing as a federal taxpayer lies in the great difficulty in establishing a causal relationship between individual specific

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[181] Arizonans for Official English v. Arizona 520, U.S. 43, 65 (1997) (citation omitted). *See also* City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (ascertaining that a plaintiff who had been choked by police lacked standing because there was an insufficient likelihood that the plaintiff would be similarly injured again in the future). *But see* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 676, 689-90 (1973) (opining that a railroad freight rate increase which adversely affected the environment and caused plaintiffs to suffer economic, recreational, and aesthetic harm, constituted sufficient actual injury to confer standing).

[182] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968). The Court determined that the plaintiff had standing despite the fact that the injury suffered was worth a few cents in taxes. *Id.* at 92-93.

[183] *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972). In *Sierra Club*, the court opined that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular . . . interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 734. Despite espousing this seemingly broad view, the Court nonetheless dismissed Sierra Club's environmental challenge because of a lack of distinct injury to the institution or its members. *Id. See also Friends of the Earth*, 528 U.S. 167; United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973). One commentator describes *Students Challenging Regulatory Agency Procedures*, as "an all-time high in Supreme Court liberality on the subject of standing." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-2, at 489 (1976).

[184] *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209-10, 211 (1972) (determining that the exclusion of minority person from the apartment complex constituted a loss of important benefits from interracial associations). *See also* Northeastern Florida Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656 (1993) (holding that any member of a group disadvantaged by a barrier established by government is injured by the denial of equal treatment and thus has standing so long as plaintiffs are ready and able to take advantage of the challenged program). *But see* Allen v. Wright, 468 U.S. 737 (1984) (opining that parents of African-American children attending public schools did not have standing to demand judicial review of Internal Revenue Service standards that unconstitutionally permit charitable contributions to be made to racially discriminatory private educational institutions).

[185] NOWAK & ROTUNDA, *supra* note 179, § 2.12 at 88.

[186] 262 U.S. 447 (1923). In *Frothingham*, the plaintiff taxpayer challenged the Federal Maternity Act, which sought to reduce infant and maternal mortality by conditioning appropriations to states who complied with provisions of the Act. *Id.* at 479. The plaintiff alleged that she suffered injury because the appropriations increased her future tax burden which constituted a taking of property without due process of law. *Id.* at 479-80.

injury and general governmental tax policies.[187] While this may represent the general consensus, a few notable exceptions exist: taxpayer challenges to expenditures in violation of the Establishment Clause,[188] and taxpayer challenges brought in a state[189] or Ninth Circuit[190] jurisdiction. Ultimately, however, as one commentator has noted, "[i]t is often difficult, and in some cases impossible, to meet the taxpayer standing requirements necessary to challenge a governmental action in federal courts."[191]

Although the federal standing requirements curtail "the reach of Article III courts by imposing strict entry requirements on litigants,"[192] the Supreme Court has acknowledged that "[t]here would be nothing irrational about a system that granted standing in these cases . . . [.]"[193] Indeed, although Hawai'i courts claim to follow federal standing doctrines substantively,[194] they tend to take a more relaxed stance.[195]

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[187] *Id.* at 487. The Court determined that the effect of any payment from treasury funds on future taxes was too remote and uncertain to establish the necessary direct injury to confer standing. *Id.*

[188] *Flast*, 392 U.S. 83. In *Flast*, plaintiff taxpayers successfully brought suit, under the establishment clause, challenging the expenditure of federal funds under the Elementary and Secondary Education Act of 1965. *Id.* at 85. More specifically, the plaintiffs argued that because the funds were to be used to finance teaching and the purchase of school materials for religious schools it contravened the Establishment Clause of the First Amendment. *Id.* at 86. The Court did not overrule *Frothingham*, but rather distinguished the decision because it was based on prudential concerns of self restraint. *Id.* at 101. Essentially the *Flast* Court determined that federal taxpayer standing could be recognized in certain limited situations if the taxpayer could establish "a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. This meant that first, the taxpayer must establish a logical link between the taxpayer's status and the type of legislative enactment attacked. *Id.* More specifically, the litigant must allege "unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8 of the Constitution." *Id.* Second, the plaintiff taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. *Id.* Although the *Flast* court allowed standing, subsequent cases have used its test to deny taxpayer standing. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974); Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

[189] *See infra* text accompanying notes 201-10.

[190] The Ninth Circuit has a separate standard that they apply: "In the Ninth Circuit, taxpayers have standing to file a taxpayer suit if their complaint sets forth a sufficient nexus between the taxpayer, tax dollars, and the allegedly illegal government activity." Rice v. Cayetano, 941 F. Supp. 1529, 1538 (D. Haw. 1996) (citing Hoohuli v. Ariyoshi, 741 F.2d 1169, 1178 (9th Cir. 1984)). *See also* Arakaki v. Cayetano, 198 F. Supp. 2d 1165 (D. Haw. 2002).

[191] Lisa K. Strandtman & Charles M. Heaukulani, Note, Hawai'i's Thousand Friends v. Anderson*: Standing to Challenge Governmental Actions*, 12 U. HAW. L. REV. 435, 443 (1990).

[192] *See* Hershkoff, *supra* note 3, at 1852.

[193] Raines v. Byrd, 521 U.S. 811, 828 (1997).

[194] *See infra* text accompanying notes 196, 200.

[195] *See* Strandtman & Heaukulani, *supra* note 191, at 443, 458-459.

2. Standing: Hawai'i standard

Hawai'i courts acknowledge that "[a]lthough Supreme Court doctrine on this issue [of standing] does not bind us, we have on occasion sought guidance therefrom."[196] The basic position that the court espouses is that standing requirements should not be barriers to justice.[197] In fact, the "touchstone of this court's notion of standing is 'the needs of justice.'"[198]

Besides considering the *needs of justice*, the court's inquiry in determining whether standing has been established is focused on "whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant . . . invocation of the court's jurisdiction and to justify exercise of the court's remedial powers . . . [.]"[199] More specifically, the Hawai'i Supreme Court has expressly adopted the three part test used by federal courts to determine whether the plaintiff has the requisite interest in the outcome of the litigation: "(1) has the plaintiff suffered an actual or threatened injury as a result of the defendant's . . . conduct; (2) is the injury fairly traceable to the defendant's actions; *and* (3) would a favorable decision likely provide relief for plaintiff's injury."[200]

As noted earlier, federal taxpayer standing requirements are somewhat onerous.[201] In comparison, the Hawai'i Supreme Court has historically been characterized as "willing, if not eager to find standing where taxpayers sought to prevent public officials from inflicting public harm."[202] Currently, however, courts are not quite so eager to find taxpayer standing in every circumstance.[203]

To explain, the Hawai'i Supreme Court has "allowed standing for taxpayers who allege an unconstitutional expenditure of public funds."[204] An oft-cited case that clarifies this rule for taxpayer standing comes from *Hawai'i's*

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[196] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 173, 623 P.2d 431, 439 (1981) (footnote omitted).

[197] *Id.*

[198] *Id.* at 176, 623 P.2d at 441.

[199] *In re* Application of Matson Navigation Co. v. Fed. Deposit Ins. Corp., 81 Hawai'i 270, 275, 916 P.2d 680, 685 (1996).

[200] Sierra Club v. Hawai'i Tourism Auth., 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002) (citing Mottl v. Miyahira, 95 Hawai'i 381, 389, 23 P.3d 716, 724 (2001)) (emphasis added).

[201] *See supra* text accompanying note 191.

[202] *See* Strandtman & Heaukulani, *supra* note 191, at 443. The Strandtman article provides a comprehensive review that traces Hawai'i taxpayer standing cases back to nearly a century. *Id.*

[203] *See infra* notes 204-10.

[204] Mottl v. Miyahira, 95 Hawai'i 381, 390-91, 23 P.3d 716, 725-26 (2001) (citing Bulgo v. County of Maui, 50 Haw. 51, 430 P.2d 321 (1967); Castle v. Secretary of the Territory, 16 Haw. 769 (1905)).

Thousand Friends v. Anderson,[205] wherein the court stated that "[t]wo requirements . . . must be met for taxpayer standing: (1) plaintiff must be a taxpayer who contributes to the particular fund from which the illegal expenditures are allegedly made; and (2) plaintiff must suffer a pecuniary loss [by the increase of the burden of taxation], which, in cases of fraud, are presumed."[206]

A recent case that applied this test is *Mottl v. Miyahira*.[207] In *Mottl*, University of Hawai'i faculty members, and the University of Hawai'i Professional Assembly challenged Budget Director Anzai and Governor Cayetano's decision to withhold funds totaling six million dollars that had been obtained through a payroll lag.[208] The court determined that although the plaintiffs alleged in their complaint that they were taxpayers, "they did not expressly claim general taxpayer standing, let alone any recognized 'special circumstances.'"[209] Further, "they have not alleged that they suffered any pecuniary loss as a result of Anzai's and Cayetano's actions . . . [and therefore] their complaint may not be justified on the ground that they were taxpayers."[210]

Taxpayer standing was not the only issue that the Hawai'i Supreme Court expounded upon in *Mottl*. The court also explained that standing barriers are lowered to permit more judicial access in certain circumstances.[211] For example, actions that call for declaratory relief,[212] and cases that involve environmental concerns or native Hawaiian rights.[213]

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[205] 70 Haw. 276, 768 P.2d 1293 (1989).

[206] *Id.* at 282, 768 P.2d at 1298. In certain special circumstances, injury to taxpayers may be presumed. Notably, Hawai'i does not follow the *Flast* nexus test. *See* Strandtman & Heaukulani, *supra* note 191, at 452.

[207] 95 Hawai'i 381, 23 P.3d 716 (2001).

[208] *Id.* at 383, 385, 23 P.3d at 718, 720.

[209] *Id.* at 391 n.13, 23 P.3d at 726 n.13.

[210] *Id.*

[211] Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172 n.5, 623 P.2d 431, 438 n.5 (1981) (citing Haw. Rev. Stat. ch. 632, Declaratory Judgments, and Article XI, Section 9, Environmental Rights, as examples of how standing requisites may be tempered, or even prescribed, by legislative and constitutional declarations of policy).

[212] *Mottl*, 95 Hawai'i at 389, 23 P.3d at 724 (citations and footnote omitted). *See supra* note 166 and accompanying text. To explain, in declaratory actions involving standing "HRS § 632-1 interposes less stringent requirements for access and participation in the court process." *Life of the Land*, 63 Haw. at 389, 23 P.3d at 724. More specifically, declaratory actions are to be "liberally interpreted and administered, with a view to making the courts more serviceable to the people." Richard v. Metcalf, 82 Hawai'i 249, 254 n.12, 921 P.2d 169, 174 n.12 (1996) (citation omitted).

[213] *Mottl*, 95 Hawai'i at 393, 23 P.3d at 728.

With respect to cases pertaining to environmental concerns[214] or native Hawaiian rights,[215] "[t]o date, the appellate courts of this state have generally recognized public interest concerns . . . warrant the lowering of standing barriers in [these] two types of cases."[216] Additionally, while the basis for standing has expanded in cases implicating these two concerns, "plaintiffs must still satisfy the injury-in-fact test."[217]

Early cases indicate that the Hawai'i Supreme Court has "consistently looked toward 'the needs of justice' in deciding public standing issues, and in allowing those injured by the acts of others to challenge the propriety of that action."[218] More recent cases suggest, however, that the courts may now not be so generous in conferring standing.[219] In *Mottl*, for example, the plaintiffs attempted to analogize their situation to that of plaintiffs involved in actions raising environmental concerns, in which the court has held "that an injury to

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[214] *See, e.g.*, Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); Life of the Land v. Land Use Comm'n, 63 Haw. 166, 623 P.2d 431 (1981); Ka Pa'akai O Ka'aina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000); Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 101, 979 P.2d 1120 (1999). The most persuasive argument for environmental standing is that it has been constitutionally recognized:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

HAW. CONST. art. XI, § 9.

[215] *See, e.g., Ka Pa'akai*, 94 Hawai'i 31, 7 P.3d 1068.

[216] *Mottl*, 95 Hawai'i at 393-94, 23 P.3d at 728-29. A plaintiff who claims standing based on the public interest must show 1) injury in fact; and 2) that concerns of multiplicity of suits are satisfied by any means. Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982). In tracing the cases that led up to this rule, the Hawai'i Supreme Court has recognized that its opinions have moved,

> from 'legal right' to 'injury in fact' as the standard for judging whether a plaintiff's stake in a dispute is sufficient to invoke judicial intervention, from economic harm to inclusion of aesthetic and environmental well-being as interests deserving of protection, and to the recognition that a member of the public has standing to enforce the rights of the public even though his or her injury is not different in kind from the public's generally, if he or she can show that he or she has suffered an injury in fact.

Sierra Club v. Hawai'i Tourism Auth., 100 Hawai'i 242, 251, 59 P.3d 877, 886 (2002) (citations omitted) (quotations omitted).

[217] *Sierra Club*, 100 Hawai'i at 251, 59 P.3d at 886.

[218] *See* Strandtman & Heaukulani, *supra* note 191, at 451.

[219] *See, e.g., infra* text accompanying notes 220-26; *see Sierra Club*, 100 Hawai'i 242, 59 P.3d 877 (striking down Sierra Club's challenge to Hawai'i Tourism Authority's decision to promote tourism and increase visitor expenditures without conducting an environmental impact assessment based on the Sierra Club's failure to meet the three part injury in fact test for standing).

aesthetic, recreational, or conservational interests was sufficient to confer standing."[220]

According to the plaintiffs, "if an unquantified deterioration of air quality and odor nuisance are sufficient to confer standing in such cases, then the injury resulting from the loss of the quantifiable sum of six million dollars should also be sufficient" to confer standing.[221] The court rejected plaintiffs' arguments and determined that the amount of interest affected is not dispositive in determining standing, especially when the public interest is at issue.[222] In fact, "the severity of any injury suffered by the plaintiffs in the present matter is not at issue. The issue is whether they have suffered a cognizable injury at all."[223] Because plaintiffs' claim did not attempt to prove a "distinct and palpable"[224] injury, but rather "press[ed] their general proposition that, in any organization, a loss of six million dollars from its budget must have *some* negative effect on its operations,"[225] the court ultimately denied standing.[226]

In sum, the focus in standing is on the party and whether a distinct and palpable injury can be proved. Where standing represents that aspect of justiciability that focuses on the party seeking a forum, rather than on the issues adjudicated, the political question doctrine addresses whether those issues can actually be decided.

D. The Political Question Doctrine

The political question doctrine differs from other strands of justiciability in the sense of finality.[227] Problems of ripeness, mootness, and standing can all be cured by various factual circumstances.[228] For example, a case that involved an unripe dispute could eventually be resolved at a later time, or a case that involved a litigant who lacked standing could be decided if presented by a different complainant with a more personal stake in the matter. If a court determines, however, that the subject matter of a case is inappropriate for judicial consideration based on the political question doctrine, then a holding of nonjusticiability is almost absolute in its foreclosure of judicial scrutiny.[229]

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[220] *Mottl*, 95 Hawai'i at 394, 23 P.3d at 729.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 394 n.16, 23 P.3d at 729 n.16.

[224] *Id.* at 394, 23 P.3d at 729 (citation omitted).

[225] *Id.* at 395, 23 P.3d at 730.

[226] *Id.*

[227] *See* NOWAK & ROTUNDA, *supra* note 179, § 2.15, at 122.

[228] *See id.*

[229] *See id.*

1. Political question: federal standard

The political question doctrine is considered "the most amorphous aspect of justiciability."[230] Indeed, a significant amount of uncertainty pervades the doctrine with respect to its extent and validity.[231] The determination of whether a political question is present or not is "impossib[le] of resolution by any semantic cataloguing."[232] The boundaries of the doctrine are broad and unclear, thus making it difficult to predict when the courts will elect to invoke it.[233] Nonetheless, a case presenting a political question essentially means that it cannot be adjudicated because the issues or matters within are unsuitable for judicial review.[234]

Luther v. Borden,[235] authored by Chief Justice Taney in 1849, was the leading case in the development of the political question doctrine.[236] Rhode Island was governed by a 1663 Charter which specified that only male property owners could vote.[237] John Dorr, who led a movement advocating for all males to vote, organized a constitutional convention where they drafted a new constitution declaring Dorr's group to be a government.[238] In response, the Charter government declared martial law, which conferred upon Borden, a member of the military, the power to arrest Luther, a member of the Dorr group, by breaking and entering Luther's home.[239]

The specific issue thus was whether the soldiers committed trespass when breaking into Luther's private home to arrest him, but to resolve this issue, the Court would actually have had to determine which government was legitimate.[240] The Court held that a federal court did not have "the power of determining that a State government has been lawfully established."[241] Instead, Congress had the authority to decide this question pursuant to Article IV section 4 of the Guarantee Clause because, as a politically elected branch,

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[230] RIPPLE, *supra* note 17, § 3-7, at 96.

[231] *See* Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 405 (1983-84).

[232] Baker v. Carr, 369 U.S. 186, 217 (1962).

[233] *See* Glenn Ching, Note, *The* Trustees of the Office of Hawaiian Affairs v. Yamasaki*: The Application of the Political Question Doctrine to Hawai'i's Public Land Trust Dispute*, 10 U. HAW. L. REV. 345, 352 (1988).

[234] *See* NOWAK & ROTUNDA, *supra* note 179, § 2.15, at 121.

[235] 48 U.S. 1 (1849).

[236] *Id.* at 34.

[237] *Id.* at 37.

[238] *Id.* at 36-37.

[239] *Id.* at 37.

[240] *Id.* at 33.

[241] *Id.* at 40.

Congress was better suited to decide issues of such import.[242] Although the case sets forth the rule that federal courts should not answer questions that are beyond judicial resolution, the criteria given to ascertain whether or not certain questions constitute a justiciable case-or-controversy are lacking.

A modern formulation of the political question doctrine was set forth in *Baker v. Carr*,[243] where the Supreme Court held that an equal protection challenge to a malapportioned state legislature did not present a political question, and hence concluded that the case was justiciable.[244] In determining whether the political doctrine should be invoked, the Court set forth six criteria for determining whether a political question exists: (1) is there a "textually demonstrable constitutional commitment of the issue to a coordinate political department;"[245] (2) is there a "lack of judicially discoverable and manageable standards for resolving the issue;"[246] (3) is the issue impossible to decide "without an initial policy determination of a kind clearly for nonjudicial discretion;"[247] (4) is the case impossible to adjudicate without "expressing lack of the respect due coordinate branches of government;"[248] (5) is there an "unusual need for unquestioning adherence to a political decision already made;"[249] (6) Is there a potential for embarrassment from "multifarious pronouncements by various departments on one question."[250]

The Court ultimately determined that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."[251] Overall, *Baker* seems to permit a broad exercise of judicial review; one commentator even suggests that the Court was "attempting to lay out a standard by which future courts would be more inclined to decide cases than dismiss them for nonjusticiability."[252] Since *Baker*, the Court has found only two issues to be political questions.[253] Despite the Court's seemingly broad exercise of judicial

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[242] *Id.* at 42.

[243] 369 U.S. 186 (1962).

[244] *Id.* at 237.

[245] *Id.* at 217.

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.* at 217.

[252] Ching, *supra* note 233, at 355. Indeed, it does appear that the Court has consolidated the gains of *Baker* inasmuch that it "has had the long-range effect of opening up large new political vistas to judicial review." Robert J. Pushaw, *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1177 (2002) (citation omitted).

[253] Nixon v. United States, 506 U.S. 224, 238 (1993) (holding that the language and structure of art. I § 3 cl. 6 demonstrates a textual commitment of impeachment to the Senate and

review,[254] certain specific issues have consistently been held to be political questions:[255] foreign affairs,[256] constitutional amendments,[257] impeachment,[258] and the guaranty clause.[259] Additionally, federal courts have generally regarded the decision whether or not to recognize or not to recognize an Indian Tribe to be a political controversy inappropriate for judicial resolution.[260] Ultimately, however, what can be stated about *Baker* and its progeny is that they do not set forth easy-to-follow guidelines insofar as "Baker's six factors cannot meaningfully distinguish 'political' questions from justiciable 'legal' ones."[261] Not surprisingly, Hawai'i has also struggled with the doctrine, and its decisions, like its federal counterparts, "display somewhat amorphous characteristics."[262]

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that judicial review of impeachment would violate separation-of-powers); Gilligan v. Morgan, 413 U.S. 1, 10-12 (1973) (opining that the composition, training, equipping and control of a military force is a clear example of the type of governmental action that was intended by the Constitution to be left to the political branches, not the judiciary).

[254] *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1969); United States v. Nixon, 418 U.S. 683 (1974); Immigration and Naturalization Servs. v. Chadha, 462 U.S. 919 (1983); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[255] Ching, *supra* note 233, at 352.

[256] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (dismissing Congress's challenge of President Carter's unilateral decision to terminate a treaty with Taiwan on the grounds that the case constituted a nonjusticiable political question).

[257] *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939) (determining that a time limitation of a proposed amendment to the Constitution and the effect of a ratification of a previously rejected amendment were nonjusticiable political questions).

[258] *See, e.g.*, *Nixon*, 506 U.S. 224. *See also supra* text accompanying note 253.

[259] *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *See supra* text accompanying notes 235-42.

[260] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 215-17 (1962) (identifying cases that questioned the status of Indian tribes as nonjusticiable political controversies); Miami Nation of Indians of Indiana, Inc. v. United States Dep't of the Interior, 255 F.3d 342, 345 (7th Cir. 2001) (determining that the issue of whether a tribe constitutes a nation with which the United States might establish governmental relations raises a nonjusticiable political question); Western Shoshone Bus. Council v. Babbit, 1 F.3d 1052, 1057 (10th Cir. 1993) (opining that determinations of tribal recognition have historically been deferred to the executive and legislative branch); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (stating that Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights); Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213 (D. Haw. 2002) (holding that a challenge to the regulations surrounding exclusion of Native Hawaiians in tribal recognition involves matters that have been constitutionally committed to the other branches thus constituting a nonjusticiable controversy).

[261] Pushaw, *supra* note 252, at 1175.

[262] Trs. of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 172, 737 P.2d 446, 456 (1987).

2. Political Question: Hawai'i standard

The earliest cases involving the political question doctrine in Hawai'i trace back to two cases: *Territory v. Kapiolani Estate*,[263] and *Territory v. Puahi*.[264] In both cases plaintiffs challenged the validity of the Constitution of the Republic of Hawaii and the ownership and title of crown lands.[265] The court struck down both claims, holding that they did not present a judicial question.[266] Even though no real standards were enunciated in either case, the *Kapiolani* Court explained that "[t]he position here taken in refusing to regard the defendant's claim that the title is otherwise than is fixed by constitutional law as presenting a judicial question is well illustrated in numerous decisions of the United States [S]upreme [C]ourt."[267] Although these cases ultimately decided that the issue of whether the United States illegally obtained the crown and government lands from the Kingdom of Hawai'i constituted a non-justiciable political question, this issue and related issues remain unsettled.[268]

A small group of cases[269] helped to shape and develop the political question doctrine, but the two seminal cases that represent the current stance are discussed below.

First, in *Yamasaki*,[270] the Office of Hawaiian Affairs ("OHA") sought a declaration that they were entitled to receive twenty percent of the income

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[263] 18 Haw. 640 (1908).

[264] 18 Haw. 649 (1908).

[265] *Kapiolani*, 18 Haw. at 641; *Puahi* 18 Haw. at 650.

[266] *Kapiolani*, 18 Haw. at 646; *Puahi* 18 Haw. at 651.

[267] *Kapiolani*, 18 Haw. at 646 (citations omitted).

[268] Both cases were decided before *Baker*. Arguably, these early territorial cases have been superseded by both legislative and judicial decisions. To explain, the United States government recognized in the 1993 Apology Bill the illegality of the overthrow of the Kingdom and the role of the United States in that event. *See* Overthrow of Hawai'i (Apology Resolution), S.J. Res. 19, 103d Cong., 107 Stat. 1510 (1993). Moreover, the Hawai'i State government, in Act 359, has also acknowledged that the United States participated in the overthrow of the Kingdom of Hawai'i "in violation of treaties between the two nations and of international law." An Act Relating to Hawaiian Sovereignty, Act 359, 1993 Haw. Sess. Laws 1009, *amended by* 1996 Haw. Sess. Laws, Act 140, § 2. *See also* State v. Lorenzo, 77 Hawai'i 219, 883 P.2d 641 (Haw. App. 1994), and Arakaki v. Cayetano, 198 F. Supp. 2d 1165 (D. Haw. 2002). Because there is both federal and state recognition of wrongdoing, the uncertainty regarding the legitimacy of the overthrow and the transfer of land has been completely eliminated—thus it is conceivable that the judiciary today does have manageable standards to apply to this same dispute. *See generally* Jon Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 110 (1998).

[269] Koike v. Bd. of Water Supply, 44 Haw. 100, 114, 352 P.2d 835, 843 (1960); Akahane v. Fasi, 58 Haw. 74, 565 P.2d 552 (1977); Bulgo v. County of Maui, 50 Haw. 51, 430 P.2d 321 (1967). *See* Ching, *supra* note 252, at 356-57 (providing a historical discussion of these cases).

[270] 69 Haw. 154, 174, 737 P.2d 446, 458 (1987).

derived from the lands held in public trust by the State.[271] OHA sought: 1) a portion of the damages received by the state for an illegal sand mining operation on trust land; and 2) twenty percent of the income and proceeds from the sale, lease, or other disposition of land surrounding all the major harbors, land on Sand Island, land on which the Honolulu Internal Airport is located, and land on which the Aloha tower complex stands.[272] Central to the dispute in *Yamasaki* are three statutory provisions: Hawai'i Revised Statutes ("HRS") sections 10-3,[273] 10-13.5,[274] and 261-5.[275] Essentially, HRS section 10-13.5 mandates that twenty percent of the funds derived from the public land trust be expended by OHA pursuant to section 10-3.[276] Accordingly, with respect to the first issue, OHA argued that they were entitled to receive an undivided twenty percent in the land conveyed to the State as damages for the illegal operation of a sand mine on trust land.[277]

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[271] *Id.* at 174, 737 P.2d at 458.

[272] *Id.* at 175, 737 P.2d at 458.

[273] The statute states in pertinent part: The purposes of the Office of Hawaiian Affairs include:

> (1) The betterment of conditions of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of land defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e).

HAW. REV. STAT. § 10-3 (1983).

[274] In relevant part the statute provides that, "[t]wenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter." *See id.* § 10-13.5 (1983).

[275] The statute explains,

> All moneys received by the department of transportation from rents, fees and other charges pursuant to this chapter as well as all aviation fuel taxes . . . shall be paid into the airport revenue fund . . . All such moneys paid into the airport revenue fund shall be expended by the department for the statewide system of airports . . . and for operation and maintenance of airports and air navigation facilities . . . [.]

See id. § 261-5 (1983).

[276] *See id.* §§ 10-3, 10-13.5.

[277] Trs. of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 174, 737 P.2d 446, 458 (1987).

The second issue involved a statutory conflict between HRS sections 261-5 and 10-13.5. A problem arose because HRS section 261-5 requires all income and proceeds from the airport operations be paid into the airport revenue fund and thereafter expended for the maintenance of the state airport system.[278] Hence, if all of revenues from airport operations must be used for the airport, then this conflicts with HRS section 10-13.5, which provides that twenty percent of funds generated by the airport, which is a part of the public trust, be expended by OHA.[279]

The court applied the *Baker* test and concluded that "the disputes . . . [did] not constitute traditional fare for the judiciary; and if the circuit court ruled on them, it would be intruding in an area committed to the legislature."[280] With respect to the first issue, the court ascertained that a determination of whether damages from the illegal sand mining operation should be included in the trust, should not be decided without "an initial policy determination of a kind normally reserved for nonjudicial discretion."[281] In regard to the second issue, the court determined that there was a lack of "judicially discoverable and manageable standards [for resolving] the conflict between the mandates of HRS §§ 10-13.5 and 261-5."[282] Hence, the court determined that the issues presented were of a peculiarly political nature and therefore not appropriate for adjudication.[283]

In response to this ruling, the legislature enacted Act 304,[284] which amended HRS section 10-13.5 to provide: "Twenty per cent of all [funds] *revenue* derived from the public land trust[, described in section 10-3,] shall be expended by . . . [OHA] . . . for the [purposes of this chapter.] *betterment of the conditions of native Hawaiians.*"[285] "Revenue" was defined to include all "*proceeds, fees, charges, rents, or other income . . . derived from any . . . activity that is situated upon and results from the actual use of . . . the public land trust . . . but excluding any income, proceeds, fees, charges, or other moneys derived through the exercise of sovereign functions and powers . . .* [.]"[286] Act 304 therefore provided a substantive definition of revenue that produced a standard by which to discern what funds OHA was entitled to receive.[287] Despite these amendments, OHA and the State were still unable

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[278] *Id.* at 175, 737 P.2d at 458.

[279] *Id.*

[280] *Id.* at 173, 737 P.2d at 457.

[281] *Id.* at 174-75, 737 P.2d at 458.

[282] *Id.* at 175, 737 P.2d at 458.

[283] *Id.*

[284] Act of July 3, 1990, No. 304, § 1, 1990 Haw. Sess. L. Act 947, 947.

[285] *Id.* at § 7 at 951 (quoting HAW. REV. STAT § 10-13.5 (1985)) (emphases in original) (brackets in original).

[286] *Id.* § 3 at 949 (quoting HAW. REV. STAT. § 10-2 (1985)) (emphases in original).

[287] Office of Hawaiian Affairs v. Hawai'i, 96 Hawai'i. 388, 391, 31 P.3d 901, 904 (2001).

to agree on the amount owed to OHA.[288] Fourteen years after the *Yamasaki* decision, OHA brought suit in *Office of Hawaiian Affairs v. State*.[289]

In *Office of Hawaiian Affairs*, OHA again sought to recover its pro rata share of airport revenues pursuant to HRS sections 10-2 and 10-13.5, as amended by Act 304.[290] The State contended that the Forgiveness Act prohibited payment of airport revenue to OHA.[291] The Forgiveness Act states in pertinent part that, "[t]here shall be no further payment of airport revenues for claims related to ceded lands, whether characterized as operating expenses, rent, or otherwise, and whether related to claims for periods of time prior to or after the date of the enactment of this Act."[292]

The court determined that the invalidity of Act 304 essentially reinstated the previous version of HRS sections 10-2 and 10-13.5, "which then place[d] this court precisely where it was at the time *Yamasaki* was decided."[293] Because the substantive definition of revenue provided in Act 304 was now invalid, the court was essentially left with no judicially manageable standards to determine the specific funds that OHA was entitled to receive "without making 'an initial policy determination . . . of a kind normally reserved for nonjudicial discretion.'"[294] Hence, the case was dismissed as nonjusticiable.[295] The court, nonetheless, believed it was fitting to quote Senator Neil Abercrombie's statement made at the time HRS section 10-13.5 was first enacted: "I regret to say that I expect that the moment this passes into statute, there will be a suit and the business of the Office of Hawaiian Affairs is, as a result, going to be tied up in court for God-knows how many years."[296] The court concluded that "[n]ow, more than twenty years later, as we continue to struggle with giving effect to that enactment, we trust that the legislature will re-examine the State's constitutional obligation to native Hawaiians and the purpose of HRS section 10-13.5 and enact legislation that most effectively and responsibly meets those obligations."[297]

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[288] *Id.* at 392, 31 P.3d at 905.

[289] *Id.* at 388, 31 P.3d at 901.

[290] *Id.* at 394, 31 P.3d at 907.

[291] *Id.*

[292] Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 340(c), 111 Stat. 1425, 1448 (1998).

[293] *Office of Hawaiian Affairs*, 96 Hawai'i at 400, 31 P.3d at 913.

[294] *Id.* at 401, 31 P.3d at 914 (quotation omitted) (citation omitted).

[295] *Id.*

[296] *Id.* (quoting testimony of Senator Abercrombie on Conf. Comm. Rep. No. 97-80, in 1980 S. Journal, at 881-82).

[297] *Id.*

IV. NO NEED TO ADOPT THE FEDERAL MODEL OF JUSTICIABILITY

None of the cases discussed herein reflect that Hawai'i courts stringently apply or radically depart from federal justiciability standards.[298] Indeed, the prevailing principle surrounding Hawai'i's justiciability policies is that they "must be applied as the 'needs of justice' require"[299] and should not be used as a "barrier to justice."[300] Hawai'i's caselaw indicates that the courts exercise the federal rule of prudential self-restraint.[301] They do not, however, necessarily apply this rule to all situations insofar as Hawai'i courts sometimes decide cases that are arguably prohibited by federal justiciability precepts.[302]

There is "something of a consensus . . . that [state] courts ought to follow a paradigm for institutional behavior typically called 'judicial restraint'"[303] thus transferring the justiciability rules associated with Article III to state courts.[304] However, "there is little reason to think that directly appropriating an institution that functions well in one system will produce the same beneficial effects when it is inserted into another."[305] Indeed, the federal government "does not adequately describe the diverse, redundant, overlapping, and often semiprivate governance structures of the fifty states."[306] For that reason, "rather than automatically adhere to a federal model, state courts should independently construct judicial access rules to promote . . . state and local governance[,] . . . public participation . . . [and] community through the provision of public goods, to curb faction-dominated decisionmaking, and to cure adverse externalities and spillovers."[307]

First, it must be reiterated that state courts are not bound by the confines of Article III and therefore are free to depart from the federal standards of

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[298] *See* discussion *supra* Parts III. A-D.

[299] Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawai'i 192, 205, 891 P.2d 279, 292 (1995) (citing Life of the Land v. Land Use Comm'n, 62 Haw. 166, 176, 623 P.2d 431, 439 (1981)).

[300] *Life of the Land*, 62 Haw. at 176, 623 P.2d at 439 (citations omitted).

[301] *See supra* text accompanying notes 34-35.

[302] *See supra* text accompanying notes 148-49.

[303] Peter M. Shane, *Interbranch Accountability in State Government and the Constitutional Requirement of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 23 (1998).

[304] *See* Hershkoff, *supra* note 3, at 1876. *See also*, Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 736 (1988).

[305] Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1307 (1999).

[306] *See* Hershkoff, *supra* note 3, at 1883.

[307] *See id.* at 1834.

justiciability.[308] Indeed, "[n]othing in the federal Constitution . . . mandates that states replicate the structure of the federal government"[309] and therefore state constitutions may "allocate power in a manner that deviates from the federal framework."[310] Furthermore, even if countervailing interests exist, "principles of federalism demand a clear and significant justification before the federal government can alter these fundamental choices regarding the structure of state government by imposing the federal case or controversy requirement on state judiciaries."[311] Finally, there is no reason why state courts in general should be required to cling inflexibly to federal standards that even Article III courts sometimes choose to ignore.[312]

Perhaps a more persuasive argument for upholding, or even broadening,[313] Hawai'i's construction of the justiciability doctrine is that its framework provides more access to the court. It is quite easy to get lost in the "legalistic wrangling"[314] involved with justiciability, but in actuality, justiciability principles serve as a barrier to obtaining adjudication inasmuch that it determines who has court access, who controls claim development and

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[308] *See Asarco*, 490 U.S. 605, 617 (1989) (opining that the limitations of Article III are not applicable to state courts).

[309] Brian A. Stern, Note, *An Argument Against Imposing the Federal "Case or Controversy" Requirement on State Courts*, 69 N.Y.U. L. REV. 77, 97 (1994). *See also* Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993). One commentator states,

> General constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation. It would cost casebook editors very little just to inform students that the term[] 'case or controversy' derive[s] from federal, not a state's, constitution; that state courts . . . decide moot cases in order to settle important questions, as well as . . . decide issues that the Supreme Court declares 'nonjusticiable' . . . [.]

Id. at 933. *See also* Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) (explaining that states are not required to emulate the separation of powers prescribed for the federal government).

[310] *See* Stern, *supra* note 309, at 97.

[311] *See id.* at 97-98.

[312] *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000). According to one commentator, *Bush*, represents a series of decisions that reveal:

> a majority of the Justices . . . [do] not feel bound by constitutional text, precedent, prudential restraint, or the votes of the populace. Neither the usual constraints of judicial craftsmanship nor the messy processes of democracy act as significant barriers before the march of an increasingly Imperial Court.

Aviam Soifer, *Courting Anarchy*, 82 B.U. L. REV. 699, 700-01 (2002).

[313] Hawai'i courts have used justiciability standards to avoid addressing issues that arguably could have been adjudicated. *See, e.g.*, *supra* note 268 and accompanying text.

[314] *See* Monaghan, *supra* note 2, at 1364.

presentation, and what standards and perspectives will be applied.[315] According to one commentator, "courts in important instances not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages."[316]

Hawai'i's justiciability doctrine, at the very least, should continue to avoid stringent application of federal standards, and at best, should acknowledge that their decision regarding courthouse entry "can help either to reinforce or counter a prevailing . . . narrative in a given community."[317] Hence, the prudential rule of self-restraint: "The most important thing [courts] do . . . is not doing,"[318] works both productively and counterintuitively.

V. CONCLUSION

Justiciability is indeed a complex and amorphous doctrine, but at its core it merely asks whether a case is suited for adjudication.[319] Each strand from this doctrine essentially addresses a particular aspect of a case's justiciability: ripeness and mootness focuses on "when," standing concentrates on "who," while political questions contemplate "what" issues should be adjudicated. Finally, if a court opts to ignore any of the above principles and decide a case, despite the lack of a justiciable case-or-controversy, it is considered to be a prohibited advisory opinion.

This Article has examined the issue of whether Hawai'i courts adhere or radically depart from federal justiciability standards. In short, Hawai'i courts generally exercise prudential self-restraint, but they do not "follow every twist and turn" of the federal justiciability model.[320] Indeed, this Article posits that Hawai'i courts need not, and should not, rigidly apply federal standards of justiciability. But at the same time, it is important to recognize that if the court intends to tip-toe around the difficult issues and hide behind the prudential rules of self-restraint, it can work both as a boon and as a pitfall.[321]

Avis K. Poai[322]

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[315] Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 19 (1994).

[316] *Id.* at 20-21.

[317] *Id.* at 21.

[318] *See* Bickel, *supra* text accompanying note 23 at 112 (quoting Justice Brandeis).

[319] *See* D.J. GALLIGAN, *supra* text accompanying note 1 at 241.

[320] *See supra* text accompanying note, 36.

[321] *See supra* text accompanying notes, 314-18.

[322] J.D. Candidate 2004, William S. Richardson School of Law, University of Hawai'i at Manoa. MLISc Candidate 2004, University of Hawai'i at Manoa.

Ozaki and Comparative Negligence: Imposing Joint Liability Where a Duty to Protect or Prevent Harm from Third Party Intentional Tortfeasors Exits Is Fairer to Plaintiffs and Defendants

I. INTRODUCTION

Is it fair to determine liability and recovery solely upon a mere 2% fault apportionment difference—where 2% would mean the difference between zero liability/recovery and full liability/recovery? In *Ozaki v. AOAO of Discovery Bay*,[1] the Hawai'i courts applied Hawai'i's comparative negligence and joint liability statutes, Hawai'i Revised Statute ("HRS") Sections 663-31, 663-11, and 663-10.9, in a way that created disparate outcomes based upon a 2% fault apportionment difference. The Hawai'i Supreme Court's interpretation and application of these statutes to *Ozaki*-type situations (situations where a comparatively negligent plaintiff's injury is caused by a combination of negligent and intentional tortfeasors) provides inconsistent and unfair results to plaintiffs and negligent defendants. The Hawai'i statutes provide either minimal redress for comparatively negligent plaintiffs or substantial liability for negligent defendants. Therefore, Hawai'i's comparative negligence and joint liability statutes provide unfair results.

In *Ozaki*, Peter Sataraka murdered Cynthia Dennis, his ex-girlfriend, in her Discovery Bay Condominium apartment after a Discovery Bay security guard permitted him into the building.[2] In a civil suit following Sataraka's murder conviction, a Honolulu jury found Sataraka 92% at fault for his intentional conduct, Discovery Bay 3% at fault for its negligent conduct, and Dennis 5% at fault for her comparatively negligent conduct.[3] Under Hawai'i's comparative negligence statute, examination of fault is limited to only percentages of fault attributed to a party's *negligence*.[4] Thus, only a negligent defendant and a comparatively negligent plaintiff's percentages of fault are compared to determine liability. The Hawai'i Supreme Court found Discovery Bay not liable to the plaintiffs under the comparative negligence statute because

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[1] 87 Hawai'i 265, 954 P.2d 644 (1998), *aff'd in part, rev'd in part* [hereinafter "*Ozaki II*"], 87 Hawai'i 273, 954 P.2d 652 (App. 1998) [hereinafter "*Ozaki I*"].

[2] *Ozaki II*, 87 Hawai'i 265, 954 P.2d 644; *Ozaki I*, 87 Hawai'i 273, 954 P.2d 652.

[3] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 277-78, 954 P.2d at 657.

[4] *See* HAW. REV. STAT. § 663-31 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

Discovery Bay's percentage of fault (3%) was less than Dennis's (5%).[5] Therefore, plaintiffs recovered nothing (0%) from Discovery Bay.[6]

The Hawai'i Supreme Court acknowledged that if, however, the jury had found the opposite, (i.e. Discovery Bay 5% at fault and Dennis 3% at fault) a drastically different outcome would have resulted.[7] In the court's hypothetical situation, under the comparative negligence statute, Discovery Bay would be liable to plaintiffs because its percentage of fault (5%) would be greater than Dennis's (3%).[8] And, after finding liability under the comparative negligence statute, Hawai'i's joint liability statutes would render Discovery Bay and Sataraka joint tortfeasors. As a joint tortfeasor, Discovery Bay would be jointly liable with the intentional tortfeasor for 97% (92% Sataraka + 5% Discovery Bay) of the damages. Therefore, plaintiffs could recover 97% of the damages from Discovery Bay. A negligible 2% difference, between 5% and 3%, in the apportionment of fault between the negligent defendant and the comparatively negligent plaintiff produces extreme and unfair differences in liability and recovery. A 2% difference in fault apportionment produces, in one situation no recovery (0%), and in the other, 97% recovery from Discovery Bay.

When drafting the comparative negligence and joint liability statutes, the Hawai'i State Legislature did not provide a workable method concerning *Ozaki*-type situations. The outcomes of these types of cases depend heavily upon the manner in which a jury apportions percentages of fault to an intentional tortfeasor, a negligent tortfeasor, and a comparatively negligent plaintiff. The apportionment of fault to the intentional tortfeasor plays a significant role in the *Ozaki* discrepancy. Any rational jury would apportion the "lion's share" of fault to an intentional tortfeasor when instructed to allocate fault to an intentional tortfeasor and a negligent tortfeasor.[9] Juries are not likely to apportion a large percentage of fault to a negligent defendant when an intentional co-defendant contributes to the injury.[10] Because the Legislature did not consider *Ozaki*-type situations when drafting the comparative negligence statute, the Legislature failed to take into account the intentional tortfeasor's fault when another defendant's negligence is involved.

In an *Ozaki*-type situation, after apportioning the "lion's share" of fault to an intentional tortfeasor, depending on how a jury apportions percentages of

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[5] *Ozaki II*, 87 Hawai'i at 270, 954 P.2d at 649; *Ozaki I*, 87 Hawai'i at 280, 954 P.2d at 659.

[6] *Ozaki II*, 87 Hawai'i at 270, 954 P.2d at 649; *Ozaki I*, 87 Hawai'i at 280, 954 P.2d at 659.

[7] *Ozaki II*, 87 Hawai'i at 270-71, 954 P.2d at 649-50.

[8] *Id.* at 271, 954 P.2d at 650.

[9] Veazey v. Elmwood Plantation Assoc., Ltd., 650 So. 2d 712, 719 (La. 1994).

[10] *Id.*

fault to negligent parties, the application of Hawai'i's comparative negligence and joint liability statutes can provide very inconsistent and unfair results to comparatively negligent plaintiffs and negligent defendants. To resolve this unfairness in *Ozaki*-type situations, Hawai'i should adopt the concepts in the Uniform Apportionment of Tort Responsibility Act ("Uniform Act"), and modify Hawai'i's joint liability statutes, HRS Sections 663-10.9 and 663-11, to create joint liability in *Ozaki*-type situations where a duty to protect or prevent harm from a third party intentional tortfeasor exists, and is breached. Such an adoption would assist Hawai'i courts in dealing with the comparative negligence statute, HRS Section 663-31, which fails to address *Ozaki*-type situations where liability and recovery depend upon small differences in fault apportionment to the negligent parties. This modification of Hawai'i's statutes would facilitate fairer, more consistent outcomes. Joint liability is fairer to plaintiffs because it permits recovery when a negligent defendant owes a duty to protect or prevent harm from third party intentional tortfeasors and breaches that duty. Applying a duty/breach approach for joint liability is fairer to negligent defendants by providing several liability when they either did not have a duty to protect, prevent harm or did not breach that duty.

This article addresses the problem of Hawai'i's comparative negligence and joint liability statutes in *Ozaki*-type situations. Part II discuses the purposes of Hawai'i's comparative negligence and joint liability statutes, the statutory model proposed under the Uniform Act, and the *Ozaki* decisions. Part III examines the Hawai'i Supreme Court's interpretation and application of the comparative negligence and joint liability statutes, the inconsistencies associated with its interpretations, and discusses the Uniform Act as applied to *Ozaki*. Part IV offers a solution to modify the joint liability statutes to provide a fairer, more consistent method for dealing with *Ozaki*-type situations. Part V concludes that because the Legislature did not conceive of an *Ozaki*-type situation when it drafted the comparative negligence and joint liability statutes, the Hawai'i Supreme Court could not produce fair and consistent results when applying them to *Ozaki*. Moreover, Hawai'i should adopt a fairer two-part test modeled after the Uniform Act when dealing with *Ozaki*-type situations.

II. BACKGROUND

The Legislature did not consider *Ozaki*-type situations when it drafted the comparative negligence and joint liability statutes, HRS Sections 663-31, 663-10.9, and 663-11. Due to this neglect, the Hawai'i courts' application of the statutes to *Ozaki* proved to be difficult and inconsistent. The Hawai'i Supreme Court's application provides drastically different outcomes when jury apportionment of fault differs only slightly. The Uniform Act, a statutory

model, provides guidance in addressing *Ozaki*-type situations involving comparatively negligent plaintiffs, and intentional and negligent defendants.[11] The Hawai'i courts, however, did not have the benefit of the Uniform Act when it decided *Ozaki*.

A. Comparative Negligence and Joint Liability Statutes

Hawai'i has three major statutes dealing with comparative negligence and joint liability. HRS Section 663-31 is the comparative negligence statute. HRS Section 663-10.9 abolishes joint and several liability in a limited manner. HRS Section 663-11 defines joint tortfeasors. This section discusses these statutes and the purposes behind them.

1. HRS § 663-31: Comparative negligence

In 1969, the Hawai'i State Legislature enacted a comparative negligence statute to eliminate the common law doctrine of contributory negligence, which barred a plaintiff's recovery against negligent defendants if he or she contributed in any amount to his or her injuries.[12] In 1976, the Legislature

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[11] *See* UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT (2002).

[12] H.R. STAND. COMM. REP. NO. 397, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. HOUSE J. 778, 778; SEN. COMM. REP. NO. 849, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. SEN. J. 1194, 1194.

In addressing the harsh effects of contributory negligence, the House and Senate Committees stated that contributory negligence "seem[ed] to be unfair and in opposition to the average person's concept of justice." H.R. STAND. COMM. REP. NO. 397, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. HOUSE J. 778, 778; SEN. COMM. REP. NO. 849, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. SEN. J. 1194, 1194. The Committees concluded that a comparative negligence law would remove this unfairness and allow the factfinder to compare the fault of the negligent defendant and the comparatively negligent plaintiff and reduce the amount of recovery by the amount of fault attributed to the plaintiff. H.R. STAND. COMM. REP. NO. 397, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. HOUSE J. 778, 778-79; SEN. COMM. REP. NO. 849, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. SEN. J. 1194, 1194. If the plaintiff's comparative negligence, however, was greater than the defendant's negligence, recovery would be barred. H.R. STAND. COMM. REP. NO. 397, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. HOUSE J. 778, 778-79; SEN. COMM. REP. NO. 849, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. SEN. J. 1194, 1194. (Originally the statute barred recovery "if the evidence showed that the fault of the plaintiff was as great as or greater than that of the defendant," but this has been overruled by the 1975 amendment, which allows recovery if plaintiff's negligence is equal to the defendant's negligence. H.R. STAND. COMM. REP. NO. 397, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. HOUSE J. 778, 778-79; SEN. COMM. REP. NO. 849, 5th Leg., Reg. Sess. (1969) *reprinted in* 1969 HAW. SEN. J. 1194, 1194. H.R. STAND. COMM. REP. NO. 722, 8th Leg., Reg. Sess. (1975) *reprinted in* 1975 HAW. HOUSE J. 1309, 1309; SEN. COMM. REP. NO. 489, 8th Leg., Reg. Sess. (1975) *reprinted in* 1975 HAW. SEN. J. 1020, 1020).

amended the comparative negligence statute to allow the comparison of the aggregate negligence of defendants when two or more negligent defendants cause a plaintiff's injury.[13] HRS Section 663-31 provides that:

> Contributory negligence shall not bar recovery . . . for negligence resulting in death . . . if such negligence was not greater than the negligence of the person or . . . the *aggregate negligence* of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of *negligence* attributable to the person for whose . . . death recovery is made.[14]

The statute also states that "if the said proportion [of fault attributable to plaintiff] is greater than the negligence of the [defendant] or in the case of more than one [defendant], the *aggregate negligence* of such [defendants] against whom recovery is sought, the court will enter a judgment for the defendant."[15]

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[13] The House and Senate Committee reports noted that "[a]n ambiguity exist[ed] under . . . existing law where there are two or more [negligent] defendants, whose aggregate degree of negligence expressed as a percentage is more than the [percentage of fault of the plaintiff], . . . but separately is less." H.R. CONF. COMM. REP. NO. 26, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. HOUSE J. 1132, 1132; SEN. CONF. COMM. REP. NO. 21-76, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 848, 848; SEN. COMM. REP. NO. 435, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 1068, 1068. The committees gave an example: "if the injured person's degree of negligence was 40 [percent] and if there were two defendants, each of whose degree of negligence was 30 [percent] (or 60 [percent] aggregate)," may the plaintiff recover? H.R. CONF. COMM. REP. NO. 26, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. HOUSE J. 1132, 1132; SEN. CONF. COMM. REP. NO. 21-76, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 848, 848; SEN. COMM. REP. NO. 435, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 1068, 1068. The committees answered in the affirmative, stating "that where there are two or more [negligent] defendants, the [comparatively negligent plaintiff's percentage of fault] . . . should be compared against the *aggregate* [percentages of fault of the negligent defendants] . . . rather than against each one of them individually." H.R. CONF. COMM. REP. NO. 26, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. HOUSE J. 1132, 1132; SEN. CONF. COMM. REP. NO. 21-76, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 848, 848; SEN. COMM. REP. NO. 435, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 1068, 1068. To the Committees, this provided the "most fair and equitable portion." H.R. CONF. COMM. REP. NO. 26, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. HOUSE J. 1132, 1132; SEN. CONF. COMM. REP. NO. 21-76, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 848, 848; SEN. COMM. REP. NO. 435, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 1068, 1068. Another Senate Committee report stated that, because it is "the total conduct of the defendants resulted in the harm suffered by the plaintiff, it is against the defendants' *combined fault* with which the plaintiff's fault should be compared." SEN. COMM. REP. NO. 705-76, 8th Leg., Reg. Sess. (1976) *reprinted in* 1976 HAW. SEN. J. 1613, 1613 (emphasis added).

[14] HAW. REV. STAT. § 663-31 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.) (emphasis added).

[15] *Id.*

The plain meaning of the language of the statute indicates that the Legislature did not intend for the comparison of all types of fault, only *negligence*. The House and Senate Committee reports also indicate that the Legislature did not consider *Ozaki*-type situations when drafting this statute.[16] The Legislature considered only situations involving a comparatively negligent plaintiff and one or more negligent defendants.

2. HRS § 663-11: Joint tortfeasors defined

Despite many pleas to the Legislature from diverse groups seeking to abolish joint liability, HRS Section 663-11 retains the general concept of joint tortfeasor liability in Hawai'i law.[17] Enacted in 1941, the Legislature stated that the law "is the uniform law on the subject prepared and approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws."[18] HRS Section 663-11 defines "joint tortfeasors" as "two or more persons *jointly or severally liable* in tort for the *same injury* to person . . . whether or not judgment has been recovered against all or some of them."[19] The statute requires a finding of *liability* before imposing *joint tortfeasor liability*.[20] The definition requires joint tortfeasors to have caused the "same injury" to the plaintiff.[21] After finding that parties are joint tortfeasors, a court must then apply HRS Section 663-10.9 to determine the parties' liability for damages.

3. HRS § 663-10.9: Joint and several liability

HRS Section 663-10.9 provides exceptions to the abolishment of joint liability for joint tortfeasors, as defined in HRS Section 663-11. In 1986, the Legislature spent many days in special session debating the enactment of a statute that would theoretically eliminate, but actually allow many exceptions to, common law joint liability.[22] From the inception of the bill, representatives

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[16] *See supra* note 13.

[17] *Hearing on S.B. No. S1-86*, 13th Leg., Spec. Sess. 7-31 (1986) (testimony of Representatives Marumoto, Liu, Ikeda, Hemmings, Tom, Bunda, Cavasso, Metcalf, Jones, Isbell, Graulty, Kamali'i, Shito, Anderson, Kawakami).

[18] *Hearing on S.B. No. 339*, 21st Leg., Reg. Sess. 1042 (1941) (testimony of Representative Arthur A. Akina).

[19] HAW. REV. STAT. § 663-11 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

[20] *See id.*

[21] *See id.*

[22] *Hearing on S.B. No. S1-86*, 13th Leg., Spec. Sess. 7-31 (1986) (testimony of Representatives Marumoto, Liu, Ikeda, Hemmings, Tom, Bunda, Cavasso, Metcalf, Jones, Isbell, Graulty, Kamali'i, Shito, Anderson, Kawakami).

voiced their concerns over the "badly drafted" provisions.[23] Despite harsh criticisms, the Legislature enacted HRS Section 10.9, which abolishes joint liability for joint tortfeasors except: (1) for the recovery of economic damages;[24] (2) in actions involving: injury or death to persons, intentional torts, environmental pollution torts, toxic and asbestos-related torts, aircraft accidents, strict and products liability, and car accidents;[25] and (3) in actions where a defendant's negligence is greater than 25%.[26]

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[23] *Id.* Representatives commented that the bill does not abolish joint liability for a significant number of tort cases and creates large loopholes rendering it useless. *Id.* Representative Liu stated his concerns that "under this bill . . . the defendant who is one percent negligent will still be liable for a large share of most of the damages owing the plaintiff." *Hearing on H.B. No. 1-86*, 13th Leg. Spec. Sess. 7-31, 9 (1986) (testimony of Representative Liu). The reasoning behind this is that when joint liability is imposed, a defendant who is only 1% liable would be liable for the entire amount of damages (possibly 100% liable). Liu also stated that the bill does not define intentional torts. *Id.* (testimony of Representative Liu). Because it was not defined, "it could take a meaning of its own." *Id.* (testimony of Representative Liu). Liu also stated that by "involving all those exceptions or torts relating to those exceptions leaves wide open the question of what acts are *involved*." *Id.* (testimony of Representative Liu).

[24] HAW. REV. STAT. § 663-10.9(1) (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

[25] *See id.* § 663-10.9(2). HRS Section 663-10.9(1) retains joint liability "[f]or the recovery of *economic* damages . . . in actions involving . . . injury and *death* to persons." *See id.* § 663-10.9 (emphasis added). This means that joint tortfeasors are jointly liable for economic damages. Under HRS Section 663-10.9(2)(A), joint liability is also retained "[f]or the recovery of *economic and noneconomic* damages in actions *involving . . . [i]ntentional torts.*" *See id.* § 663-10.9(2)(A) (emphasis added). This means that joint tortfeasors are jointly liable for economic and noneconomic damages in actions "involving" intentional torts. As noted by Representative Liu, the term "involving" was not defined. *Hearing on H.B. No. 1-86*, 13th Leg., Spec. Sess. 7-31, 9 (1986) (testimony of Representative Liu). Therefore, the question of whether an action "involves" an intentional tort was left open for courts to decide, and that precise question arose in the *Ozaki* case.

[26] HAW. REV. STAT. § 10.9(3) (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

HRS Section 663-10.9(3) also provides a 25% threshold for the recovery of *noneconomic damages* in actions "other than those enumerated in paragraph (2) [i.e. intentional torts; environmental pollution torts; toxic and asbestos-related torts; aircraft accidents; strict and products liability torts; and car accidents]." *See id.* The statute provides in subsection (3) that a tortfeasor is jointly liable for noneconomic damages in actions involving death (other than those listed in subsection (2)) when the tortfeasor's "individual degree of negligence is found to be [25%] or more under section 663-31." *See id.* The statute also provides that "[w]here a tortfeasor's degree of negligence is less than [25%], then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned." *See id.* In other words, in cases other than those enumerated in subsection (2), when a joint tortfeasor's percentage of negligence is greater than 25%, he or she is jointly liable for non-economic damages, but when a joint tortfeasor's percent of fault is below 25%, he or she is only severally (proportionally) liable for noneconomic damages.

From the plain language of the statute, the Legislature intended that: (1) all joint tortfeasors be jointly liable for economic damages;[27] (2) *intentional* joint tortfeasors be jointly liable for economic and noneconomic damages;[28] and (3) *negligent* joint tortfeasors be jointly liable where their individual liability is above the 25% threshold, and severally liable when their individual liability is below the 25% threshold.[29] The Legislature also required a determination of whether a defendant is a joint tortfeasor before the application of HRS Section 663-10.9.[30] Further, in an *Ozaki*-type situation, before a negligent defendant can be considered a joint tortfeasor, a court must first find the negligent defendant liable under the comparative negligence statute, HRS Section 663-31.[31] Under the Uniform Act, however, comparative negligence need not be found before the imposition of joint liability.[32]

B. Uniform Apportionment of Tort Responsibility Act

The Uniform Act, promulgated by the National Conference of Commissioners on Uniform State Laws, is a model act that states may choose to adopt. The Commissioners, acknowledging that "disparate approaches" exist among states, adopted the Uniform Act in 2002, to replace the older uniform acts,[33] which failed to address many issues facing courts today.[34] The *Ozaki*-type situation illustrates such an issue where intentional and negligent tortfeasors contribute to a comparatively negligent plaintiff's injuries. The Commissioners also noted that these *Ozaki*-type issues have "increased as the courts have expanded tort liability in areas involving an actor's obligation to protect a tort victim from the intentional torts of a third party."[35] The Commissioners further stated that current legislation has not addressed these *Ozaki*-type situations and court decisions have been "anything but unanimous in resolving the problems."[36] In attempting to create uniformity between states, the Uniform Act provides many possible solutions. It ultimately gives state legislatures the final decision on how to apportion fault, what types of fault to compare, and which sections to adopt.

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[27] *See id.* § 663-10.9(1).

[28] *See id.* § 663-10.9(2).

[29] *See id.* § 663-10.9(3).

[30] *See id.* § 663-11.

[31] *See id.* §§ 663-11; 663-31.

[32] *See infra* section II.B.

[33] The Conference stated that the Uniform Apportionment of Tort Responsibility Act of 2002 is intended to replace the Uniform Contribution Among Joint Tortfeasors Act of 1955 and the Uniform Comparative Fault Act of 1977.

[34] UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT Prefatory Note (2002).

[35] *See id.*

[36] *See id.*

1. Uniform Act § 2: Definitions

The Uniform Act begins by defining certain terms used throughout the Uniform Act. The Uniform Act, however, defers interpretation of these definitions to legislatures and courts. Section 2 of the Uniform Act defines "contributory fault," "person," "released person," and "responsibility."[37] The Uniform Act defines "contributory fault" as including "contributory negligence . . . , unreasonable failure to avoid or mitigate harm, and assumption of risk."[38] A "person" is defined as "an individual . . . [or an] association."[39] A "released person" is "a person that would be liable for damages to a claimant for personal injury . . . if the person had not been discharged from liability."[40] The Uniform Act defines "responsibility" as "the legal consequences of an act or omission that is the basis for liability or a defense in whole or in part."[41]

The Uniform Act makes no attempt to define "fault." The Commissioners stated that by not defining "fault" it "avoids the issue[s] of deciding for all those who consider adopting the [Uniform] Act whether intentional conduct should be compared with other forms of fault and, if so, in what situations."[42] Thus, because the Uniform Act fails to define "fault," states can determine whether "fault" includes only negligence, or a combination of negligence and intentional torts, or some other combination of theories of liability.

The definition of "responsibility" also allows adopting states to determine which types of conduct should be compared (i.e. negligent, intentional, strict liability). The Commissioners deferred to the states the determination of "the type of conduct for which liability may be imposed and which should be compared under the [Uniform] Act."[43] By stating that "responsibility" is formed under "basis for liability," states are free to determine what the "basis for liability" should be (i.e. negligence, intentional tort).

2. Uniform Act § 3: Effect of contributory fault

The Uniform Act's "Effect of Contributory Fault" section is similar to Hawai'i's comparative negligence statute. The Uniform Act section 3, subsection (a) provides that:

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[37] *See id.* § 2.
[38] *See id.* § 2(1).
[39] *See id.* § 2(2).
[40] *See id.* § 2(3).
[41] *See id.* § 2(4).
[42] *See id.* § 2 cmt.
[43] *See id.*

> in an action seeking damages for personal injury . . . based on negligence . . . or on a claim for which the claimant may be subject to a defense in whole or part based on contributory fault, any contributory fault chargeable to the claimant diminishes the amount that the claimant otherwise would be entitled to recover as compensatory damages for the injury or harm by the percentage of responsibility assigned to the claimant . . . .[44]

The Uniform Act allows states to decide which type of modified comparative fault scheme to adopt. Subsection (b) states that "[i]f the claimant's contributory fault is (equal to or) greater than the combined responsibility of all other parties and released persons whose responsibility is determined to have caused personal injury to . . . the claimant, the claimant may not recover any damages."[45] Adopting states have the choice of either utilizing or eliminating the words "equal to or" to implement the proper comparative fault scheme. Including the bracketed text ("equal to or") bars the claimant from recovery when the claimant's share is greater than that of the defendants, but allows recovery if the claimant's share is equal to the defendants' share of fault. Eliminating the bracketed text ("equal to or") bars the claimant from recovery when the claimant's share equals that of the defendants. Subsection (b) also allows a claimant's fault to be compared to the aggregate fault of the other parties and any released person. Because "fault" is not defined, states are free to decide whether to allow the comparison of a plaintiff's comparative negligence to only negligent defendants or to both negligent and intentional defendants.

3. Uniform Act § 4: Finding damages; attribution of responsibility

Section 4 of the Uniform Act provides that the factfinder shall assign "the percentage of the total responsibility of all the parties and released persons attributed to each claimant, defendant, and released person that caused the injury or harm."[46] This means that fault shall be apportioned only to parties and any released persons regardless of whether they are intentional or negligent. Section 4 also provides a finding of "any other issue of fact fairly raised by the evidence which is necessary to . . . enter judgment under Section 6."[47] This allows the factfinder to decide the issue of duty to protect or prevent harm of third party intentional tortfeasors, and breach of that duty.

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[44] *See id.* § 3(a).
[45] *See id.* § 3(b).
[46] *See id.* § 4.
[47] *See id.* § 4(a)(4).

4. Uniform Act § 6: Entering judgment

The Uniform Act adopts several liability as the general rule.[48] The Uniform Act states that a party shall be severally liable except when a party failed to prevent an intentional tort.[49] Section 6 provides that "[i]f a party is adjudged liable for failing to prevent another party from intentionally causing personal injury to . . . the claimant, the court shall enter judgment jointly and severally against the parties for their combined shares of responsibility."[50] "[T]he Drafting Committee felt that joint and several liability should be retained where a defendant breaches a duty to protect another person from an intentional tort of a third party."[51] The Commission noted that many jurisdictions have recognized this type of duty in situations dealing with occupiers of land.[52] "Owners and operators of hotels, office buildings, shopping centers, and transit facilities . . . have been held liable for failing to take reasonable precautions to protect invitees and others on their premises from *foreseeable intentionally* inflicted injuries by others."[53] This imposition of joint liability where a duty to protect or prevent harm exists, creates incentives to maintain a higher duty of care.[54] A jury must find a breach of the duty to protect or prevent harm before the court can impose joint liability. This, however, was not the situation in *Ozaki*.

C. Ozaki v. AOAO of Discovery Bay

1. Factual background

Cynthia Dennis ("Dennis") moved into her Discovery Bay apartment in early June 1990.[55] Peter Sataraka ("Sataraka") lived with Dennis but was not a tenant of the condominium.[56] Sataraka moved out of the apartment a short time thereafter, but continued to visit and spend nights with Dennis.[57] Timothy Walker ("Walker"), a Discovery Bay security guard, noticed Sataraka in the building many times and observed Sataraka with Dennis on

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[48] *See id.* § 6 cmt.
[49] *See id.* § 6.
[50] *See id.* § 6(2).
[51] *See id.* § 6 cmt.
[52] *See id.*
[53] *See id.*
[54] *See id.*
[55] Ozaki v. AOAO of Discovery Bay, 87 Hawai'i 273, 276, 954 P.2d 652, 655 (Haw. App. 1998).
[56] *Id.*
[57] *Id.*

numerous occasions.[58] Walker also observed Sataraka entering the building via the "enterphone"[59] and by use of a key.[60]

On July 3, 1990, Sataraka and Dennis had a confrontation at a nightclub.[61] When Dennis left the nightclub without Sataraka he proceeded to her condominium.[62] When Sataraka's attempts to contact Dennis by enterphone failed, he asked the security guard, Walker, to provide him entry into the building.[63] Walker, who had seen Sataraka enter the building previously with Dennis, let Sataraka in the building.[64] After discovering that Dennis was not in her apartment, Sataraka went to the lobby and spoke with Walker.[65] As Walker's shift ended he notified his replacement that Sataraka was "waiting for his girlfriend."[66] Upon Dennis's return later that night, Sataraka confronted her in the hallway next to her apartment and followed her in.[67] The next day, Dennis was found dead in her apartment.[68] Sataraka was tried and convicted of Dennis's murder.[69]

Betty Ozaki, Dennis's sister, and Teruko Dennis, Dennis's mother, filed a suit against Discovery Bay and Sataraka.[70] Plaintiffs' complaint alleged that

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[58] *Id.*

[59] *Id.* at 276 n.1. "The 'enterphone' is evidently a communication device that permits visitors to the Discovery Bay complex to contact their hosts from a telephone located near the entry. A resident wishing to admit the guest into the complex could then 'buzz' that person in through a designated door." *Id.*

[60] *Id.* at 276.

[61] Ozaki v. AOAO of Discovery Bay, 87 Hawai'i 265, 266, 954 P.2d 644, 645 (1998); *Ozaki I*, 87 Hawai'i at 276, 965 P.2d at 655.

[62] *Ozaki II*, 87 Hawai'i at 266, 954 P.2d at 645; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[63] *Ozaki II*, 87 Hawai'i at 266, 954 P.2d at 645; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[64] *Ozaki II*, 87 Hawai'i at 266, 954 P.2d at 645; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[65] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[66] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[67] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[68] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[69] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

[70] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655. "The circuit court entered a partial directed verdict on Ozaki's individual claim because she was not a surviving spouse, child, father, mother, or a person wholly or in part dependent upon the deceased and, therefore, was ineligible to maintain a wrongful death action pursuant to HRS [Section] 663-3." *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 276, 956 P.2d at 655.

Discovery Bay negligently allowed Sataraka into the building giving him access to an area near Dennis's apartment.[71] A jury found that Sataraka's intentional conduct and the negligence of Discovery Bay and Dennis contributed to her death.[72] The jury apportioned 92% of fault to the intentional conduct of Sataraka, 3% to the negligent conduct of Discovery Bay, and 5% to the comparatively negligent conduct of Dennis.[73]

2. Intermediate Court of Appeal's ("ICA") opinion

The ICA began with an examination of the comparative negligence statute, HRS Section 663-31. The ICA reasoned that because the comparative negligence statute allows only the comparison of negligence percentages, the comparative negligence statute "applie[d] only in actions . . . sound[ing] *entirely* in negligence."[74] In other words, the statute applied only to actions involving a comparative negligent plaintiff and one or more negligent defendants. The ICA, in deciding that the comparative negligence statute did not apply to the facts of *Ozaki*, looked to other comparative principles.

The ICA stated that the Hawai'i Supreme Court in *Kaneko v. Hilo Coast Processing*,[75] *Armstrong v. Cione*,[76] and *Hao v. Owens-Illinois, Inc.*,[77] held that comparative negligence principles applied, but would not be applied in a way that barred recovery in situations where a plaintiff's negligence combined with a defendant's strict liability to cause the injury.[78] The ICA

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[71] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 656; *Ozaki I*, 87 Hawai'i at 276-77, 956 P.2d at 655-56.

[72] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 277-78, 956 P.2d at 656-67.

[73] *Ozaki II*, 87 Hawai'i at 267, 954 P.2d at 646; *Ozaki I*, 87 Hawai'i at 278, 956 P.2d at 657.

[74] *Ozaki I*, 87 Hawai'i at 280, 954 P.2d at 659 (emphasis added).

[75] 65 Haw. 447, 654 P.2d 343 (1982).

[76] 69 Haw. 176, 738 P.2d 79 (1987).

[77] 69 Haw. 231, 738 P.2d 416 (1987).

[78] *Ozaki I*, 87 Hawai'i at 281-82, 954 P.2d at 660-61 (citing *Hao*, 69 Haw. at 236, 738 P.2d at 418-19; *Armstrong*, 69 Haw. at 180-81, 738 P.2d at 82; *Kaneko*, 65 Haw. 447, 654 P.2d 343). In strict products liability actions, fault is apportioned to all parties and pure comparative negligence principles apply.

In *Kaneko*, the plaintiff was injured when he fell from a steel beam that came loose. *Kaneko*, 65 Haw. at 448, 654 P.2d at 345. The jury found that the manufacturer was 73% strictly liable, the employer was 0% negligent, and the plaintiff was 27% comparatively negligent. *Id.* at 449, 654 P.2d at 345. The *Kaneko* court applied comparative negligence principles because it "would 'accomplish a fairer and more equitable result' and that 'fairness and equity are more important than conceptual and semantic consistency.'" *Ozaki I*, 87 Hawai'i at 281, 954 P.2d at 660 (quoting *Kaneko*, 65 Haw. at 461, 654 P.2d at 352); *see also Kaneko*, 65 Haw. at 461, 654 P.2d at 352. Here the comparative negligence statute was enough to permit

noted that the Hawai'i Supreme Court adopted "'comparative negligence principles' as *best suited* 'to accomplishing a fairer and more equitable result.'"[79] The ICA held that "where a defendant's intentional conduct, a co-defendant's negligence, and the plaintiff's negligence combine to cause the plaintiff's damages, 'pure comparative negligence principles' should be applied and the plaintiff's recovery should reflect the relative degrees of fault of all culpable parties."[80] Therefore, each defendant should be held liable for his proportion of fault regardless of the amount of comparative negligence allocated to the plaintiff. The ICA determined that the plaintiffs' recovery against Sataraka and Discovery Bay must be reduced by 5%, the degree of Dennis's negligence.[81]

The ICA then considered whether Discovery Bay and Sataraka were joint tortfeasors. Without providing any reasons, the ICA quickly concluded that Discovery Bay and Sataraka were joint tortfeasors under HRS Section 663-

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recovery. The *Armstrong* and *Hao* courts, on the other hand, held that "pure comparative negligence" principles applied rather than the comparative negligence statute. In *Armstrong*, the jury found the plaintiff to be 67% comparatively negligent and the defendant 33% strictly liable. *Armstrong*, 69 Haw. at 179, 738 P.2d at 81. The *Armstrong* court stated that the comparative negligence statute did not apply to actions involving strict products liability. *Ozaki I*, 87 Hawai'i at 281, 954 P.2d at 660 (citing *Armstrong*, 69 Haw. at 180, 738 P.2d at 82); *see also Armstrong*, 69 Haw. at 180, 738 P.2d at 82. Thus, the plaintiff was able to recover even though he was found more negligent than the defendant. *Ozaki I*, 87 Hawai'i at 281, 954 P.2d at 660 (citing *Armstrong*, 69 Haw. 176, 738 P.2d 79). This was also the case in *Hao*, where the jury determined that the plaintiff was 51% at fault for his illness due to his negligence in smoking cigarettes and the defendants were 49% strictly liable for manufacturing and distributing products with asbestos. *Ozaki I*, 87 Hawai'i at 282, 954 P.2d at 661; *see also* Hao v. Owen-Illinois, Inc., 69 Haw. 231, 234, 738 P.2d 416, 418 (1987). The *Hao* court stated that "'pure comparative negligence principles' were to be applied where a plaintiff's [comparative] negligence was considered with a defendant's strict products liability." *Ozaki I*, 87 Hawai'i at 282, 954 P.2d at 661 (citing *Hao*, 69 Haw. at 236, 738 P.2d at 419); *see also* Hao v. Owen-Illinois, Inc., 69 Haw. 231, 236, 738 P.2d 416, 419 (1987). Again, the plaintiff was able to recover even though he was found more negligent than the defendants. *Ozaki I*, 87 Hawai'i at 282, 954 P.2d at 661. Thus, the ICA reasoned that the *Ozaki* issues were "sufficiently analogous" to those in *Kaneko*, *Armstrong*, and *Hao* to apply the doctrine of pure comparative negligence. *Ozaki I*, 87 Hawai'i at 282, 954 P.2d at 661.

[79] *Ozaki I*, 87 Hawai'i at 283, 954 P.2d at 662 (emphasis added).

[80] *Id.*

[81] *Id.* at 286, 954 P.2d at 665. The ICA's determination, reducing plaintiffs' recovery by 5%, indicates that the ICA was willing to reduce the "joint tortfeasors'" damages by 5%. Intentional and negligent defendants were the "joint tortfeasors." Does this mean that Hawai'i courts will reduce an intentional tortfeasor's liability by fault apportioned to a comparatively negligent plaintiff? The comparative negligence statute allows an offset of the negligent defendant's liability by the comparatively negligent plaintiff. HAW. REV. STAT. § 663-31 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.). It does not, however, indicate that an intentional tortfeasor can use the comparative negligence statute to offset its liability.

11.[82] After finding joint tortfeasor liability, the ICA next addressed the issue of whether Sataraka and Discovery Bay would be jointly liable for economic and noneconomic damages. The ICA stated that joint liability, as set forth in HRS Section 663-10.9(2)(A), does not abolish recovery for economic and noneconomic damages "against joint tortfeasors in actions 'involving' . . . [i]ntentional torts."[83] The ICA reasoned that because "involving" is the participle form of the word "involve," which is defined as "to have within or as part of itself," "involving" means to "include."[84] The ICA concluded that the action "involved" an intentional tort because it was based on Sataraka's intentional tort and fell within the purview of HRS Section 663-10.9(2)(A).[85] Therefore, the ICA held that joint liability was not abolished in *Ozaki* for economic and noneconomic damages.[86]

In sum, the ICA reasoned that application of the comparative negligence statute, HRS Section 663-31, designed to favor defendants by abolishing joint liability in many cases was limited to cases sounding entirely in negligence and did not apply to *Ozaki*-type situations involving negligent and intentional tortfeasors.[87] Instead, the ICA applied the doctrine of pure comparative negligence, which allows a plaintiff to recover even though his percentage of comparative negligence is greater than that of the negligent defendant.[88] Based on its findings that Discovery Bay and Sataraka were joint tortfeasors; that HRS Section 663-10.9(2)(A) retained joint liability for economic and noneconomic damages in actions "involving" intentional torts; and that because an intentional tort was involved, HRS Section 663-10.9(2)(A) governed,[89] Discovery Bay and Sataraka were jointly liable for the economic and noneconomic damages, reduced only by Dennis's 5% negligence.[90]

Discovery Bay quickly appealed to the Hawai'i Supreme Court. The Hawai'i Supreme Court granted Discovery Bay's petition for a writ of certiorari within thirty-six days after the ICA decided *Ozaki*. Fearing the post-*Ozaki* effects of heightened liability, the Hawai'i Insurance Council also filed amicus briefs to the Hawai'i Supreme Court.

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[82] *Ozaki I*, 87 Hawai'i at 285, 954 P.2d at 664.

[83] *Id.*

[84] *Id.* (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (1990)).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 283, 954 P.2d at 662.

[88] *Id.*

[89] *Id.* at 285, 954 P.2d at 664.

[90] *Id.* at 286, 954 P.2d at 665.

3. Hawai'i Supreme Court's opinion

Justice Stephen Levinson, authoring the court's unanimous opinion, began the analysis by addressing the issue of whether the comparative negligence statute, HRS Section 663-31, applied only in actions based entirely in negligence.[91] The court stated that the ICA misinterpreted the Hawai'i Supreme Court's precedent in *Hao*, *Armstrong*, and *Kaneko*.[92] The ICA, relying on these cases, "reasoned that HRS [Section] 663-31 would not apply in any action in which negligence was not the only theory of liability pled."[93] In other words, the ICA determined that where negligence and some other tort liability (i.e. intentional tort, strict liability) were alleged, the comparative negligence statute did not apply. The Hawai'i Supreme Court, however, distinguished *Hao*, *Armstrong*, and *Kaneko* from *Ozaki*.[94] The court noted that:

> negligence was only one of several theories of liability asserted against the same defendant or group of defendants; [and] accordingly, [the court] held that the provisions of HRS [Section] 663-31 applied only to the plaintiff's contributory negligence and did not operate as a complete bar to recovery with respect to other asserted theories of liability.[95]

In other words, the court reasoned that, although the application of the comparative negligence statute may preclude recovery from the negligent defendant, it does not preclude recovery from the other intentional tortfeasor defendant.[96] The court conceded that the ICA correctly stated that "the premise of HRS [Section] 663-31 is that, 'in the action,' recovery is against defendants whose liability is based on negligence."[97] The court reasoned that "this is precisely why Discovery Bay's conduct necessarily fell within the ambit of the statute, inasmuch as negligence was the sole theory advanced against it as the basis for imposing liability."[98] The court held that pure comparative negligence did not apply to *Ozaki*.[99]

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[91] *Ozaki II*, 87 Hawai'i at 269, 954 P.2d at 648.
[92] *Id.* at 270, 954 P.2d at 649.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*

The court, relying on the plain language of HRS Section 663-31,[100] stated that the "statute requires that judgment be entered in favor of Discovery Bay, inasmuch as the jury's special verdict apportioned greater fault to Dennis than to Discovery Bay."[101] The court could not find a valid reason "why Discovery Bay should lose the protection of HRS [Section] 663-31 merely because its codefendant committed an *intentional* tort."[102] Thus, the comparative negligence statute applied to *Ozaki* where fault was apportioned to an intentional defendant, a negligent defendant, and a comparatively negligent plaintiff even though the statute allows only the comparison of the negligent defendant's percentage of fault to the comparatively negligent plaintiff's percentage of fault.

The court further commented in a footnote, that:

> [i]n light of the fact that the circuit court correctly entered final judgment in favor of Discovery Bay and against the plaintiffs pursuant to the jury's special verdict, it follows tautologically that Discovery Bay and Sataraka are not "joint tortfeasors" within the meaning of HRS [Section] 663-11, because Discovery Bay and Sataraka cannot be *"jointly or severally liable"* to the plaintiffs for the injuries arising out of Dennis's death . . . . And a tortfeasor, such as Discovery Bay, *cannot be jointly and/or severally liable with another unless "the person who has been harmed can sue and recover from both."*[103]

After concluding that Discovery Bay and Sataraka were not joint tortfeasors the court gave an example where they would be:

> Had the jury, for example, apportioned [92%] of the total fault to the intentional conduct of Sataraka, [5%] to the negligent conduct of Discovery Bay, and [3%] to the negligent conduct of Dennis, the result would be quite different. Under those circumstances, *HRS [Section] 663-31(a) would not bar the plaintiffs from recovering against Discovery Bay* because Dennis's negligence would not have been "greater than the negligence of the person or, in the case of more than one person, the aggregate negligence of such persons whom recovery is sought." Thus, *Sataraka and Discovery Bay would be "joint tortfeasors"* within the

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[100] HRS section 663-31 states that "if the [proportion of negligence attributable to the person, for whose injury, damage, or death recovery is sought,] is greater than the negligence of the person or . . . the aggregate negligence of such persons against whom recovery is sought, the court will enter judgment for the defendant." HAW. REV. STAT. § 663-31 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

[101] *Ozaki II*, 87 Hawai'i at 270, 954 P.2d at 649.

[102] *Id.* at 270-71, 954 P.2d at 649-50 (emphasis added). The court noted that "[t]he public policy underlying the decision to permit recovery in strict product liability actions subject only to reduction to the extent of the purely comparative degree of a plaintiff's contributory negligence—i.e., the 'desire to create economic incentives for safer products,'—as reflected in *Hao*, *Armstrong*, and *Kaneko*, simply has no bearing on the facts of this case." *Id.* at 271, 954 P.2d at 650 (citations omitted).

[103] *Id.* at 271, 954 P.2d at 650 n.5 (citations omitted) (emphasis added).

> meaning of HRS [Section] 663-11, and Discovery Bay would be liable for its *pro rata share* of the plaintiff's *economic damages* pursuant to HRS [Sections] 663-10.9(1) and (3).[104]

Distinguishing the situation at hand, the court reversed the ICA's decision.[105] In sum, the Hawai'i Supreme Court held that fault may be apportioned to negligent and intentional defendants and a comparatively negligent plaintiff.[106] The comparative negligence statute, HRS Section 663-31, applies to situations involving negligent and intentional defendants and a comparatively negligent plaintiff, but allows only for the comparison of faults of the negligent defendant and comparatively negligent plaintiff.[107] The court concluded that because Discovery Bay could not be liable under the comparative negligence statute, Discovery Bay could not be a joint tortfeasor.[108]

III. ANALYSIS

The ICA and the Hawai'i Supreme Court's analyses of the Hawai'i statutes reveal the problems inherent in the application of the comparative negligence and joint liability statutes to *Ozaki*-type situations. This section addresses the issues of unfairness and inconsistency in the Hawai'i Supreme Court's interpretation and application of the statutes. This section also demonstrates how the Uniform Act offers fairer, more consistent outcomes for *Ozaki*-type situations.

A. An Examination of the Hawai'i Supreme Court's Interpretation of Hawai'i Statutes

The Hawai'i Supreme Court's interpretation and application of the Hawai'i statutes produce drastic differences in *Ozaki* and the hypothetical situation it posed. A 2% fault apportionment difference could mean the difference between no recovery and substantial recovery. Utilizing the *Ozaki* situation and the court's hypothetical situation, this section shows that the court's application produces unfair and inconsistent outcomes.

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[104] *Id.*
[105] *Ozaki II*, 87 Hawai'i 265, 954 P.2d 644.
[106] *Id.*
[107] *Id.*
[108] *Id.*

1. The Hawai'i Supreme Court's application and interpretation of HRS § 663-31 as applied to Ozaki and the court's hypothetical situation

After holding that the comparative negligence statute applied to *Ozaki*, the court correctly held that Discovery Bay's lesser percentage of negligence, as compared to Dennis's, precluded liability. HRS Section 663-31 provides that "if the said proportion [of fault attributed to plaintiff] is greater than the negligence of the [defendant] . . . the court will enter a judgment for the defendant."[109] The court properly reasoned that "by its plain language, the statute requires that judgment be entered in favor of Discovery Bay [because] the jury . . . apportioned greater [negligence] to Dennis than to Discovery Bay."[110] The court added that Discovery Bay "should [not] lose the protection of HRS [Section] 663-31 merely because its codefendant committed an intentional tort."[111] By the plain language of the statute, which dictates the comparison of "negligence," the court correctly compared only Discovery Bay's 3% negligence to Dennis' 5% comparative negligence. The court appropriately concluded that Discovery Bay's lesser percentage of negligence (3%) precluded liability, therefore rendering HRS Section 663-11, joint tortfeasor liability, inapplicable.

The jury's apportionment of less fault to Discovery Bay led the court to conclude that the comparative negligence statute should protect Discovery Bay from liability. But, the court gave a similar hypothetical situation where Discovery Bay *would* "lose the protection" of the comparative negligence statute. The court stated that if the jury had apportioned 5% negligence to Discovery Bay and 3% negligence to Dennis, the result would be very different.[112] In the court's hypothetical situation, under the comparative negligence statute Discovery Bay would be *liable* because its percentage of negligence would be greater than Dennis'. Because, in the hypothetical situation, Discovery Bay would be liable, HRS Section 663-11, joint tortfeasor liability, would apply. A mere 2% difference of apportionment of fault to Discovery Bay and Dennis yields liability in one situation, and no liability in the other situation.

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[109] HAW. REV. STAT. § 663-31 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

[110] *Ozaki II*, 87 Hawai'i at 270, 954 P.2d at 649.

[111] *Id.* at 270-71, 954 P.2d at 649-50.

[112] *Id.* at 271, 954 P.2d at 650 n.5.

2. The Hawai'i Supreme Court's application and interpretation of HRS § 663-11 as applied to Ozaki and the court's hypothetical situation

The court correctly held that Discovery Bay was not a joint tortfeasor, as defined in HRS Section 663-11, because it was not liable under HRS Section 663-31. HRS Section 663-11, the definition of joint tortfeasors, requires a finding of liability before a party can be a joint tortfeasor. This section states that "'joint tortfeasors' means two or more persons *jointly or severally liable* in tort for the same injury to person."[113] The first part of the definition requires finding a party either "jointly or severally liable."[114] The court stated in a footnote that "[i]n light of the fact that the circuit court correctly entered final judgment in favor of Discovery Bay and against plaintiffs pursuant to the jury's special verdict, it follows tautologically that Discovery Bay and Sataraka are not 'joint tortfeasors' within the meaning of HRS [Section] 663-11."[115] Under the plain meaning of the statute, the court correctly concluded that Discovery Bay was not a joint tortfeasor as defined in HRS Section 663-11.

In the court's hypothetical situation, however, where Discovery Bay is allocated 5% and Dennis 3% of fault,[116] there would be a very different outcome. Such a situation makes Discovery Bay liable under the comparative negligence statute, thus rendering joint tortfeasor liability for Discovery Bay. If the jury had apportioned only 2% more fault to Discovery Bay and 2% less fault to Dennis, Discovery Bay would be a joint tortfeasor as defined in HRS Section 663-11, subject to the joint and several liability statute, HRS Section 663-10.9.

3. The Hawai'i Supreme Court's application and interpretation of HRS § 663-10.9 as applied to Ozaki and the court's hypothetical situation

The court correctly held that HRS Section 663-10.9 did not apply to *Ozaki* because Discovery Bay and Sataraka were not joint tortfeasors as defined in HRS Section 663-11. Only after finding liability and joint tortfeasor liability does a court apply HRS Section 663-10.9, which provides mechanisms for finding joint or several liability for economic and noneconomic damages.[117]

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[113] HAW. REV. STAT. § 663-11 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

[114] *See id.*

[115] *Ozaki II*, 87 Hawai'i at 271, 954 P.2d at 650 n.5.

[116] *See supra* note 104 and accompanying text.

[117] HAW. REV. STAT. § 663-10.9 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.).

Because Discovery Bay was not liable under HRS Section 663-31, joint tortfeasor liability and joint liability do not apply.

In the court's hypothetical situation, however, after finding Discovery Bay liable as a joint tortfeasor, the application of HRS Section 663-10.9 would allow plaintiffs to recover 97% of the economic damages from Discovery Bay. HRS Section 663-10.9(1) provides joint liability for the "recovery of economic damages against joint tortfeasors."[118] Thus, Discovery Bay would be jointly liable for 97% of the economic damages. The court, in its hypothetical situation analysis, erred by stating that Discovery Bay would only be severally liable for economic damages.[119] The issue of the determination of noneconomic damages has not been resolved by the court because, in its hypothetical situation analysis, the court did not indicate whether and how Discovery Bay would be liable for noneconomic damages.[120]

Utilizing the court's application and interpretation of the statutes, a difference of only 2% of fault apportionment would produce a difference of no (0%) liability in one situation, and 97% liability, in another, for Discovery

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[118] *See id.* § 663-10.9(1).

[119] The court stated that in this situation, "Discovery Bay would be liable for its pro rata share of the plaintiffs' economic damages pursuant to HRS [Sections] 663-10.9(1) and (3)." *Ozaki II*, 87 Hawai'i at 271, 954 P.2d at 650 n.5.

[120] The issue of determining noneconomic damages is outside the scope of this article. HRS Section 663-10.9(3) pertains to noneconomic damages and is not applicable to the court's hypothetical situation, which referred only to the determination of economic damages. HRS Section 663-10.9(3) states that tortfeasors are jointly and severally liable "[f]or the recovery of noneconomic damages in actions . . . involving . . . death to person against those tortfeasors whose individual degree of negligence is . . . twenty-five per cent or more under section 663-31." HAW. REV. STAT. § 663-10.9(3) (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.). But, if a "tortfeasor's degree of negligence is less than twenty-five per cent, then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned." *See id.* The court did not analyze its hypothetical with regard to the threshold test in HRS Section 663-10.9(3). The court did not indicate whether, under the hypothetical situation, Discovery Bay should be only severally liable for economic damages because its share of negligence was less than 25%. HRS Section 663-10.9(3) considers only negligence. The court did not address the issue of whether a jury should compare negligent percentages totaling 100%. In an *Ozaki*-type situation where fault is apportioned to intentional and negligent tortfeasors, does a court have to inflate the negligence percentages to equal 100% to acquire an accurate representation of the threshold comparison of negligence? The Legislature did not envision an *Ozaki*-type situation when it drafted the 25% negligence threshold, and the court did not apply it to *Ozaki*, therefore this has not been answered.

The court also did not address HRS Section 663-10.9(2)(A), which provides that joint tortfeasors are jointly liable for economic and noneconomic damages in actions "involving" intentional torts, because it had already determined that Discovery Bay could not be a joint tortfeasor. The Legislature probably thought only of imposing joint liability for economic and noneconomic damages to intentional joint tortfeasor, not joint tortfeasors involving a negligent and an intentional tortfeasor.

Bay. Application of the statutes in this manner produces very *inconsistent* results depending solely on minor differences in fault apportionment. The court's application of the comparative negligence and joint liability statutes to *Ozaki*-type situations also produces *unfair* outcomes. With only a 2% fault difference, the plaintiffs could either recover nothing (0%) or 97% of the damages, and Discovery Bay could either be liable for nothing (0%) or 97% of the damages. In one instance, it is unfair to plaintiffs because their injury goes uncompensated, and in the other instance, it is unfair to negligent defendants who are liable for the entire amount of fault attributed to the intentional tortfeasor.

Another aspect of the court's unfairness in its interpretation and application of the statutes is evident in the comparison of the *Ozaki*-type situation and a similar situation, involving two negligent tortfeasors and no intentional tortfeasors. In *Ozaki*, the *plaintiffs lost because Sataraka committed an intentional tort*, and *Discovery Bay won because Sataraka committed an intentional tort*. Had Sataraka been convicted of manslaughter, the jury in the following civil trial might have found his acts to be negligent, instead of intentional. If the jury had found Sataraka 92% negligent, Discovery Bay 3% negligent, and Dennis 5% comparatively negligent, the *aggregate* negligence of Discovery Bay and Sataraka (95%) would have been compared to Dennis's 5% comparative negligence. Under these circumstances, the aggregate negligence (95%) would have been more than Dennis's comparative negligence (5%). Thus, Discovery Bay and Sataraka would be liable under the comparative negligence statute. Discovery Bay and Sataraka would also be joint tortfeasors and the plaintiffs would be able to recover 95% of the damages from either Sataraka or Discovery Bay.

Should plaintiffs lose because one of the defendants committed an intentional tort? Should a negligent defendant win because its codefendant committed an intentional tort? Should plaintiffs lose and defendants win because of a mere 2% fault apportionment difference? What is fair? These issues of fairness and consistency can be resolved by the adoption of the Uniform Act.

B. Uniform Act Applied to Ozaki

The Uniform Act addresses many of the consistency and fairness issues arising from the Hawai'i Supreme Court's interpretation and application of the Hawai'i statutes to *Ozaki*. Unlike the Hawai'i State Legislature, the National Commissioners considered *Ozaki*-type situations when drafting the Uniform

Act.[121] The Uniform Act offers a fairer, more consistent solution to *Ozaki*-type situations.

1. The Uniform Act's imposition of joint liability, where a duty to protect exists, as applied to Ozaki and the court's hypothetical situation

Although the Uniform Act's duty to protect or prevent harm provision provides more consistency and fairness, it does not change the outcome in *Ozaki*. The Uniform Act adopts several liability as the general rule but provides for joint liability "where a [negligent] defendant breaches a *duty to protect* another person from an intentional tort of a third party."[122] In general, and in the absence of special relationships or circumstances, a person has no duty to protect another from a criminal attack by a third party.[123] A duty to protect arises when there is a "special relationship" or where one has undertaken the duty to protect.[124]

Hawai'i's courts have examined the issue of whether a condominium association-tenant is a "special relationship" warranting a higher duty to protect. In *King v. Ilikai Properties, Inc.*,[125] the ICA held that landlord-tenant and condominium association-tenant relationships were not "special relationships" that warranted the imposition of a duty to protect or prevent harm from third party intentional tortfeasors.[126] In *King*, the ICA cited the Restatement (Second) of Torts, section 315, which provides that "a special relation [must] exist[] between the actor and the other which gives to the other a *right to protection*."[127] Special relationships include "common carrier-passenger, innkeeper-guest, and custodian-inmate."[128] The ICA refused to expand that list to include landlord-tenant and association-tenant relationships.[129]

In 1986, the ICA in *Moody v. Cawdrey & Associates, Inc.*,[130] revisited the issue of the landlord-tenant relationship. The ICA held that landlord-tenant and condominium association-tenant relationships were "special relation-

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[121] *See infra* sections B.1. and 2.

[122] UNIF. APPORTIONMENT OF TORT RESPONSIBILITY ACT § 6 cmt. (2002) (emphasis added).

[123] Touchette v. Ganal, 82 Hawai'i 293, 922 P.2d 347 (1996); Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 944 P.2d 1279 (1997).

[124] *See* Touchette v. Ganal, 82 Hawai'i 293, 922 P.2d 347 (1996); Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 944 P.2d 1279 (1997).

[125] 2 Haw. App. 359, 632 P.2d 657 (1981).

[126] *Id.*

[127] *Id.* at 362, 632 P.2d at 661 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)) (emphasis added).

[128] *Id.*

[129] *Id.* at 363, 632 P.2d at 661.

[130] 6 Haw. App. 355, 721 P.2d 708 (1986).

ships" deserving an imposition of a duty to protect.[131] The Hawai'i Supreme Court, in *Moody v. Cawdrey & Associates, Inc.*,[132] disagreed and reversed.[133] Because the Hawai'i Supreme Court reversed the ICA decision in *Moody*, it can be inferred that no "special relationship" exists between a condominium association and its tenants and therefore, a condominium association has no duty to protect in Hawai'i.[134] Thus, in *Ozaki*, the condominium association-tenant relationship between Discovery Bay and Dennis did not amount to a "special relationship" to create a duty to protect. Because Discovery Bay had no duty to protect, it would not be jointly liable with Sataraka under the Uniform Act.

Although no "special relationship" existed in *Ozaki*, a duty to protect may arise when a party undertakes to perform a duty.[135] That duty is breached when a party fails to exercise reasonable care and increases the risk of harm, or harm is suffered because of the third party's reliance on the undertaking of the duty.[136] Discovery Bay may have assumed a duty to protect by placing a security guard on the premises. The Discovery Bay security guard, Walker, however, most likely did not fail to exercise reasonable care. Walker, who had permitted Sataraka into the building, knew that Dennis and Sataraka lived together and had seen them together in the building numerous times before.[137] A reasonable person, knowing Sataraka as Dennis's boyfriend, would have allowed Sataraka into the building. A jury would likely find that a reasonable person would not have perceived any danger in permitting a tenant's boyfriend, who had lived with the tenant, into the lobby. There were no facts to indicate that anyone in the building, or the security guard, knew that Sataraka had become Dennis's estranged boyfriend. A jury would likely find that Discovery Bay acted reasonably and Dennis's murder by her boyfriend was not reasonably foreseeable. Even if Dennis relied on Discovery Bay's undertaking of security, the facts do not show that she called security to report an unwanted person, Sataraka, in the building. Therefore, if Discovery Bay had a duty to protect, a jury would likely find that it did not breach that duty because it acted reasonably and the events were not reasonably foreseeable. Under the Uniform Act, which provides for joint liability of a negligent defendant when there is a duty to protect or prevent harm from a third party intentional tortfeasor, and Hawai'i's case law, Discovery Bay is not be jointly

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[131] *Id.* at 360, 721 P.2d at 712.

[132] 68 Haw. 527, 721 P.2d 707 (1986).

[133] *Id.* at 528, 721 P.2d at 707.

[134] *Id.*

[135] Doe v. Grosvenor Props., Ltd., 73 Haw. 158, 169, 829 P.2d 512, 518 (1992) (citing RESTATEMENT (SECOND) OF TORTS § 324A).

[136] *Id.*

[137] Ozaki v. AOAO of Discovery Bay, 87 Hawai'i 265, 266, 954 P.2d 644, 645 (1998).

liable because it did not have a special relationship warranting a duty to protect. If Discovery Bay had a duty to protect from undertaking that duty, it did not breach that duty because it acted reasonably and the outcome was not reasonably foreseeable. Therefore, because Discovery Bay did not have a duty to protect or prevent harm, it would not, under any circumstances, be jointly liable with Sataraka for Dennis' death.

Similarly, in the court's hypothetical situation, Discovery Bay would not be jointly liable. Even if the jury apportioned 2% more fault to Discovery Bay and 2% less fault to Dennis, the outcome under the Uniform Act would be the same. Hawai'i's duty analysis precludes joint liability for Discovery Bay. After finding that Discovery Bay either did not have a duty to protect or did not breach that duty, the Uniform Act's section on contributory fault, which provides for a mechanism of comparison almost identical to Hawai'i comparative negligence statute, HRS Section 663-31, applies.

2. The Uniform Act's application of contributory fault as applied to Ozaki and the court's hypothetical situation

Although the Uniform Act's contributory fault provision would not hold Discovery Bay liable, it provides fairer, more consistent outcomes when applied after a finding of either no duty to protect or no breach of that duty. The Uniform Act provides for a contributory fault provision mirroring Hawai'i's comparative negligence statute. The Uniform Act allows an adopting state to decide the types of "fault" to compare, and Hawai'i's Legislature and Supreme Court have chosen to compare only negligence.[138] The Uniform Act also allows an adopting state to determine the type of modified comparative fault scheme to apply, and the Legislature has selected the 50% rule, which provides that plaintiffs will recover if their percentage of negligence is equal to or less than the defendant's negligence.

Under the Uniform Act's contributory fault provision, Discovery Bay is not liable because Discovery Bay's lesser percentage of negligence (3%) precludes plaintiffs' recovery. Discovery Bay is not be jointly liable because it had no duty to protect, and is not be liable under the Uniform Act's contributory fault provision because its percentage of fault is less than Dennis'. In the court's hypothetical situation, however, Discovery Bay's greater fault (5%) allows the plaintiffs to recover 5% of the damages from Discovery Bay. Thus, in the court's hypothetical situation, Discovery Bay is severally liable to the plaintiffs for its 5% of fault.

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[138] *See* HAW. REV. STAT. § 663-31 (West, WESTLAW through 2002 Reg. Sess. of the 21st Leg.); *Ozaki II*, 87 Hawai'i 265.

C. Hawai'i Supreme Court's Method Versus the Uniform Act's Method

The *Ozaki* jury apportioned 3% negligence to Discovery Bay and 5% comparative negligence to Dennis. But, the jury could have easily apportioned fault in the same manner as in the court's hypothetical situation, 5% negligence to Discovery Bay and 3% comparative negligence to Dennis. A 2% difference in fault apportionment to Discovery Bay and Dennis would have had a huge effect on the outcome of *Ozaki* under the Hawai'i Supreme Court's application of the comparative and joint liability statutes. In one instance, it would provide plaintiffs with no (0%) recovery, and in the other, it would provide plaintiffs with 97% recovery. These results, under the Hawai'i statutes, are very inconsistent because a 2% negligible difference would have produced extremely different outcomes.

The outcomes under the Uniform Act, however, are not so inconsistent. In *Ozaki*, Discovery Bay did not have a duty to protect under Hawai'i case law and thus, cannot be jointly liable with Sataraka. After finding Discovery Bay not jointly liable, the Uniform Act then applies a contributory fault analysis identical to Hawai'i's comparative negligence statute. The comparison of Discovery Bay's 3% fault to Dennis's 5% fault precludes liability for Discovery Bay because its fault is less than Dennis'. In the court's hypothetical situation, Discovery Bay is not jointly liable because it did not have a duty to protect. The application of the Uniform Act's contributory fault analysis to the court's hypothetical situation renders Discovery Bay severally liable for 5% of the damages. These results are more consistent than those produced under the Hawai'i Supreme Court's method. A 2% difference in fault apportionment produces no (0%) recovery in one situation, and 5% recovery, in the other situation. A 5% liability and recovery difference, under the Uniform Act method compared to a 97% liability and recovery difference, with the court's method, demonstrates that the Uniform Act produces fairer, more consistent results.

The Uniform Act provides more consistent outcomes as shown by the Act's application to *Ozaki* and the court's hypothetical situation. The Uniform Act, however, would not have changed the outcome in *Ozaki* because Hawai'i does not recognize condominium association-tenant relationships as "special relationships" warranting a higher duty of protection. The Uniform Act would, however, change the outcomes in similar *Ozaki*-type situations where a special relationship exists.

D. Uniform Act Applied to Ozaki-Type Situations Where a Duty to Protect Exists

Although the Uniform Act would not change the outcome in *Ozaki*, it would alter the outcomes in similar *Ozaki*-type situations where a duty to protect or prevent harm from third party intentional tortfeasors exists. A hypothetical *Ozaki*-type situation, for example, is in the context of a school setting. If the facts of the case involved a school/teacher, a student, and a third party intentional tortfeasor, the Uniform Act would yield a different result than in *Ozaki*.

For example, suppose during lunch breaks, Discovery Bay School requires teachers to monitor the students on campus to ensure that they are safe and abiding by the rules. Mr. Timothy Walker, a Discovery Bay School teacher, monitored the students during lunch breaks. Peter Sataraka approached Mr. Walker and asked if he could come on campus to talk to his girlfriend, Cynthia Dennis. Mr. Walker, who knew that Sataraka was Dennis's boyfriend and had seen Sataraka pick up Dennis from school on numerous occasions, allowed him on campus. Dennis led Sataraka off to the side to talk in private. They had a confrontation and Sataraka stabbed Dennis. Dennis died as a result of her injuries. In a criminal trial, a jury found Sataraka guilty of murder. In the following civil trial, the jury apportioned fault in the same manner as in *Ozaki*. The jury found Discovery Bay School 3% negligent, Sataraka 92% at fault for his intentional conduct, and Dennis 5% comparatively negligence.

If the Hawai'i Supreme Court's method applied, it would produce the same *Ozaki* analysis and outcome. The court would first apply the comparative negligence statute, HRS Section 663-31, to determine whether the school is liable. Because Discovery Bay School's 3% negligence is less than Dennis's 5% comparative negligence, the court would find Discovery Bay School not liable. Finding Discovery Bay School not liable under the comparative negligence statute, the court would then hold that the school could not be a joint tortfeasor. Therefore, the plaintiffs would not be able to recover from the school.

Under the Uniform Act, however, Discovery Bay School would have a higher duty to protect or prevent harm of third party intentional tortfeasors. In Hawai'i, a "special relationship" exists between a school and its students[139] and the finding of a "special relationship" imposes upon the school a duty to protect or prevent harm students from harm by third party intentional tortfeasors. By allowing Sataraka on campus and not taking preventative measures to protect Dennis, a jury would likely find that Discovery Bay School breached its higher duty to protect. After finding that Discovery Bay School breached its duty to protect, joint liability would be imposed and Discovery

[139] *See* Doe Parents v. Dep't of Educ., 100 Hawai'i 34, 58 P.3d 545 (2002).

Bay School would be jointly liable with Sataraka. The application of the Uniform Act's contributory fault provision would reduce the damages by the amount of fault attributed to the plaintiffs (5%). Thus, plaintiffs would be able to recover 95% of the damages from Discovery Bay School because the school breached its duty to protect Dennis.

Another example where a court would impose joint liability is in the common carrier-passenger situation. Suppose that the Discovery Bay Tour Bus, operating out of Waikiki, takes tourists to numerous locations on the island of Oahu. Discovery Bay Tour Bus employs Timothy Walker as a bus driver. Walker picks up tourists at various hotels in Waikiki. At the Ala Moana Hotel, Walker picked up Cynthia Dennis. After several stops the bus filled to almost maximum capacity; however, Walker decided to make one more stop before heading to Waimea Falls Park. At the Waikiki Beach Inn, Peter Sataraka boarded the bus. The only empty seat was next to Dennis. On the long drive to Waimea Falls Park Dennis fell asleep and her head leaned against Sataraka. Sataraka became irritated, woke her up, and asked Dennis not to lean against him. A few minutes later Dennis fell asleep again and her head nodded towards Sataraka and touched him. Out of fury, Sataraka punched Dennis in the face. She suffered a broken nose. In Sataraka's criminal trial, the jury convicted Sataraka of assault. In the following civil trial the jury apportioned 92% fault to Sataraka for his intentional conduct, 3% negligence to Discovery Bay Tour Bus, and 5% comparative negligence to Dennis.

If the Hawai'i statutes applied, as in *Ozaki*, Dennis's recovery from Discovery Bay Tour Bus would be nothing (0%) because Discovery Bay Tour Bus's negligence is less than Dennis'. Discovery Bay would avoid liability even though it had a higher duty to protect. The Hawai'i method would not provide a fair outcome in the common carrier-passenger situation. Under the Uniform Act, however, the duty to protect analysis would allow plaintiffs to recover.

Hawai'i recognizes a common carrier-passenger relationship as a "special relationship" warranting the imposition of a duty to protect.[140] The "special relationship" imposes a higher duty to take reasonable precautions to protect from foreseeable harms.[141] In the tour bus example, Discovery Bay Tour Bus had an affirmative duty to protect Dennis, a passenger, from foreseeable harms. A jury could likely find that Walker did not act reasonably because he picked up Sataraka when the bus was nearly full. Walker should have foreseen that passengers, who do not know each other, would not appreciate strangers sleeping on them during the long drive. A jury could easily find that

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[140] *Id.* at 71, 58 P.3d at 582.

[141] *Id.*

Discovery Bay Tour Bus breached its duty to protect Dennis from the intentional acts of Sataraka. After finding that Discovery Bay Tour Bus breached its duty to protect, the Uniform Act analysis renders Discovery Bay Tour Bus jointly liable with Sataraka. The Uniform Act's contributory fault provision diminishes plaintiff's recovery from Discovery Bay Tour Bus by the amount of fault attributed to Dennis. Under the Uniform Act, Dennis could recover 95% of the damages from Discovery Bay Tour Bus.

Where a "special relationship" warrants a duty to protect or prevent harm from third party intentional tortfeasors, plaintiffs have a fairer opportunity to recover from negligent defendants. The policies behind tort liability and the duty to protect support the rationale of the Uniform Act's imposition of joint liability where there is a breach of the duty to protect or prevent harm from third party intentional tortfeasors. Imposing joint liability where a duty to protect or prevent harm exists would make negligent defendants more vigilant to protect their wards from intentional acts committed by third parties. Negligent defendants would not be able to rely on the jury's apportionment of the "lion's share" of fault to the intentional tortfeasor, rendering negligent defendants' liability diminutive. The imposition of joint liability would not diminish the intentional tortfeasor's responsibility because common law already holds intentional tortfeasors jointly liable.

IV. SOLUTION

The Uniform Act offers a fairer, more consistent solution for Hawai'i. Similar to Hawai'i, the Uniform Act retains the concept of joint liability. Incorporating the Uniform Act model and Hawai'i's joint liability and comparative negligence statutes, the following proposal provides a fair mechanism for Hawai'i courts to follow when faced with *Ozaki*-type situations. Hawai'i should adopt a two-part test when addressing *Ozaki*-type situations. The test provides a mechanism for plaintiff recovery when the negligent defendant has a duty to protect or prevent harm from a third party intentional tortfeasor and breaches that duty. If a duty to protect or prevent harm exists and there is a breach, joint liability would be imposed before the application of the comparative negligence statute. If no duty exists or there is no breach of the duty, the court would first apply the comparative negligence statute, HRS Section 663-31. If the aggregate negligence of the defendants is greater than the plaintiff's comparative negligence, the plaintiff recovers. If, on the other hand, the aggregate negligence of the defendants is less than the plaintiff's comparative negligence, the plaintiff does not recover. In either case, the intentional tortfeasor would still be jointly liable for all of the plaintiff's damages. This test only indicates when and how a negligent codefendant will be liable.

Under this proposal, when an action involves comparatively negligent plaintiff(s), negligent defendant(s), and intentional tortfeasor(s), the court shall determine whether the negligent defendant(s) had a duty to protect the plaintiff against harm from third party intentional tortfeasors and apply the following test.

Two-Part Test to *Ozaki*-type Situations:

(1) If a DUTY to protect or prevent harm from intentional acts of third parties exists and there is a breach of that duty:

(a) the negligent defendant is a "joint tortfeasor," within the meaning of HRS Section 663-11, with the intentional tortfeasor;

(b) the comparative negligence of the plaintiff will reduce the total liability of the negligent defendant "joint tortfeasor" by the percentage of fault apportioned to the plaintiff; but the intentional defendant "joint tortfeasor" will be liable for 100% of the plaintiff's damages, and will not have its total liability reduced by the fault apportioned to the plaintiff

(2) If NO DUTY to protect or prevent harm from intentional acts of third parties exists or there is no breach of the duty to protect or prevent harm: compare the plaintiff's comparative negligence to the aggregate negligence of the defendants (same as HRS Section 663-31);

(a) if the aggregate negligence of the defendants is greater than the plaintiff's comparative negligence, the defendants are severally liable for their proportion of fault;

(b) if the aggregate negligence of the defendants is less than the plaintiff's comparative negligence, the negligent defendants are not liable, and the plaintiff does not recover from the negligent defendants.

V. CONCLUSION

Hawai'i should modify its comparative negligence and joint liability statutes to provide joint liability in *Ozaki*-type situations where a duty to protect or prevent harm from third party intentional tortfeasors exists, and that duty is breached. Because the Legislature did not consider *Ozaki* issues when it drafted the comparative negligence statute, HRS Section 663-31, and the joint liability statutes, HRS Sections 663-10.9 and 663-11, the Hawai'i Supreme Court could not properly apply them to produce consistent and fair results. The drafters of the Uniform Act contemplated *Ozaki*-type situations and outlined a practical and meaningful solution that the Hawai'i courts and Legislature did not consider. The application of joint liability, where a duty to protect or prevent harm from intentional tortfeasors exists and that duty is breached, would provide more predictability, consistency, and fairness to plaintiffs and negligent defendants involved in *Ozaki*-type situations. Under

the Uniform Act plaintiffs have a greater opportunity to recover damages when negligent defendants breach their duty to protect or prevent harm and defendants also have a better opportunity to avoid joint liability when they did not have a duty to protect or prevent harm. The Hawai'i Legislature should adopt parts of the Uniform Act that address *Ozaki*-type situations because it would provide fairer outcomes for both comparatively negligent plaintiffs and negligent codefendants. A 2% difference in fault apportionment would no longer have the effect of producing extremely inconsistent and unfair outcomes as in *Ozaki*.

Lori K. Amano[142]

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[142] William S. Richardson School of Law, University of Hawai'i at Manoa, Class of 2004. Many thanks to my family: Daniel and Gail Miyasato, Harold and Rose Kobayashi, and Joshua Amano.