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## ARTICLES



## CASENOTES



## RECENT DEVELOPMENTS

# How to Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa

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## I. INTRODUCTION

If you were to find yourself in the troublesome position of being put on trial for murder in a location where pretrial publicity was so severe that you could not be expected to obtain a fair and impartial jury, you could be minimally comforted by the fact that the Sixth Amendment, as applicable to the states through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,"[1] and that the court would allow you to transfer the matter to another appropriate venue where an impartial jury could be had.

While this venue problem may be rectified with relative ease on the U.S. mainland, were you to find yourself the subject of a highly publicized criminal investigation in the remote Pacific island territory of American Samoa, the only U.S. territory south of the equator, political geography would force upon you a strange legal impasse. On paper, American Samoa seems to fairly address the problem of unfair venue, providing under American Samoa Code section 46.0602 that "[a]ny case brought in the High Court or in a district court may, in the interest of justice and for the convenience of the parties and witnesses, be transferred by order of the Chief Justice or the Associate Justice to any court in which it might have been brought originally."[2] Yet, what the legislature may have resolved on paper may, at present, be impossible for the High Court to achieve in practice. American Samoa lies 2,500 miles southwest of Hawai'i and 1,800 miles northeast of New Zealand.[3] With an

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[1] U.S. CONST. amend. VI; *see* Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the right to a criminal jury trial in state prosecutions for serious criminal offenses is a fundamental right incorporated by the Fourteenth Amendment's Due Process Clause); *see also* Baldwin v. New York, 399 U.S. 66 (1970).

[2] AM. SAMOA CODE ANN. § 46.0602 (2004). All American Samoan statutes, cases, and rules referred to throughout this article are available to the reader online at the American Samoa Bar Association website at http://www.asbar.org.

[3] U.S. CENSUS BUREAU, BRIEF HISTORY OF THE ISLAND AREAS (2002), *available at* http://www.census.gov/population/www/proas/pr_ia_hist.html [hereinafter ISLAND HISTORY].

approximate population of a mere 57,291,[4] the territory has only one principal court, the High Court of American Samoa, that conducts both trial and appellate matters in a small, wooden courthouse on the island of Tutuila. Further, as an unincorporated, unorganized U.S. territory, American Samoa, although Polynesian, does not fall under the sovereignty of the State of Hawai'i nor that of any other state in the union, and the High Court and district court are the only courts authorized under article III of the American Samoa Constitution to hear matters arising under American Samoan law.[5] In short, in an environment where the population is extremely small and close-knit, American Samoa must grapple with the fact not only that a high profile criminal defendant faces a greater risk of jury bias there than in more populated areas of the U.S. mainland, but also that, absent political or legal change, there is no alternative venue available to which a defendant can be transferred.

This Article attempts to examine both the problems giving rise to potential jury bias in the territory of American Samoa, and the possible solutions the High Court of American Samoa can pursue to effectually implement or ignore its transfer of venue statute once such bias has become insurmountable. The first section highlights the practical problem of assembling an impartial jury in American Samoa. Examining census data and statutory jury service requirements for the territory, I begin with a "numbers game," breaking down the population of the territory as a whole and demonstrating that only small numbers of an already small island population are even eligible to serve on a jury in American Samoa. Next, by looking at the recent Samoan murder cases of defendants Richard Majhor and Marlon Uli, I explore the impact that Samoan culture may have on the jury process, looking both at arguments that traditional culture is inherently inconsistent with all jury trials in the territory, and, alternatively, the effect that social pressure may have on jury trials under certain, more particularized circumstances.

The second section explores three possible solutions the territory could adopt when faced with the need to transfer venue. First, I propose that given the limited applicability of the U.S. Constitution within the unincorporated territories, the High Court, through judicial interpretation, could advance the proposition that where no impartial jury is available it can properly deny a defendant the right to a jury trial altogether and offer instead an impartial bench trial, even for serious criminal offenses. Second, I discuss the complicated manner by which the High Court can instead attempt to

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[4] U.S. CENSUS BUREAU, POPULATION AND HOUSING PROFILE: 2000, GEOGRAPHY: AMERICAN SAMOA 1 (revised May 2004), *available at* http://www.census.gov/prod/cen2000/island/ASprofile.pdf [hereinafter CENSUS 2000].

[5] *See* AM. SAMOA CONST. art. III, § 1.

implement its territorial change of venue statute, either through negotiations with the State of Hawai'i or other U.S. territories, or by treaty with other Pacific nations, such as Independent Samoa. And third, looking at the involuntary servitude case of Kil Soo Lee, I suggest that in the situation where a defendant can be simultaneously charged for violations of federal criminal law, American Samoa may use its limited federal jurisdiction to facilitate transfer of the case to the United States District Court for the District of Hawai'i, thereby ensuring that the defendant receive an impartial jury elsewhere.

In the end, there exists a legal oversight in American Samoa with regard to a criminal defendant's venue rights which, as yet, has had no resolution. Given the likelihood that the territory will some day soon be faced with a defendant who cannot receive a fair jury trial among his Samoan peers, both defendants and the High Court should be aware of the possible alternative mechanisms available to guarantee that the defendant receive an impartial trial for any alleged crimes committed in American Samoa.

## II. JURY LIMITATIONS: PROBLEMS OF POPULATION AND CULTURE

To begin to understand how problems of venue may arise in American Samoan jury trials, it is necessary to examine the demographic and cultural obstacles that defendants face when put on trial in the territory.

### *A. The Limited Jury Pool in American Samoa*

American Samoa is small, both geographically and demographically. The territory, itself no larger than Washington, D.C., consists of five mountainous islands and two atolls, with ninety-five percent of the estimated 57,291[6] residents living on the island of Tutuila.[7] With no road access along the rugged northern half of Tutuila, the population of the territory is heavily concentrated around a single stretch of coastal road along the southern half of the island,[8] with nearly forty percent of the total population living in the 8.5

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[6] *See* CENSUS 2000, *supra* note 4, at 1. The Central Intelligence Agency estimated that the territorial population as of July 2006 would be approximately 57,794 with a population growth rate of -0.19%. CIA, THE WORLD FACTBOOK: AMERICAN SAMOA (2007), *available at* https://www.cia.gov/cia/publications/factbook/geos/aq.html [hereinafter WORLD FACTBOOK]; *see also* ISLAND HISTORY, *supra* note 3.

[7] *See* ISLAND HISTORY, *supra* note 3.

[8] *See* GOVERNOR'S TASK FORCE ON POPULATION GROWTH, IMPACTS OF RAPID POPULATION GROWTH IN AMERICAN SAMOA: A CALL FOR ACTION 6 (May 2000) (noting that "only one third of this mountainous island [Tutuila] contains lands that are best suited for human settlement (i.e., only 19 sq. miles have land with slopes less than 30%)"), *available at* http://doc.asg.as/crag/Population%20Action%20Plan.pdf [hereinafter TASK FORCE]; *see also*

square mile area of Tualauta County alone.[9] Yet, even though this already small and well concentrated population may prove difficult for a high profile defendant when attempting to select an impartial jury, further territorial legislation limiting jury eligibility is even more problematic.

On its face, title 46, chapter 15 of the American Samoa Code, discussing the necessary qualifications and territorial policies for selecting a jury, does its best to insure that a defendant receives a fair trial in the territory. At the outset, the American Samoa Government asserts that:

> [i]t is the policy of this territory that all persons selected for jury service be selected at random from a fair cross-section of the population of the area served by the court, and that all qualified nationals and U.S. citizens who are residents of this territory have the opportunity in accordance with this chapter to be considered for jury service. . . .[10]

To further reinforce the "fair cross-section" jury requirement, section 46.1502 prohibits discrimination in the jury selection process, maintaining that "[a] national shall not be excluded from jury service in this territory on account of race, color, religion, sex, national origin, economic status, or on account of a physical handicap."[11]

Despite these safeguards demanding non-discriminatory selection from a cross-section of the population, section 46.1504(1) states, in part, that an individual will be disqualified as a prospective juror if he or she "is not a national of the United States, 18 years old and a resident of the territory."[12] While these may be typical jury service restrictions, they place substantial limits on prospective jurors in American Samoa. Indeed, turning to U.S. Census Bureau data from the 2000 Census, we find immediately that only 31,753 of the 57,291 people living in American Samoa were classified as "18 years and over," thus automatically rendering 25,538 people, or approximately

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MICHELLE BENNETT ET AL., SAMOAN ISLANDS 129 (Lonely Planet Publications 2003) ("The dramatic landscape of Tutuila is characterized by steep, rugged and lush forested covered mountains that branch out from the central ridge and dominate the wild topography, confining most of the development to a narrow strip along the south coast . . . This is the only flat land in the entire territory.").

[9] *See* CENSUS 2000, *supra* note 4, at 115 (stating that 22,025 of the 57,291 American Samoan residents live in Tualauta County); *see also* AM. SAMOA DEP'T OF COMMERCE, STATISTICAL YEARBOOK 2003 & 2004, at 165 (2004), *available at* http://www.asdoc.info/03&04Yearbook.pdf [hereinafter STATISTICAL YEARBOOK]. Although the yearbook calculates the area of Tualauta as twenty-two square kilometers, given that one square mile equals 2.59 square kilometers, I have taken the liberty of making the conversion; TASK FORCE, *supra* note 8, at 15 (stating that "[s]ixty percent of all the developable land in the Territory (under 30% slope) is in this [Tualauta] county").

[10] AM. SAMOA CODE ANN. § 46.1501 (2004).

[11] *Id.* § 46.1502.

[12] *Id.* § 46.1504(1).

forty-five percent of the population, automatically ineligible for jury service prior to voir dire.[13]

Moreover, of the remaining 31,753 people over the age of eighteen, still more must be struck under the requirement that a juror be a "national of the United States."[14] The 2000 Census details that 20,251 of the 57,291 people (or 35.3%) currently living in American Samoa are foreign born and "not a [United States] citizen."[15] We cannot, of course, subtract this number from the 31,753 to calculate the jury pool because not all non-citizens are over the age of eighteen—that is, the categories are not mutually exclusive. Given that the 2000 Census data does not make clear the number of foreign American Samoan inhabitants over eighteen, however, were we to assume for the sake of discussion that the alien population is proportional across all age groups, approximately 35.3% of the 31,753 people classified as "18 years and over," or an additional 11,209 people living in the territory, will now likewise become automatically ineligible for jury service under the nationality requirements of section 46.1504(1), dwindling the total jury pool down to 20,544 people.[16]

Additional statutory practice draws jury pool numbers even lower. The High Court does not, of course, have the omnipresence to clearly identify all 20,544 eligible jurors on its own. Therefore, in order to practicably discern who among the territorial residents is eligible for jury service, American Samoa Code section 46.1511(a) provides that the names of eligible jurors will, in general, be identified from "all voter registration lists for the territory."[17] While voter registration lists may serve to approximate the population of

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[13] *See* CENSUS 2000, *supra* note 4, at 1. The territory as a whole has a younger population than the rest of the United States. As the U.S. Department of Labor has observed, "[t]he median age for the territory remained at around 20 years, compared to about 33 years for the United States." U.S. DEP'T OF LABOR, INFORMATION ON AMERICAN SAMOA GEOGRAPHY, HISTORY, CULTURE, GOVERNMENT, AND ECONOMICS (2006), *available at* http://www.dol.gov/esa/whd/AS/sec2.htm; *see also* STATISTICAL YEARBOOK, *supra* note 9.

[14] AM. SAMOA CODE ANN. § 46.1504(1).

[15] *See* CENSUS 2000, *supra* note 4, at 2. Although American Samoans are typically U.S. "nationals," and themselves not U.S. citizens, the census category refers to "foreign born" non-citizens as those who are neither U.S. citizens, nor U.S. nationals. *Id.*

[16] The data actually suggests that my estimates are generous. Although the 2000 Census does not show the number of aliens who are above the age of eighteen, it does demonstrate that while 45% of all residents fall under the age of eighteen, of those born in American Samoa, a much larger 57.7% of residents are classified as falling between the ages of zero to fourteen, with the number rising to 68% if we include the age group of fifteen to nineteen. *See* U.S. CENSUS BUREAU, CENSUSES OF POPULATION (2000), *available at* http://www.asdoc.info/Population/pdfsection01/T1_16.pdf.

[17] AM. SAMOA CODE ANN. § 46.1511(a) (2004) (continuing that the list "may be supplemented with names from other lists of persons resident therein such as lists of taxpayers and driver's licenses"); *see also* King v. Andrus, 452 F. Supp. 11, 16 (D.D.C. 1977).

resident U.S. nationals over the age of eighteen, such lists naturally exclude the subset of the eligible population who choose not to register. Consequently, were we generous, and assumed that all 20,544 eligible jurors are registered, a defendant would discover that, at the very best, 64.2% of the total population of 57,291 would be immediately excluded from any territorial jury prior to voir dire. Yet, in reality, the defendant would find the number excluded to be even greater. In 2004, a total of 16,102 American Samoans were registered for the November 2, 2004 election.[18] With this figure representing the entire eligible jury pool in the territory, a defendant would, at minimum, face a pool in which 71.8% of the total population of 57,291 has been disqualified.

It should be clear that this 71.8% represents the percentage of the population that will be automatically disqualified as a matter of course. An even greater, though perhaps incalculable, number would be further disqualified from this eligible jury pool for cause. For example, if the High Court were to start with a total jury pool of 16,102, American Samoa Code section 46.1505 would compel the court to disqualify any prospective juror in a case "in which his relative by affinity or by consanguinity within the 3d degree is interested, either as a plaintiff or defendant, or in the issue of which the juror has, either directly or through such relative, any pecuniary interest."[19] While these limitations will require a case by case analysis, it should not be terribly unreasonable to suggest that within an isolated, well-concentrated population of 57,291, where eighty-eight percent of the population is ethnically Samoan,[20] the problem of a juror's genetic or financial relationship with a party in the case will not be terribly uncommon.

In addition to familial relation, poverty could prove problematic. Section 46.1507 of the American Samoan Code allows a juror to be excused where "it appears that jury duty would entail a serious personal hardship."[21] In American Samoa, the median household income in 1999 was $18,219, with the average household consisting of 6.05 members.[22] Of individuals eighteen years or older in the territory, 56.6% fell below the poverty level in 1999.[23] While the numerical impact of this rule on the overall jury pool is unclear, it

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[18] *See* STATISTICAL YEARBOOK, *supra* note 9, at 115. Turnout was even lower with 11,498 voting in the gubernatorial election, and 12,198 voting in the race for the territory's non-voting delegate to the U.S. House of Representatives. THE GREEN PAPERS: AMERICAN SAMOA 2004 GENERAL ELECTION, *available at* http://www.thegreenpapers.com/G04/AS.phtml.

[19] AM. SAMOA CODE ANN. § 46.1505 (2004).

[20] *See* CENSUS 2000, *supra* note 4, at 3 (noting that out of the total population, 32,470 people are born in American Samoa, and another 17,712 people were born in Western Samoa). While only the American Samoans can serve on a jury, an eligible juror can obviously still be related by blood to a defendant who is a Western Samoan national.

[21] AM. SAMOA CODE ANN. § 46.1507 (2004).

[22] *See* CENSUS 2000, *supra* note 4, at 1, 4.

[23] *Id.* at 5. This is the figure for the entire population, not necessarily the jury pool.

is apparent that the rule will have a disproportionate effect on highly publicized cases that may call for a transfer of venue. Indeed, during the first day of jury selection for the trial of Richard Majhor (discussed below), the High Court informed the seventy prospective jurors that due to concerns of jury exposure to the intense publicity in the case, they would have to be sequestered for the duration of the trial.[24] Upon questioning the jurors further, the court found it necessary to excuse thirty people for demonstration of economic hardship that such a sequestration period would pose.[25]

Given that a prospective juror may be further ineligible or exempt from jury service if he or she is mentally unfit, a convicted felon, unable to understand either the English or Samoan languages, an attorney, an elected official, a minister, a practicing physician, or an active duty member of the military,[26] it becomes apparent that both mandatory disqualifications and disqualifications after voir dire severely diminish the available pool of jurors in American Samoa.[27] While this does not in itself suggest that it is impossible to obtain an impartial jury trial in the territory, it nevertheless demonstrates that where a criminal defendant has been the subject of tremendous pretrial publicity, the limitations of an already small population are exacerbated further by jury service restrictions, raising the likelihood that a change of venue will someday soon be needed in order to secure a fair trial.

### *B. The Impact of Community and Samoan Culture*

Apart from the issue of population, a defendant may advocate a transfer of venue under a different theory, namely that it is inherently impossible to receive an impartial trial by jury in American Samoa because Samoan traditions, customs, and conceptions of justice are incompatible with an American legal system. That is, regardless of the number of people on the islands, a defendant may maintain that the practices and beliefs of the Samoan community contradict a Western system of law. As the murder cases of Richard Majhor and Marlon Uli demonstrate, however, while broad claims that local culture is inherently irreconcilable with trial by jury will fail in *all* transfer of venue motions, allegations that traditional leaders or other powerful figures have used their influence to shape the verdict in a *particular* case may provide grounds for demonstrating the need for change of venue.

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[24] KHJ Radio, *Local News*, Feb. 7, 2006, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=104499 (last visited Jan. 26, 2007) [hereinafter February 7].

[25] *Id.*

[26] AM. SAMOA CODE ANN. §§ 46.1504, 46.1506 (2004).

[27] *Id.*

*1. Richard Majhor, Jake King, and broad cultural allegations*

In March 2003, Richard Majhor was charged under American Samoan law with first-degree murder, felonious restraint, tampering with evidence, and property damage in the February 24, 2003 disappearance of twenty-four year old Wyatt Bowles, Jr.[28] According to the government, Majhor, an alleged drug dealer, became upset when a cargo container holding expected contraband arrived late in the territory.[29] Majhor, believing that Bowles, an employee of the shipping company, was apparently responsible for the transport and late arrival of the container, met with Bowles, and was accompanied by his two associates, co-defendants Victor Sepulona and Talofa Seumanu.[30] At this meeting Majhor allegedly beat Bowles in the face and head with a .357 magnum, then ordered the two youths to "finish the job."[31] Wrapping Bowles' body in tape and a blanket, the defendants then purportedly disposed of the body by dumping it and Bowles' Jeep Cherokee, off a cliff and into the ocean.[32] Although Bowles' mangled jeep was recovered, his body has never been found, and he is presumed dead.[33] Trial began on February 8, 2006, and after four days of testimony, a six-person jury found Majhor guilty on all four counts.[34] The court sentenced him to fifty years imprisonment.[35]

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[28] *See In American Samoa an American Man has been Convicted of a Murder Committed 3 Years Ago*, RADIO NEW ZEALAND INT'L, Feb. 17, 2006, http://www.rnzi.com/pages/news.php?op=read&id=22307 (last visited Jan. 26, 2007). Because court proceedings in the Richard Majhor case are sealed, and because the High Court of American Samoa has not published case materials beyond its 1997 Reports, I rely on secondary materials in the discussion of territorial cases.

[29] KHJ Radio, *Local News*, Feb. 9, 2006, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=104571 (last visited Jan. 26, 2007).

[30] *Id.* For detailed accounts of trial testimony, see KHJ Radio, *Local News*, Feb. 10, 2006, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=105021 (last visited Jan. 26, 2007) [hereinafter February 10]; *see also* KHJ Radio, *Local News*, Feb. 13, 2006, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=106303 (last visited Jan. 26, 2007).

[31] *See, e.g.*, February 10, *supra* note 30. Based on testimony of prison inmates who allegedly overheard prison conversations of Majhor's co-defendants stating to the effect that they planned "to put the blame for Wyatt's death on Majhor," Majhor asserted that he was a scapegoat for the crimes of others and had no personal involvement. KHJ Radio, *Local News*, Feb. 14, 2006, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=106338 (last visited Jan. 26, 2007) (Referring to testimony made by Tafuna Correctional Facility inmates Marlon Uli and Jimmy Lin).

[32] *See* February 10, *supra* note 30.

[33] *See, e.g.*, Fili Sagapolutele, *Injunction Sought in Murder Case*, PAC. MAG., Jan. 12, 2006, *available at* http://www.pacificmagazine.net/pina/pinadefault2.php?urlpinaid=19515; February 7, *supra* note 24.

[34] *See* B. Chen-Fruean, *Fifty Years for Majhor, Defense Will Appeal*, SAMOA NEWS, Mar. 13, 2006, at 1.

[35] *Id.*

The brutality and intrigue of the Majhor case created an immediate media buzz on the island, including press allegations describing Majhor as the "drug king of American Samoa" and implicating him as the perpetrator of the alleged crimes.[36] In response, the High Court, early on fearing the "reasonable likelihood that any further publications could prejudice a fair trial," issued a gag order on August 13, 2003, nearly 2.5 years before Majhor's trial, prohibiting "attorneys, witnesses, defendants, court personnel and anyone connected with the investigation and litigation of the case from making statements to the media about it."[37] To Majhor, a gag order was not enough. On November 7, 2005, after Majhor had twice tried and failed to convince the High Court to transfer venue out of the territory, Majhor filed a motion for preliminary injunction in the U.S. District Court for the District of Columbia to prevent a trial against him from going forward in the High Court of American Samoa in an environment that would deny him a fair and impartial jury.[38]

Although the District Court dismissed his motion on jurisdictional grounds, the substantive arguments would likely have proven inadequate.[39] In his motion, Majhor continued to assert that the "intensive" pretrial publicity before the gag order rendered impossible access to an impartial jury.[40] More broadly, however, Majhor now challenged the American Samoan venue in its entirety, submitting a research study by an anthropological expert maintaining that "well organized channels of informal communication and decision making

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[36] KHJ Radio, *Local News*, Dec. 21, 2005, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=90178 (last visited Jan. 26, 2007) [hereinafter December 21]; *see also* Sagapolutele, *supra* note 33.

[37] *See American Samoa Court Gives Gag Order in High-Profile Disappearance Case*, RADIO NEW ZEALAND INT'L, Aug. 15, 2003, http://www.rnzi.com/pages/news.php?op=read&id=6077. Associate Justice Lyle Richmond noted that the media coverage to date included "comments by several counsel, the police and at least one defendant." *Id.*

[38] KHJ Radio, *Local News*, Dec. 22, 2005, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=90189 (last visited Jan. 26, 2007) [hereinafter December 22]; *see* December 21, *supra* note 36; *see also* Sagapolutele, *supra* note 33. I discuss the process of appeal within the federal district court system later in the article. *See infra* note 54. For an excellent analysis of the appellate process and the general structure of the American Samoan judicial system, see Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379 (1991).

[39] On January 13, 2006, in what appears to be an unpublished opinion, the District Court dismissed the suit maintaining it lacked jurisdiction over the matter before a final determination was made by the Appellate Division of the High Court. *See* Sagapolutele, *supra* note 33 (observing that the U.S. Attorney's Office also argued that Majhor failed to prove any set of facts in support of his substantive claim of presumed prejudice that would entitle him to relief); *see also* Fili Sagapolutele, *Suit Against Interior Secretary Dismissed*, PAC. MAG., Jan. 23, 2006, *available at* http://www.pacificislands.cc/pina/pinadefault2.php?urlpinaid=19780; December 21, *supra* note 36; KHJ Radio, *Local News*, Jan. 11, 2005, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=93245 (last visited Jan. 26, 2007).

[40] *See* December 21, *supra* note 36; *see also* Sagapolutele, *supra* note 33.

in Samoan villages affect and determine public opinion on significant issues and impede the open mindedness of potential jurors in even the most serious criminal cases."[41]

Majhor's argument that the "cultural environment" in American Samoa would deny him a fair and impartial jury will fail given the holdings of *King v. Andrus*[42] and *King v. Morton*.[43] The right to a criminal jury trial is a relatively new phenomenon in American Samoa, and came into existence quite reluctantly in the territory in 1978 after the case of Jake King.[44] In 1972, the American Samoan government charged Jake King with "willful failure to pay his 1969 American Samoan personal income tax" and to file his 1970 personal income tax return pursuant to American Samoa Code section 18.0405.[45] With no right to a criminal jury existing at that time, King was tried and convicted by High Court judges serving as both triers of law and fact.[46] King appealed his conviction to the Appellate Division of the High Court, asserting that he was deprived of his federal constitutional right to a jury trial.[47] The High Court denied King's appeal, which made an argument similar to Richard Majhor's— that the Sixth Amendment right to a trial by jury was inconsistent with American Samoan culture, and therefore inapplicable to the territory.[48]

The High Court of American Samoa observed that, under what has become known as the "*Insular Tariff Cases*" or "*Insular Cases*" of the U.S. Supreme Court, the Federal Constitution is not deemed to automatically "follow the flag" and apply in full to the "unincorporated territories"[49] of the United States, but rather, only "fundamental" constitutional rights apply absent congressional extension.[50] The High Court has noted:

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[41] *See* December 22, *supra* note 38.

[42] 452 F. Supp. 11 (D.D.C. 1977).

[43] 520 F.2d 1140, 1143 (D.C. Cir. 1975).

[44] Am. Sam. Gov't v. King, 4 Am. Samoa 785 (Trial Div. 1973); *see also* Pelesasa v. Te'o (1978) (holding that the due process clause of the Revised Constitution of American Samoa does not require jury trial, but that the Chief Justice may so provide by rule). *Pelesasa* does not appear to have been a published case, but is discussed in the "Case Notes" following AM. SAMOA CONST. art. I, § 2, which is available at http://www.asbar.org/asconst.htm.

[45] *King*, 4 Am. Samoa at 786.

[46] *Id.* at 797.

[47] The Appellate Division opinion is unpublished, but discussion of it is found in King v. Morton, 520 F.2d 1140, 1143 (D.C. Cir. 1975) (citing Am. Sam. Gov't v. King, App. No. 63-73 (Am. Samoa 1974)).

[48] *Id.*

[49] Those territories not intended for statehood at the time of acquisition.

[50] *See* Laughlin, *supra* note 38 (providing a detailed analysis of the *Insular Cases* and their application in American Samoa); *see also* Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, a Case Study*, 2 U. HAW. L. REV. 337 (1981); Joseph McDermott, Office of Insular Affairs, Definitions of Insular Area Political Organizations (2003), *available at* http://www.doi.gov/oia/Islandpages/political_types.htm;

> the Constitution applie[s] only insofar as its tenets restate "those fundamental limitations in favor of personal rights" that are "the basis of all free government." *Dorr v. United States*, 195 U.S. 138, 146 (1922); *see also Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901). Rights which are regarded as fundamental in the Anglo-American tradition but not in other free and civilized societies do not apply in an unincorporated territory, at least when they would tend to be destructive of the traditional culture.[51]

Emphasizing the U.S. Supreme Court holding in *Balzac*, which held that the constitutional right to a jury trial did not extend to the unincorporated territory of Puerto Rico,[52] the High Court reasoned that the imposition of the Anglo-American right to trial by jury upon American Samoa's legal and cultural structure "would be an arbitrary, illogical, and inappropriate foreign imposition."[53]

On appeal of King's conviction to the U.S. District Court for the District of Columbia,[54] the federal court flatly rejected these assumptions of cultural

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Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL'Y J. 69, 78-79 (2001).

[51] Banks v. Am. Sam. Gov't, 4 Am. Samoa 2d 113, 124-25 (Trial Div. 1987). The Territorial Clause, which underlies the *Insular Cases*, provides that "[t]he Congress shall have the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3. Although not exhaustive, other cases that are collectively referred to as the "*Insular Cases*" include *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

[52] *Balzac*, 258 U.S. at 313.

[53] *Morton*, 520 F.2d at 1143 (quoting *King*, App. No. 63-73).

[54] American Samoa does not have its own federal district court. While the issue of limited American Samoan access to the federal district court system is itself worthy of lengthy discussion, for purposes here, the reader should note that the Secretary of the Interior is responsible for administering the government of the territory pursuant to Executive Order No. 10,264 and can be sued in U.S. District Court for the District of Columbia for improper administration. *See* Exec. Order No. 10,264, 16 Fed. Reg. 6,417 (June 29, 1951). That is, when a party alleges that his federal constitutional rights have been violated by an appellate decision of the High Court, that individual may appeal the court decision to the Secretary of the Interior. *Id.* If the Secretary fails to overturn the High Court decision, the party can file a civil action against the Secretary of the Interior in the District of Columbia maintaining that the Secretary has improperly administered the territory by allowing the alleged constitutional violation to continue. *Morton*, 520 F.2d at 1144. Courts have stated:

> the Secretary is within the geographical jurisdiction of the United States District Court for the District of Columbia, and that court is competent to judge the Secretary's administration of the government of American Samoa by constitutional standards and, if

incongruity. As a matter of law, the court agreed with the Appellate Division that the *Insular Cases* remained good law, and placed limitations on the applicability of the Federal Constitution to the unincorporated territories.[55] Indeed, it determined that the only issue before it was one of fact within the *Insular Case* framework as to whether in American Samoa "circumstances are such that trial by jury would be impracticable and anomalous" with local traditions such that the right may not be deemed "fundamental."[56] Conducting a lengthy trial analyzing the questions of "whether the Samoan mores and *matai* culture with its strict societal distinctions will accommodate a jury system" and "whether a jury in Samoa could fairly determine the facts in accordance with the instructions of the court without being unduly influenced by customs and traditions,"[57] the district court found that a jury system was quite compatible with the Samoan way of life.[58]

Similar to Richard Majhor's anthropological study, the Interior Department argued that the Samoan communal family system, in which a "*matai*," or chief, governs the land and daily affairs of the "*aiga*," or extended family, makes it so that:

> Samoans would not be truthful on voir dire about relationships to parties in a trial; that lawyers would not exercise challenges against prospective jurors for fear of offending *matai* of their families or other families; that Samoans would not convict a *matai* of a crime because of repercussions which would follow the family relationships; and that *matais* would influence the vote of jurors.[59]

After extensive witness testimony, however, the federal court found otherwise. First, the court noted that in trials involving land boundary disputes, members of the same extended family had no difficulty testifying against each other, and that, likewise, police officers showed no reluctance in arresting fellow Samoans.[60] Additionally, pointing to the example of High Chief Tuiteleleapaga, who, when serving as prosecutor and special assistant to the

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necessary, to order the Secretary to take appropriate measures to correct any constitutional deficiencies.

*Id.* From there, the party may challenge the district court decision by appeal to the Court of Appeals for the District of Columbia Circuit, and then to the U.S. Supreme Court. D.C. CODE § 11-721 (2001); 28 U.S.C. § 1254 (2000). As a practical matter, then, federal court access is extremely difficult for American Samoans because they are forced to travel thousands of miles to Washington, D.C. to have their cases heard. For greater discussion on this issue, see Laughlin, *supra* note 38.

[55] *Morton*, 520 F.2d at 1147.

[56] King v. Andrus, 452 F. Supp. 11, 12 (D.D.C. 1977) (quoting *Morton*, 520 F.2d at 1147).

[57] *Id.*

[58] *Id.* at 17.

[59] *Id.* at 13.

[60] *Id.* at 14.

Attorney General, "convicted his brother's son of a criminal offense and recommended that he be jailed for three months," the court reasoned that authoritative influences and presumed partiality of cultural leaders was exaggerated.[61] Finally, the court noted, with the exception of trial by jury, the American Samoa Constitution "contains all of the procedural protections of our own Constitution for criminal defendants" and that, excluding the jury provisions, "[t]he Federal Rules of Criminal Procedure apply fully" in American Samoa, countering the Appellate Division's contentions that the Anglo-American system of justice conflicts with American Samoan culture.[62] In turn, the court concluded, that in light or the "legal and cultural development" in the territory, "trial by jury in American Samoa as of the time when Jake King [was] sent to trial . . . *would not have been, and is not now, 'impractical and anomalous,'*" and accordingly "rules and regulations . . . which deny the right of trial by jury in criminal cases in American Samoa are unconstitutional on their face."[63]

Given the High Court's prior support of Majhor's cultural arguments, it may be sympathetic to his position. Yet, nearly thirty years after the relatively successful implementation of trial by jury in the territory, along with the factual findings and analysis of the *King* court, the High Court would be hard pressed to turn back the clock and conclude once again that American Samoans are, at present, inherently incapable of sitting as impartial jurors. Therefore, to the extent that a defendant making a motion for a transfer of venue, like Majhor, asserts the broad argument that *every* jury trial warrants a transfer of venue, the court will simply refer the defendant to *King* and three decades of longstanding jury service, and refuse to presume the partiality of its prospective jurors before voir dire.

### 2. *Marlon Uli and particularized cultural complaints*

Though it may be true that a defendant will be unsuccessful if he departs entirely from the problem of population and focuses only on the perceived cultural beliefs of American Samoans, the murder case of Marlon Uli suggests that voir dire may not always effectively demonstrate such bias where it does exist, and that the High Court should take notice of cultural influences in a transfer of venue motion when they are shown to have an impact in the particular case at hand. Indeed, the *Uli* case suggests not only that social influences can play a role in certain jury verdicts in the territory, but that

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[61] *Id.*

[62] *Id.* at 16.

[63] *Id.* at 17 (emphasis added).

prominent defendants can further exploit favorable publicity to their advantage in the courtroom.

In December 2003, Marlon Uli was charged with first-degree murder in the November 13, 2002 drive-by shooting death of twenty-five year old Ma`alona Felise and tried by jury in the Trial Division of the High Court of American Samoa.[64] The government contended that on the morning of his murder, Felise had assaulted Napoleon Tavale, Uli's cousin, and that Uli subsequently drove to Felise's home with Tavale and two others to confront Felise about the incident.[65] During the confrontation, Uli was purported to have pulled out a gun, aimed it out of the window of his vehicle, shot Felise, reversed his car, and left.[66] Tavale was tried separately for first-degree murder arising out of the same incident[67] and the other two individuals entered a guilty plea, agreeing to testify against both Uli and Tavale.[68] Despite incriminating evidence, including several witness statements specifically naming Uli as the killer, Uli was acquitted on the first day of jury deliberations.[69] Prosecuting attorney Harvey Kincaid was shocked, commenting that:

> [T]he verdict was a surprise. The AG's Office didn't have a perfect case but we did have a good, solid case. . . . As an attorney, I respect the jury's decision but to this day, I still think that we had the right defendant. Truth be told, I was very upset to see the government lose that case.[70]

On their own, statements of disappointment by the prosecutor may implicate the prosecution's own performance and not jury partiality as the culprit behind Uli's acquittal.[71] Yet, there is no doubt today, not even reasonable doubt, that

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[64] *See, e.g.*, B. Chen-Fruean, *High Court Dismisses One Charge Against Napoleon Tavale*, SAMOA NEWS, June 22, 2005, *available at* http://www.samoanews.com/wednesday.06222005/WEpageone/story2.html.

[65] *Id.*; *see also* La Poasa, *Murder Charges Stand Against Tavale, AG Will Prosecute*, SAMOA NEWS, Feb. 7, 2004, *available at* http://www.samoanews.com/monday.02072004/MOpageone/story4.html.

[66] Chen-Fruean, *supra* note 64.

[67] *See id.* ("Tavale was entitled to a speedy trial and he had the chance to be tried together with Marlon on the murder charges but he opted not to.").

[68] *Id.* (stating that "Tavale . . . still faces the first degree murder charge stemming from the same incident"). The article further notes that "[t]wo of the defendants, Nataniala a.k.a. 'Lala' Ah-Wong and Pita Aumavae, entered into plea agreements with the government to testify against their co-defendants Marlon and Tavale, both of whom were charged with first degree murder." *Id.*

[69] *See* B. Chen-Fruean, *Kincaid Leaves After Two Years As Assistant AG*, SAMOA NEWS, *available at* http://www.samoanews.com/wednesday.04272005/WEothernews/story3.html.

[70] *Id.*; *see also* Chen-Fruean, *supra* note 64 (noting that the Felise murder case has resulted in many "shocking twists and turns").

[71] This is exactly what Uli alleged in his deposition for the *Tavale* case, noting that: "You know, they didn't actually have an eyewitness that actually saw me shoot the guy . . . they were

the jury wrongfully acquitted Uli. After losing the *Uli* trial, the prosecution carried forward with its murder charges against Tavale, deposing Marlon Uli in preparation for the *Tavale* case. In his deposition, Uli, a free man, admitted that he had indeed had a gun in his car and that during the confrontation with Felise over the Tavale assault, his car window was halfway down and "the gun was in my hand, and then I shot it. I discharged it . . . ."[72] He then commented, "[w]ell I did the crime so I should do the time, but you guys had your chance to put me away and you guys lost."[73] Remarked Kincaid, reminiscent of Richard Majhor and Jake King, the "Samoa[n] culture and tradition is too strong here and it definitely has an affect on the jury system. Family relations and social acquaintances, among other things, do play a role in the local criminal justice system and the way things are done."[74]

While no specific information in the *Uli* case supports with certainty Kincaid's suspicions that the jury was guided by cultural pressure or familial loyalties, the bizarre outcome of the case does suggest that in addition to or in conjunction with the territory's small population, a defendant's wide notoriety or influence may significantly affect the outcome of a local trial, unless a change of venue is granted to preempt such influence.

Specifically, the *Uli* case identifies two significant cultural venue problems in the territory. On the one hand, if a defendant can make *particularized* claims that certain Samoan cultural beliefs or opinions antagonistic to his case are so pervasive among the small jury population, or that would-be jurors are so influenced by powerful local figures, say through speeches made to registered voters during an election year, the court, with the *Uli* case in mind, may now find the need to credibly revisit Majhor's contention that "well organized channels of informal communication and decision making in

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saying it came from my car, but you guys [the prosecution] couldn't prove it. It could have come from anywhere." Chen-Fruean, *supra* note 64.

[72] La Poasa, *Marlon Uli Admits Shooting Felise in Court Deposition*, SAMOA NEWS, May 26, 2005, *available at* http://www.samoanews.com/thursday.05262005/THpageone/story1.html. In the *Tavale* deposition, however, Uli contended that the gun "just went off," or in the alternative that he fired it intentionally but "not knowing that it was going to hit Ma'a [Felise]." *Id.*

[73] *See id.*; *see also American Samoan Man Acquitted of Murder Admits Pulling Trigger*, RADIO NEW ZEALAND INT'L, May 26, 2005, http://www.rnzi.com/pages/news.php?op=read&id=16977 (last visited Jan. 26, 2007); Chen-Fruean, *supra* note 64. It bears noting that in his motion for preliminary injunction in the U.S. District Court of the District of Columbia alleging jury partiality in American Samoa, Richard Majhor noted that, "[a] murder defendant [Marlon Uli] was acquitted after local leaders apparently influenced the members of the jury although his criminal conduct and intent were virtually undisputed." *See* December 22, *supra* note 38; Felise's estate has subsequently brought a civil action against Uli seeking $4,580,000 in damages. *See* KHJ Radio, *Local News*, Sept. 8, 2005, http://khjradio.com/skin/blurb.php?sectionId=213&contentId=75397.

[74] *See* Chen-Fruean, *supra* note 69.

Samoan villages affect and determine public opinion on significant issues and impede the open mindedness of potential jurors in even the most serious criminal cases"[75] without contradicting the broad holding in *King* that local culture is not *inherently* anomalous with a jury trial system.

At the same time, *Uli* and the present state of American Samoan law introduce the more troubling problem of local bias on motions for transfer of venue. If a defendant like Majhor could establish that bias against him renders the territorial venue improper, that defendant could make a motion for a change of venue that would be granted by the court. But, where the defendant is in a position where influential traditional leaders will lobby the public on his behalf, thereby creating a community environment in which conviction is highly improbable, the defendant will *never* move for a change of venue, for he would rather continue in the forum that guarantees acquittal. This places the court in a troubling legal conundrum. At present, American Samoa Code section 46.0602, the territorial transfer of venue statute in criminal matters, mirrors the language of 28 U.S.C. § 1404(a), the federal change of venue statute for *civil* matters, and clearly states that any criminal case may, in the interest of justice, be "transferred by order of the Chief Justice or the Associate Justice."[76] The rule, however, does not state whether the court may make such an order *sua sponte* or if it requires a motion offered by one of the parties. Nor does American Samoa Code section 46.0501 provide clarification. Section 46.0501 mandates that "*[e]xcept as otherwise provided in this Code* . . . the criminal procedure in the High Court . . . shall conform as nearly as may be practical to the Federal Rules of Criminal Procedure."[77] On the one hand, then, because Federal Rule of Criminal Procedure 21 demands that the court may transfer venue in criminal actions *only* "[u]pon the *defendant's* motion,"[78] a defendant with a favorable jury pool may assert that Rule 21 "fills the gaps" in American Samoan law and thus allows a court to order a change of venue only upon his own motion. On the other hand, because section 46.0602 adopts the language of 28 U.S.C. § 1404(a), under which federal courts have determined that "[a] transfer of venue for the convenience of the parties and in the interest of justice *may be made upon motion by either of the parties or*

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[75] *See* December 22, *supra* note 38.

[76] *Compare* 28 U.S.C. § 1404(a) (2000) stating that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought" *with* AM. SAMOA CODE ANN. § 46.0602 (2004) reading that "[a]ny case brought in the High Court or in a district court may, in the interest of justice and for the convenience of the parties and witnesses, be transferred by order of the Chief Justice or the Associate Justice to any court in which it might have been brought originally."

[77] AM. SAMOA CODE ANN. § 46.0501 (2004) (emphasis added).

[78] FED. R. CRIM. P. 21.

*by the court sua sponte*,"[79] the High Court can conclude that the American Samoan Code specifically departs from the language of Rule 21. Therefore, under the "exception" clause of section 46.0501, the court need not be guided by the "defendant's motion" limitation of Rule 21 and can transfer venue on its own accord. In short, American Samoan law currently provides "wiggle room" in which the court may force a change of venue motion on an unwilling defendant. Until this issue is addressed, however, a powerful defendant may be able to take advantage of local rules and favorable social influences to compel ongoing legal proceedings in the local forum, and subsequently foster more "Marlon Uli" jury verdicts.

## III. VENUE SOLUTIONS: HOW THE COURT CAN COPE WITH JURY PARTIALITY

Having examined the census data and the cases of Richard Majhor and Marlon Uli, we can see not only that the pool of eligible jurors in American Samoa is a significantly reduced subset carved out from the already small and well concentrated territorial population, but that this group may also be susceptible to the social influences and notoriety of a defendant when it fashions jury verdicts. Although section 46.0602 presently arms the High Court with the solution that "in the interest of justice and for the convenience of the parties and witnesses, [any case may] be transferred by order of the Chief Justice or the Associate Justice to any court in which it might have been brought originally,"[80] it provides no guidance as to how to effectuate such an order. Indeed if the High Court is the only trial court in the territory competent to decide cases under American Samoan law, what other court would be capable to hear the case? Even if there were another court available in American Samoa, would it not have the same jury bias from the same pool of jurors? Could the High Court transfer cases to its distant neighbor Hawai'i? Taking the practical limitations of population and geography into account, this section seeks to analyze what the High Court of American Samoa can do when a defendant is unable to receive a fair jury trial in the territory. Although enforcement of section 46.0602, with some modifications, is a possibility, I also suggest other alternatives, including the option of bench trials and prosecution under federal criminal law outside the territory.

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[79] Clisham Mgmt., Inc. v. Am. Steel Bldg. Co., 792 F. Supp. 150, 157 (D. Conn. 1992) (emphasis added) (citing Mobil Corp. v. S.E.C., 550 F. Supp. 67, 69 (S.D.N.Y. 1982)).

[80] AM. SAMOA CODE ANN. § 46.0602 (2004).

### A. Solution One: Judicial Interpretation and Clarification to Deny a Change of Venue

To avoid the administrative and bureaucratic wrangling that would be necessary to transfer venue off-island, a first solution for the High Court would be to simply avoid applying section 46.0602 altogether by offering a defendant an impartial bench trial in those limited circumstances where an impartial jury is unavailable. Indeed, despite the federal holdings in the *King* cases, the American Samoa Constitution still does not guarantee the right to jury trial, instead granting such right to the extent that the Chief Justice provides by rule.[81] Were the court to modify the rules of court and either read the *King v. Andrus* holding narrowly, or take the more drastic step of rejecting the legal analysis prescribed by the *King* cases altogether, it could validly limit a defendant's right to a jury trial in the territory where jury trial is infeasible.

#### *1. Rejecting the "impractical or anomalous" test applied in* King

Although the High Court would no doubt draw the ire of the U.S. District Court for the District of Columbia were it to modify or disregard the *King* cases, the High Court would have well-grounded precedential basis for revisiting the legal determinations formulated in *King* and concluding that a defendant, even one charged with a serious criminal offense, is not entitled to a jury trial in the territory under the Federal Constitution.

Returning to *King v. Morton*, in which the D.C. Circuit set forth the legal framework for the federal district court to apply at trial, recall that the court upheld the Supreme Court's doctrine in the *Insular Cases*, namely that only "fundamental" constitutional rights apply to unincorporated territories such as American Samoa.[82] In arriving at that determination, however, the court disputed Jake King's methodology in determining what constitutional rights may be deemed "fundamental." In arguing that he had a right to a jury trial in American Samoa, King conceded that the U.S. Supreme Court in *Balzac v. Porto Rico* held that the right to trial by jury was not "fundamental" in the

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[81] *See* AM. SAMOA CONST. art. I, § 2, *available at* http://www.asbar.org/asconst.htm. The case notes cite to *Pelesasa v. Te'o*, (1978) for the proposition that territorial due process clause does not require jury trials. *Id. Pelesasa* does not appear to be a published case, but is discussed in the "Case Notes" following AM. SAMOA CONST. art. I, § 2. In turn, AM. SAM. TRIAL CT. R. CRIM. P. 23(a) presently holds that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court."

[82] King v. Morton, 520 F.2d 1140, 1146 (D.C. Cir. 1975); *see also* Hawaii v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922).

territories.[83] But, in light of *Duncan v. Louisiana*, in which the Supreme Court concluded that the right to a jury trial in state prosecutions for serious criminal offenses was a "fundamental" right incorporated to the states through the Due Process Clause of the Fourteenth Amendment,[84] King maintained the Supreme Court had reversed course, and that he, too, was therefore entitled to a jury in American Samoa.[85]

The *Morton* court, however, reasoned that the mere labeling of a constitutional right as "fundamental" by the U.S. Supreme Court in the context of the states does not necessarily broaden the applicability of that holding to the territories.[86] The *Morton* court instead concluded that because *Duncan* and *Baldwin v. New York* dealt exclusively with the right to jury trial in the states, those holdings had no bearing on the vitality of the *Insular Cases* in the territories.[87] Thus, the proper test to determine whether a constitutional right is "fundamental" in the territorial context remained the case-by-case analysis described by Justice Harlan in *Reid v. Covert*, requiring a court to examine "the particular local setting, the practical necessities, and the possible alternatives" to determine if "circumstances are such that trial by jury would be impractical and anomalous."[88] Subsequently, as discussed above, the district court in *King v. Andrus* applied that test on remand, finding that application of the right to jury trial in American Samoa would not be "impractical and anomalous" with local culture.[89]

A competing line of federal cases originating from the Northern Mariana Islands, however, disputes the *King* cases, and has called into question whether Harlan's "impractical and anomalous" approach in *Reid v. Covert* is the correct standard when analyzing "fundamental" rights under the *Insular Cases*. In *Northern Mariana Islands v. Atalig*,[90] defendant Atalig appealed his territorial drug possession conviction after it was rendered by a trial without a jury in accordance with Northern Mariana Islands statutory provisions.[91] Atalig, like King, argued before the Ninth Circuit that he was denied the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments to the

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[83] *Morton*, 520 F.2d at 1146-47.

[84] 391 U.S. 145 (1968); *see also* Baldwin v. New York, 399 U.S. 66 (1970) (holding that the right to a criminal jury trial attaches to state offenses punishable by more than six months imprisonment).

[85] *Morton*, 520 F.2d at 1146-47.

[86] *Id.* at 1147.

[87] *Id.*

[88] *Id.* (citing Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring in result)).

[89] *See* King v. Andrus, 452 F. Supp. 11, 12 (D.D.C. 1977) ("[O]ur U.S. Court of Appeals . . . remanded with directions to this court to render a decision which rests on a solid understanding of the present legal and cultural development of American Samoa.").

[90] 723 F.2d 682 (9th Cir. 1984).

[91] *Id.* at 683-84.

Constitution.[92] The court noted, as in *Morton*, that the *Insular Cases* provided the legal framework governing the applicability of constitutional provisions to the territories.[93] Further, citing *King v. Morton*, the court rejected the position that *Duncan*, in extending the right to jury to the *states*, necessarily compelled *territories* to mandate jury trials.[94]

Unlike *Morton*, however, the *Atalig* court made no mention of Harlan's "impractical and anomalous" test when analyzing the "fundamental" nature of constitutional rights within the *Insular Cases* framework.[95] In fact, quite oppositely, the *Atalig* court rejected this test, concluding that *Reid* had no bearing on the federal government's relationship with U.S. territories, and thus the *Insular Cases*. It reasoned that "*Reid* concerned the government's power to extend military jurisdiction to civilian citizens; [while] in contrast, the *Insular Cases* considered the power of Congress to govern insular territories."[96] Having distinguished and separated *Reid* from the *Insular Cases*, the *Atalig* court further observed that Article IV, Section 3 of the U.S. Constitution—the Territorial Clause—provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[97] In turn, quoting *Dorr v. United States*,[98] the court reasoned that to facilitate such broad congressional flexibility in its territorial powers, the appropriate test in analyzing whether a federal constitutional right is applicable to the territories absent a congressional mandate is to inquire instead "whether the asserted right was one of 'those fundamental limitations in favor of personal rights' which are 'the basis of all free government.'"[99] Applying this quite different standard, the court concluded, opposite from *King*, that the Northern Mariana Islands law denying a defendant's right to a criminal jury trial for crimes

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[92] *Id.* at 684.

[93] *Id.* at 688-89.

[94] *Id.* at 689-90. Observing further, the court stated that

> [t]o focus on the label "fundamental rights," overlooks the fact that the doctrine of incorporation for purposes of applying the Bill of Rights to the states serves one end while the doctrine of territorial incorporation serves a related but distinctly different one. The former serves to fix our basic federal structure; the latter is designed to limit the power of Congress to administer territories under Article IV of the Constitution.

*Id.*

[95] *Id.* at 689 n.22 (stating that "[w]e think the district court exaggerated Reid's effect on the *Insular Cases*").

[96] *Id.* The court additionally stated outright that "[w]e believe that *Duncan* and *Reid* do not modify the holding of the *Insular Cases* concerning trial by jury." *Id.* at 690.

[97] U.S. CONST. art. IV, § 3, cl. 2.

[98] 195 U.S. 138 (1904).

[99] *Atalig*, 723 F.2d at 690 (quoting *Dorr*, 195 U.S. at 146-47). The court emphasized that "[w]e believe that a cautious approach is . . . appropriate in restricting the power of Congress to administer overseas territories." *Id.*

carrying a sentence of less than five years imprisonment or a fine of less than $2000 was *not* unconstitutional.[100]

The U.S. District Court for the Northern Mariana Islands expressly rejected the "impractical or anomalous" test in *Rayphand v. Sablan*.[101] In *Rayphand*, plaintiffs argued that the composition of the Commonwealth of the Northern Mariana Islands Senate violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because the large disparity among the populations of the three senatorial districts diluted the voting power in some districts.[102] The United States, as an intervenor, maintained that the "one person, one vote" standard was "not a fundamental right within unincorporated territories under the *Insular Cases* Doctrine and Ninth Circuit law."[103] The court, pointing to *Atalig* and *Wabol v. Villacrusis*,[104] recited the *Atalig/Dorr* "basis of all free government" test as the standard of review for "fundamental" rights under the *Insular Cases*.[105] It commented that while other courts, including the District of Columbia Circuit in *King v. Morton*, have turned to Harlan's "impractical or anomalous" language in *Reid* to interpret the *Insular Cases*, "the vitality of that test is in doubt."[106] Discussing the Supreme Court opinion in *United States v. Verdugo-Urquidez*,[107] it observed that the Court restated the central holding of the *Insular Cases* as, "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants of [unincorporated] territories" but made no mention of Harlan's "impractical or anomalous" test except in Justice Kennedy's concurring opinion.[108] Given the failure of the Court to extend the Harlan language to the *Insular Cases*, the *Rayphand* court concluded that it should instead "focus on the central test of *Atalig*, *Wabol*, and the *Insular Cases*, which is whether the given right is 'the basis of all free government.'"[109]

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[100] *Id.*

[101] 95 F. Supp. 2d 1133 (D. N. Mar. I. 1999).

[102] *Id.* at 1135.

[103] *Id.* at 1136.

[104] Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1990) (noting, as in *Atalig*, that "fundamental rights" are those "which are 'the basis of all free government'"). I discuss *Wabol* in greater detail later in the article. *See* text accompanying notes 109-12.

[105] *Rayphand*, 95 F. Supp. 2d at 1138.

[106] *Id.* at 1139 n.11.

[107] 494 U.S. 259 (1990).

[108] *Rayphand*, 95 F. Supp. 2d at 1139 n.11 (quoting *Verdugo-Urquidez*, 494 U.S. at 268) (internal quotation marks omitted). The *Rayphand* court also explained that "the *Insular Cases* hold that not every constitutional provision applies to governmental activity even where the United States has sovereign power." *Id.* at 1139 n.14 (citing *Verdugo-Urquidez*, 494 U.S. at 268).

[109] *Id.* at 1139 n.11. Indeed, other courts have noted that "[b]ecause of the lack of a five Justice majority in *Reid*, *Balzac* [holding that a right to trial by jury is not a "fundamental" right] continues to be interpreted as binding authority." *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 457 (D.D.C. 2005) (citing Balzac v. People of Porto Rico, 258 U.S. 298, 309

Finally, in *Wabol*, the Ninth Circuit expanded upon the *Atalig/Dorr* test and indicated how, when applied, an unincorporated territory may properly limit access to a jury. The court maintained that in the territorial context fundamental rights adhered to by all free governments are those "*shared beliefs of diverse cultures.* Thus, the asserted constitutional guarantee . . . applies only if this guarantee is *fundamental in this international sense.*"[110] Although *Wabol* dissected the *Atalig* test in relation to whether the Equal Protection Clause of the U.S. Constitution applied to racially based territorial land restrictions,[111] it noted in dicta that in the context of jury trials:

> [t]he jury trial guarantee is primarily a procedural right designed to safeguard the broader and more fundamental right to a fair trial protected by the due process clauses. So viewed, it is "easy to imagine" a system that omits the safeguard, but, through other mechanisms, nevertheless achieves the broader, nonwaivable goal of assuring a fundamentally fair trial.[112]

Under this view, so long as an unincorporated territory provides adequate procedural safeguards to ensure that a defendant receives a fair trial, such measures should comport with notions of "fundamental" rights in the international context, whether or not they include a jury trial, and therefore satisfy *Atalig*.[113]

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(1922)), *vacated*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007). It is noteworthy that the *Wabol* court focuses on both the *Harlan* and *Atalig* tests, and does not regard them as incongruous. *Wabol*, 958 F.2d at 1461. Nevertheless, the *Wabol* court does primarily adhere to the *Atalig* language. *Id.* at 1460. Applying the *Atalig* test, the *Rayphand* court concluded on the merits that "Congress' endorsement of the NMI negotiators' request that the voters of Saipan be denied the fundamental United States constitutional guarantee of 'one person-one vote' in regards to the composition of the CNMI Senate does not offend the United States Constitution." 95 F. Supp. 2d at 1139.

[110] *Wabol*, 958 F.2d at 1460 (emphasis of "international" in original, all other emphasis added).

[111] *Id.*

[112] *Id.* (citing Duncan v. Louisiana, 391 U.S. 145, 150 (1968) and Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984)).

[113] *Atalig* suggested as much, noting that in holding as it did, "[w]e recognize that the NMI does not dispense entirely with trial by jury in criminal cases," but only in cases imposing less "than five years imprisonment or a $2,000 fine." 723 F.2d at 684, 690. This language suggests that had the Northern Mariana Islands prohibited *all* jury trials, the *Atalig* court may not have been as accommodating. *See* Trials No. 1-55/03, Between the Queen and Seven Named Accused, Sup. Ct. of Pitcairn Islands, §§ 196-206 (2004) (stating "[w]e are satisfied that in not providing for trial by a jury [to the Pitcairn Islanders] there is no breach of the European Convention for Human Rights"), *available at* http://www.paclii.org/pn/cases/PNSC/2004/1.html. Indeed, in line with *Wabol*'s discussion of jury rights in the international context, Article 6 of the European Convention on Human Rights provides a defendant with only the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law," but makes no demand that such a tribunal include a jury. European

In light of *Atalig*, *Rayphand*, and *Wabol*, the High Court of American Samoa would have an adequate legal foundation to challenge the test applied by the U.S. District Court for the District of Columbia in the *King* cases and deny a change of venue in favor of a bench trial. The High Court could hold that by applying the Harlan test, the *King* cases wrongly interpreted the *Insular Cases* and improperly limited Congress' broad territorial powers in Article IV, Section 3 of the Constitution. That is, rather than presuming a constitutional right to be applicable in an unincorporated territory unless it is "impractical or anomalous," the *King* courts should have reasoned that a right will not be presumed to apply, absent a congressional mandate, if the territorial alternative provides adequate alternative safeguards. Under this view, the High Court can now justifiably depart from American Samoa Trial Court Rule of Criminal Procedure 23(a), that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial"[114] and add the language that where an *impartial jury in the territory cannot be had, such trial may be heard by an impartial panel of High Court judges*. Following this position, the High Court would not be forced to take the hard-line position it did in its *King* trial opinion by arguing that *no* jury trials are ever allowed in the territory.[115] Rather, it would attempt to retain the present jury trial system to the extent possible, abandoning the right to a jury, even for serious crimes, only in the rare instances where no impartial jury can be empanelled and no fair trial is available.

While a retraction of present jury rights and a rejection of the *King* cases would no doubt face an uphill legal battle, it is not at all unrealistic. First, the *King* cases are not directly binding on the High Court. Rather than appealing the final decision of the Appellate Division of the High Court directly to the U.S. Supreme Court,[116] Jake King chose the more indirect route of initiating

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Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457- 5C9014916D7A/0/EnglishAnglais.pdf.

[114] AM. SAM. TRIAL CT. R. CRIM. P. 23(a).

[115] Am. Sam. Gov't v. King, 4 Am. Samoa 785 (Trial Div. 1973).

[116] The traditional avenue of federal civil litigation originating in American Samoa involves filing an appeal first with the Secretary of the Interior, and then against the Interior Secretary in the U.S. District Court for the District of Columbia. *See* Laughlin, *supra* note 38. It is not clear, however, whether this process may be bypassed in favor of direct appeal to the U.S. Supreme Court. In *King v. Morton*, the court stopped short of answering this query noting that "[t]his case does not present the question whether the Supreme Court has appellate jurisdiction over decisions rendered by the Samoan courts, a question on which we intimate no view." 520 F.2d 1140, 1144 n.3 (D.C. Cir. 1975). On the other hand, in *U.S. v. Lee*, the U.S. District Court for the District of Hawai'i stated with seeming conviction that upon exhaustion of remedies in American Samoa, "defendants *may petition for certiorari to the United States Supreme Court*, or bring a civil action against the Secretary of the Interior, assuming they satisfy the jurisdictional requirements for such civil suits." 159 F. Supp. 2d 1241, 1245 (D. Haw. 2001)

a new and separate civil action against the Secretary of the Interior, as administrator of the territory, in the U.S. District for the District of Columbia for failing to overturn the High Court's decision.[117] Thus, while the *King v. Andrus* court asserted the unconstitutionality of Jake King's conviction without a jury trial, it sought to enforce its holding not by *overruling* the High Court, but only by enjoining the Interior Secretary from enforcing the High Court's judgment of conviction.[118] Absent binding precedent, because American Samoa does not fall within the jurisdiction of any federal circuit court,[119] it may pick and choose its precedent as it finds appropriate, allowing it to accept or reject *King* in light of subsequent legal discourse.

In turn, an examination of local judicial practice indicates that the Appellate Division of the High Court may favor federal precedent arising out of the Northern Mariana Islands and the Ninth Circuit. The High Court of American Samoa consists of only two justices appointed by the Secretary of the Interior and a panel of local judges who are experts in local custom, but who are not legally trained.[120] When the Appellate Division of the High Court meets, however, hearings are conducted before a panel of three legally trained judges.[121] Those panels include judges from other courts, usually from the Ninth Circuit, who are designated to sit on the High Court by the Secretary of the Interior.[122] For example, the Appellate Division case *In re Matai Title*

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(emphasis added) (citing *Morton*, 520 F.2d at 1145). Whether or not correct in its assertion, the *Lee* court seems unfounded in its reliance on *Morton* for this proposition.

[117] *Morton*, 520 F.2d at 1144; *see also supra* note 54.

[118] 452 F. Supp. 11, 17 (D.D.C. 1977).

[119] *See Lee*, 159 F. Supp. 2d at 1244; *see also* discussion *infra* Section III.C.

[120] *See* AM. SAMOA CODE ANN. § 3.1001(a) (2004) ("There shall be a Chief Justice of American Samoa and an Associate Justice of American Samoa. Each shall be learned in the law and appointed by the Secretary of the Interior."); *see also* AM. SAMOA CODE ANN. § 3.1004(a) (2004) ("There shall be no less than 5 associate judges of the High Court of American Samoa, who shall be appointed by the Governor upon the recommendation of the Chief Justice and who shall be confirmed by the Senate."); Jeffrey B. Teichert, *Resisting Temptation in the Garden of Paradise: Preserving the Role of Samoan Custom in the Law of American Samoa*, 3 GONZ. J. INT'L L. (1999-2000), *available at* http://www.gonzagajil.org/ (stating that "[a]ssociate Judges are not required to be law trained, and generally are not, but are traditionally chosen for their expertise in Samoan custom") (citing Ale v. Falealili, 4 Am. Samoa 2d 7 (1987)).

[121] AM. SAMOA CODE ANN. § 3.0220 (2004).

[122] *See id.* ("The appellate division shall consist of the Chief Justice, the Associate Justice, Acting Associate Justices appointed by the Secretary of the Interior, and all the associate judges. Sessions of the appellate division shall be held before 3 justices and 2 associate judges, the presence of 2 of the justices and 1 associate judge being necessary to constitute a quorum for the trial and determination of a case or controversy."); *see, e.g.*, Nouata v. Pasene, 1 Am. Samoa 2d 25, 35 (1980) (explaining that U.S. Supreme Court Justice Kennedy, who was then a Ninth Circuit judge, was "sitting by designation of the Secretary of the Department of the Interior"). While the Secretary of the Interior can draw judges from any circuit he or she chooses, the Ninth Circuit is generally the court of choice given geography and tradition.

*Tuaolo* was presided over by the "Honorable J. Clifford Wallace, Senior Circuit Judge, United States Court of Appeal for the Ninth Circuit, serving by designation of the Secretary of the Interior."[123]

Interestingly, under a similar practice, the same judges sit by designation in cases in the Northern Mariana Islands. Indeed, Judge Wallace presided over *Rayphand*, in which the District Court for the Northern Mariana Islands directly refuted application of the Harlan test to the *Insular Cases*.[124] Judge Wallace also sat among the Ninth Circuit panel of three judges in *Atalig*.[125] Moreover, of the other two judges on the *Rayphand* court, John S. Unpingco has served at least six times on the Appellate Division of the High Court of American Samoa by designation,[126] and Alex R. Munson, Chief Judge for the District Court of the Northern Marianas, has served more than thirty times on the High Court.[127]

Because Ninth Circuit judges heavily influence High Court precedent and present Ninth Circuit judges including Alfred T. Goodwin,[128] Diarmuid F.

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[123] *See In re* Matai Title Tuaolo, 1 Am. Samoa 3d 28, 33 (1997), *available at* http://www.asbar.org/Cases/ASR3d/1%20ASR3d/1%20ASR3d%2028.htm.

[124] Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1134 (D. N. Mar. I. 1999).

[125] Northern Mariana Islands v. Atalig, 723 F.2d 682, 683 (9th Cir. 1984) (stating that the case was heard "[b]efore *Wallace*, Sneed and Anderson, Circuit Judges" (emphasis added)).

[126] Fanene v. Fanene, 30 Am. Samoa 2d 115 (1996); Pen v. Lavata'i, 30 Am. Samoa 2d 10 (1996); Fanene v. Fanene, 30 Am. Samoa 2d 7 (1996); Mataiumu v. Folau, 29 Am. Samoa 2d 128 (1995); Mulitauaopele v. Maiava, 29 Am. Samoa 2d 116 (1995); Sasa v. Fuavai, 29 Am. Samoa 2d 77 (1995).

[127] Voyager Inc. v. High Ct. of Am. Sam., 29 Am. Samoa 2d 187 (1996); Voyager Inc. v. High Ct. of Am. Sam., 29 Am. Samoa 2d 10 (1995); Uiagalelei v. Ulufale, 26 Am. Samoa 2d 118 (1994); Paolo v. Utu, 26 Am. Samoa 2d 18 (1994); Foster v. Lutali, 26 Am. Samoa 2d 16 (1994); Vaouli v. Lutali, 26 Am. Samoa 2d 1 (1994); Ale v. Peter E. Reid Stevedoring, Inc., 25 Am. Samoa 2d 142 (1994); Reine v. Taotoai, 25 Am. Samoa 2d 136 (1994); Estate of Fuimoano, 25 Am. Samoa 2d 110 (1994); Soli Corp. v. Amerika Samoa Bank, 25 Am. Samoa 2d 94 (1993); Jennings v. Thompson, 25 Am. Samoa 2d 77 (1994); Jamieson v. Am. Sam. Gov't, 25 Am. Samoa 2d 49 (1993); Alamoana Recipe Inc., v. Am. Sam. Gov't, 25 Am. Samoa 2d 46 (1993); Mulitauaopele v. Mulitauaopele, 25 Am. Samoa 2d 43 (1993); Soli Corp. v. Amerika Samoa Bank, 25 Am. Samoa 2d 40 (1993); Moananu v. Alofipo, 25 Am. Samoa 2d 37 (1993); Le'i v. Letuli, 25 Am. Samoa 2d 33 (1993); Muasau v. Malae, 25 Am. Samoa 2d 31 (1993); Mane v. Willis, 21 Am. Samoa 2d 118 (1992); Afualo v. Puailo, 21 Am. Samoa 2d 115 (1992); Holland v. Haleck's Island Motors, 21 Am. Samoa 2d 106 (1992); Anderson v. Am. Sam. Gov't, 21 Am. Samoa 2d 95 (1992); Tuilesu v. Faoa, 21 Am. Samoa 2d 91 (1992); Nelson & Robertson, Pty., Ltd. v. Diocese of Pago Pago, 21 Am. Samoa 2d 6 (1992); Rakhshan v. Am. Sam. Gov't, 20 Am. Samoa 2d 115 (1992); Amerika Samoa Bank v. Pac. Reliant Indus., Inc., 20 Am. Samoa 2d 102 (1992); Lindgren v. Betham, 20 Am. Samoa 2d 98 (1992); EW Truck & Equip. Co. v. Coulter, 20 Am. Samoa 2d 88 (1992); Thompson v. Nat'l Pac. Ins., 20 Am. Samoa 2d 85 (1992); Patau v. Rosendahl Corp., 20 Am. Samoa 2d 77 (1992); Roman Catholic Diocese of Samoa v. Avegalio, 20 Am. Samoa 2d 70 (1992); Rocha v. Rocha, 20 Am. Samoa 2d 63 (1992).

[128] *See, e.g.*, *Betham*, 20 Am. Samoa 2d 98.

O'Scannlain,[129] Andrew J. Kleinfeld,[130] William C. Canby, Jr.,[131] and Arthur L. Alarcon,[132] have all served on the Appellate Division of the High Court of American Samoa, not only does the Trial Division of the High Court have a general incentive to favor Ninth Circuit authority over other circuits, in view of the judicial preferences it faces on appellate review, but so too may those appellate judges designated by the Secretary of the Interior tend to favor their own opinions rendered in the Northern Mariana Islands, or those of their colleagues. In short, because the "office politics" of the Appellate Division of the High Court are dominated by the Ninth Circuit, and because the High Court is not bound by the precedent of any federal circuit, a judicial environment exists that allows for favorable acceptance of *Atalig* and Ninth Circuit precedent, rather than a continued adherence to *King* and the D.C. Circuit decisions.

### 2. *Applying a narrow reading of* King

In order to avoid any potential disagreement with the District Court for the District of Columbia that would arise if the High Court were to apply *Atalig*, the High Court could take the safer legal path of using the *King* framework and Justice Harlan's language to achieve the same result and allow for bench trials where a transfer of venue would otherwise be required.

When analyzing the issue of whether a jury trial would be "impractical or anomalous" in American Samoa, the *King v. Andrus*[133] court conducted a factual review primarily examining how "Samoan mores and *matai* culture with its strict societal distinctions will accommodate a jury system."[134] After cross-examining *matai* leaders, police officers, and other locals, the court observed that "witnesses, both for the plaintiff and the defendant, agree that jury trial would be a desirable feature of American Samoa's criminal justice system," and that such a system would not be unduly influenced by local customs and traditions.[135] Yet, while this analysis revealed that a jury trial would not be "anomalous" with local culture, the court did not go into as much depth to determine whether jury trials were "impractical."

Indeed, with regard to the "practicality" of jury trials, the court made conclusions relating to the feasibility of the jury system as a whole but did not

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[129] *See, e.g.*, Su'a v. Star-Kist Samoa, Inc., 7 Am. Samoa 2d 58 (1988).

[130] *See, e.g.*, Pene v. Bank of Hawaii, 19 Am. Samoa 2d 52 (1991).

[131] *See, e.g.*, *Muasau*, 25 Am. Samoa 2d 31.

[132] *See, e.g.*, Kava v. Scanlan, 30 Am. Samoa 2d 7 (1996).

[133] 452 F. Supp. 11 (D.D.C. 1977).

[134] *Id.* at 12 (internal quotation marks omitted) (quoting King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975)).

[135] *Id.* at 17.

specifically consider whether a jury would be practical under the circumstances considered here, where a change of venue would be warranted. In its analysis of "impracticality," the court observed:

> [f]rom a logistical and administrative point of view, the jury system in American Samoa is entirely feasible. The evidence indicates that there are about 7,000 registered voters with the vast majority of them situated on the main island of Tutuila where the courthouse is located. Available transportation eliminates any problem of access to the courthouse. A roll of registered voters is maintained by the election department of the government and this *should* provide an adequate pool of prospective jurors who are most likely to be literate and educated.[136]

In light of the fact that the court considered only the broad analysis of the practicality of obtaining an impartial jury, the High Court can maintain that the practicality of a jury trial is not a foregone conclusion when the actual circumstances on the ground deviate from the assumptions made by the *King v. Andrus* court. Indeed, the *Andrus* court's "practicality" analysis hinges on the point that the jury pool "should" provide an adequate source of prospective jurors, but does not delve deeper to mention whether its holding would be the same when that jury pool proves inadequate. The High Court, then, can interpret *King* as holding that where an impartial jury in the territory cannot be assembled in the territory—that is, when it proves "impractical"—the trial may be heard by an impartial panel of High Court judges. By so finding, the High Court could accept a narrow reading of *King*, holding that neither broad arguments relating to Samoan custom nor arguments that American Samoa is inherently unable to compile an impartial venire, will suffice to prove that a jury trial is always "impractical or anomalous" in the territory. Yet, in the situation where a defendant can establish that no impartial jury can be empanelled and where no feasible alternative venue exists such that a speedy trial cannot be conducted under the existing territorial limitations, the High Court can point to Justice Harlan's language in *Reid* and *King*, and conclude that the "the particular local setting, the practical necessities, and the possible alternatives" render a jury trial "impractical" under the circumstances.[137] In short, the High Court can continue to adhere to the legal language of *King* and the overall principle that a jury trial is constitutionally required where practicable, but can narrowly tailor specific factual circumstances that demonstrate when a trial by jury need not be compelled.

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[136] *Id.* at 16 (emphasis added).

[137] *Morton*, 520 F.2d at 1147 (quoting Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).

### *B. Solution Two: Transfer Venue Outside of American Samoa*

If the High Court decides it would prefer to give force to American Samoa Code section 46.0602, it can instead attempt to apply the letter of the law and order that the case be transferred to a separate offshore venue. Unlike the route of judicial interpretation, however, invoking this change of venue statute will lead to a bureaucratic nightmare, both at home and in the receiving jurisdiction. While certain jurisdictions may be more accommodating than others, because transfer of venue will inevitably require the court to move the trial onto the soil of a separate sovereign, the complexity of political negotiations and potential constitutional hurdles make this the most difficult and unlikely solution.

#### *1. The legislative and administrative process at home*

Whether the High Court proposes another U.S. territory or the State of Hawai'i as an alternative venue, so long as the receiving venue is outside the territorial boundaries, the court must first await local legislative reform and possible administrative approval by the Department of the Interior before transfer would be possible.

As a necessary first step, the territorial legislature must alter the language of section 46.0602 or delegate judicial power to a foreign venue. As it currently reads, section 46.0602 allows the High Court to order a transfer of venue to "any court in which it might have been brought originally."[138] This language is inherently limiting. Under article III, section 1 of the Revised American Samoa Constitution, judicial power to hear cases arising under American Samoan law is vested "in the High Court, the District Courts, and such other courts as may from time to time be created by law."[139] Because no other courts, except the local district courts hearing misdemeanor and traffic matters, are provided with original jurisdiction over local cases, where a defendant can show that he is unable to receive an impartial jury in American Samoa, the High Court cannot provide transfer to an extraterritorial venue because no such court has been vested with authority by the territorial constitution or legislature to hear the matter "originally." Therefore, if the High Court wishes to transfer a local criminal case to Hawai'i, the "originally

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[138] AM. SAMOA CODE ANN. § 46.0602 (2004).

[139] *See* AM. SAMOA CONST. art. III, § 1; *see also* AM. SAMOA CODE ANN. § 3.0302 (2004) ("The district court is a court of limited jurisdiction" and can hear "criminal cases in which the offense charged is a misdemeanor or any offense punishable by not more than 1 year of imprisonment; traffic cases except those involving a felony; initial appearances and preliminary examinations in all criminal cases."); AM. SAMOA CODE ANN. §§ 3.0207-08 (2004) (setting forth the jurisdiction of the divisions of the High Court).

brought" language of section 46.0602 must be amended to the effect that "any case brought in the High Court or in a district court may, in the interest of justice and for the convenience of the parties and witnesses, be transferred by order of the Chief Justice or the Associate Justice to *any alternative venue deemed suitable by the High Court*," thereby allowing a court lacking original jurisdiction to hear the case. Similarly, if the legislature does not wish to delegate to the High Court the power to choose the foreign venue, or amend the language of section 46.0602, it may be able to vest the foreign court with original jurisdiction over American Samoan matters pursuant to article III, section 1 by outlining it as an "other court" that may be created by law.

Secondly, even assuming the legislature grants the High Court the power to transfer a criminal case outside of the territory, it is not entirely clear whether the court can do so on its own accord, or whether such an order would first require the consent of the Secretary of the Interior. American Samoa, as an unorganized, unincorporated territory, is governed first and foremost by the U.S. Congress according to Article IV, Section 3 of the U.S. Constitution, which provides that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[140] Under 48 U.S.C. § 1661, entitled "Islands of Tutuila, Manu'a, and Eastern Samoa," Congress has vested its territorial authority over American Samoa in the President of the United States.[141] Indeed, § 1661(c) states:

> [u]ntil Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.[142]

American Samoa remains today an "unorganized" territory.[143] As such, it is a territory in which Congress has not yet enacted an organic act—that is, Congress has not yet provided for a government within the meaning of § 1661(c).[144] Thus, so long as American Samoa remains "unorganized," authority over the territory continues to vest in the President or those to whom he delegates.

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[140] U.S. CONST. art. IV, § 3, cl. 2.

[141] 48 U.S.C. § 1661(c) (2000).

[142] *Id.*

[143] *See, e.g.*, United States v. Standard Oil Co. of Cal., 404 U.S. 558, 559 (1972) (discussing 48 U.S.C. § 1661 and American Samoa's status as an unorganized territory).

[144] *Id.* at 559 n.2 (noting that an "organized" Territory is one in which a civil government has been established by an Organic Act of Congress); *see also* McDermott, *supra* note 50.

In 1951, President Harry S. Truman declared that "administration of American Samoa is hereby transferred from the Secretary of the Navy to the Secretary of the Interior," and that "the Secretary of the Interior shall take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government in American Samoa."[145] In turn, the Secretary of the Interior, in Secretary's Order No. 2,657,[146] demarked the department's authority over the territory, stating that with regard to the judicial authority of the High Court of American Samoa, "*[l]aws or regulations bearing on the organization or operation of the judiciary shall be submitted to the Secretary of the Interior for approval prior to promulgation.*"[147]

Upon ordering an extraterritorial transfer of venue, the High Court and the Secretary of the Interior may differ over the meaning of the word "promulgation," and in turn on whether the Secretary's consent is required to effectuate a change of venue under Secretary's Order No. 2,657. According to Black's Law Dictionary, to "promulgate" means "[t]o put a law or decree into force or effect."[148] The High Court can stress that section 46.0602 is a statute that has existed on the books in its present form since 1966 without prior disapproval by the Interior Department.[149] Moreover, the court can reasonably argue that it should have been foreseeable to the Interior Department at the time of enactment that enforcement of a transfer of venue law in a jurisdiction having only one venue would inevitably require transfer to a court outside American Samoa. Subsequently, given that overseas transfer was implicitly approved by the Interior Department at the time section 46.0602 was "promulgated," or put into effect, the High Court would not now need Interior Secretary authorization to make use of the venue statute.[150]

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[145] Exec. Order No. 10,264, 16 Fed. Reg. 6,417, 6,419 (June 29, 1951).

[146] U.S. Dep't of the Interior, Delimitation of Gov't Authority, Secretary's Order No. 2,657 (Aug. 29, 1951), *available at* http://www.asbar.org (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink; then follow "Historical Documents" hyperlink; then follow "Delimitation of Government Authority" hyperlink) (stating that "[t]he purpose of this document is to delimit the extent and nature of the authority of the Government of American Samoa, as it will be exercised under the jurisdiction of the Secretary of the Interior pursuant to Executive Order No. 10264 of June 29, 1951, pending enactment of organic legislation by the Congress") [hereinafter *Secretary's Order*].

[147] *Id.* § 4 (emphasis added).

[148] BLACK'S LAW DICTIONARY 507 (Pocket ed. 1996).

[149] *See* AM. SAMOA CODE ANN. § 46.0602 (2004) (originally enacted as Act of 1966, Pub. L. No. 9-40 (1966)).

[150] *See* Williams v. Am. Sam. Gov't, 2 Am. Samoa 2d 9, 11 (1984) (commenting that Congress and the Department of the Interior can approve of American Samoan law through silence).

The Interior Department, on the other hand, concerned that giving force to section 46.0602 would allow the High Court to order a trial be heard outside of its own territorial boundaries, may contend that "promulgation," within the context of Secretary's Order No. 2,657 means that before the High Court *implements* a change of venue under section 46.0602 it must seek authorization from the Secretary. The difficulty with this "implementation," approach, of course, is that it would inappropriately suggest that the High Court has a duty to consult with the Interior Secretary every time it renders any order derived from other existing laws or regulations—no doubt a level of supervision that would significantly depart from the territory's relative judicial autonomy. Alternatively, were the Secretary unhappy with a change of venue order by the High Court, he or she could find it voidable under the Secretary's plenary authority over the territory.[151] Indeed, even were the Secretary to concede that Secretary's Order No. 2,657, as it now reads, allows the High Court to transfer venue without the Secretary's approval, he or she could simply refer the High Court to the language of Executive Order No. 10,264, granting the Interior Secretary to "take such action as may be necessary and appropriate" over the administration of the territory, and revise Order No. 2,657 to require Interior Department authorization before the High Court can act under section 46.0602 to transfer venue.[152] In short, given the extraterritorial impact of a transfer of venue order under section 46.0602, the High Court must receive legislative approval, and in all likelihood, the consent of the Department of the Interior before it can order a jury trial to be moved elsewhere.

### 2. *Bureaucratic and constitutional challenges in the receiving venue*

Even assuming the High Court could obtain the permission of the territorial legislature and Secretary of the Interior, and thus overcome the local legal hurdles that presently bar an order for change of venue, the court may face

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[151] *See id.* at 10 (stating that Interior Secretary "approval could be rescinded at any time").

[152] *See* Exec. Order No. 10,264, 16 Fed. Reg. 6,417, 6,419 (June 29, 1951). Secretary's Order No. 2,657 has been amended in the past to give the High Court "jurisdiction to effect the judicial enforcement of the Occupational Safety and Health Act of 1970." Secretary's Order, *supra* note 146, § 4. Likewise, Secretary's Order No. 3,009 authorized the American Samoa Government to pass enabling legislation to provide for an elected Governor and Lieutenant Governor in accordance with the laws of America Samoa, thereby superseding the American Samoa Constitution article VI, section 1 that "[t]he Governor of American Samoa and the Secretary of American Samoa shall be appointed as provided in the laws of the United States." U.S. Dep't Interior, Delimination of Gov't Auth, Secretary's Order No. 3,009 (Sept. 13, 1977), *available at* http://www.asbar/org (follow "Legal Resources" hyperlink; then follow "American Samoa Code" hyperlink; then follow "Historical Documents" hyperlink); *see also Williams*, 2 Am. Samoa 2d at 10.

political and constitutional resistance that could prevent transfer to the receiving venue abroad.

Analogous foreign precedent hints at the bureaucratic obstacles the High Court would face in attempting to move a case elsewhere. The Pitcairn Islands are one of the most remote island groups in the South Pacific. Halfway between New Zealand and Chile, Pitcairn is the home to the descendants of Fletcher Christian and other sailors who staged the famous "mutiny on the Bounty" in 1790 against Captain Bligh.[153] Today a territory of the United Kingdom,[154] Pitcairn is accessible only by an eight day boat trip from New Zealand, and is home to a mere forty-five residents who continue to speak a unique mixture of 18th century English and Polynesian.[155] In 1999, however, after an eighteen month investigation by British and New Zealand police, criminal charges were brought against seven Pitcairn Island men for the alleged "rape of girls as young as seven and ten, and of indecent assault against a girl as young as three," in violation of the United Kingdom's Sexual Offences Act of 1956.[156]

While the alleged offenses occurred in the Pitcairn Islands, the British High Commission and Pitcairn Islands Supreme Court felt that trial of the men on Pitcairn would have proven difficult. At the outset, the court observed that there would undoubtedly be "practical difficulties" in "constituting a jury of [twelve] people independent of the accused on Pitcairn," especially on an island of forty-five people.[157] Of perhaps greater concern, however, were the logistics of trial. With witnesses and victims in both Pitcairn and New Zealand, and with limited telecommunications infrastructure, hotels, and air access in the islands, the British High Commission pushed for the trial venue to be transferred to New Zealand.[158] Although locals, including Pitcairn

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[153] *See, e.g.*, Queen v. 7 Named Accused, Trials No. 1-55/03, paras. 1-12 (Pitcairn Islands 2004), *available at* http://www.paclii.org/pn/cases/PNSC/2004/1.html. The case in its entirety provides an extremely detailed account of Pitcairn history.

[154] *Id.* paras. 215-16.

[155] *See "Bounty" Island Faces Sex Charges*, BBC NEWS, July 19, 2002, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/2138840.stm.

[156] *See Pitcairn "Threatened" by Sex Trial*, BBC NEWS, Nov. 7, 2002, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/2414845.stm (comments of Pitcairn prosecutor Simon Moore).

[157] *7 Named Accused*, Trials No. 1-55/03, para. 201. In this particular case, it is worth noting that the Pitcairn Governor removed the right to trial by jury in this case and the Pitcairn Supreme Court upheld this action. *Id.* paras. 196, 206.

[158] This process was aided in large part because the British High Commissioner to New Zealand, Richard Fell, is also the Governor of Pitcairn Island. *See* Ruci Salato-Farrell, *New Zealand Could Host Pitcairn Sex Trials, But Islanders Want Trials Held at Home*, PAC. MAG., *available at* http://www.pacificislands.cc/pm12003/pmdefault.php?urlarticleid=0047. New Zealand Foreign Affairs Minister Phil Goff observed that "[t]he island could not sustain an influx of judges, lawyers, court staff and others who would be involved in the trials." *Id.*

Mayor Steve Christian and the defendants themselves, challenged the propriety of prosecuting Pitcairn Islanders in New Zealand,[159] the Pitcairn Islands Supreme Court concluded that "Pitcairn courts may sit in New Zealand, in accordance with the correct application of the provisions of the law of both jurisdictions."[160]

Foreshadowing the process of effectuating an order under American Samoa Code section 46.0602, this process meant political maneuvering and acceptance was required by *all* parties concerned before transfer of venue could be possible. On the Pitcairn side, the procedure was relatively easy, involving domestic legislative reform, like that proposed for American Samoa above, to allow foreign venue transfers. The Pitcairn Islands Supreme Court noted that "[i]n March 2003, the Governor of Pitcairn made an Order . . . expressly declaring New Zealand to be appointed as a place where the Magistrates and Supreme Courts may sit for the purposes of the current trials."[161]

Obtaining the receiving venue's permission proved more difficult. The Supreme Court recognized that the mere fact that the Pitcairn Governor ordered trials to be heard in New Zealand did not compel the government of New Zealand to accede to his demand. Thus, amidst the defendants' challenge of the change of venue, the Pitcairn Supreme Court pointed out:

> [i]n October 2002, the Governments of the United Kingdom and New Zealand concluded the "Agreement Between the Government of New Zealand and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Trials Under Pitcairn Law in New Zealand and Related Matters." The Agreement provides for Pitcairn courts to sit, and for sentences to be served, in New Zealand. Legislative effect was given to the Agreement by the Pitcairn Trials Act 2002 (NZ), which came into force on 14th March 2003 (due to the Pitcairn Trials Act Commencement Order 2003 (NZ)), along with the Judicature Amendment Ordinance 2003.[162]

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[159] *7 Named Accused*, Trials No. 1-55/03, para. 185.

[160] *Id.* para. 220.

[161] *Id.* para. 194.

[162] *Id.* para. 188. Under British law, the Governor of Pitcairn Island is required to appoint the designated venue among those that can hear the case. *See id.* paras. 190-92 (discussing that under Section 5(2A) of the Pitcairn (Amendment) Order 2002 (UK), "[the courts of Pitcairn may sit] in the United Kingdom, or in such place within any other part of Her Majesty's dominions as the Governor, acting in accordance with the advice of the Chief Justice and with the concurrence of the Governor of such part of Her Majesty's dominions, may appoint"). In the United States, however, it appears that the plenary authority over American Samoa granted by Congress to the Secretary of the Interior allows the Secretary, as opposed to the territorial governor, to make a decision on venue absent consent from the American Samoan legislature or High Court. *See* Exec. Order No. 10,264, 16 Fed. Reg. 6,419 (June 29, 1951).

In other words, Pitcairn had to obtain the consent of the New Zealand government to hold trial on their soil, and await enactment of New Zealand law to set forth the rules and regulations surrounding the manner in which such trials could be held. Not surprisingly, given the diverse political positions held in any legislature, such legislative approval did not come overnight. After protracted negotiations, the New Zealand Green Party stated that it would abstain from voting on the bill because it was torn by the competing demands of ensuring a fair trial in New Zealand and listening to local Pitcairn community calls for an on-island trial.[163] The "New Zealand First" Party opposed the bill altogether.[164] Yet, after several drafts, New Zealand granted the transfer of venue with legislation that simply allowed Pitcairn Courts to sit in New Zealand and apply Pitcairn law, denying New Zealand any input into the decision over the charges to be laid or prosecuted, denying New Zealand the right to determine the trial process or provide any appeal, and requiring that a sentence could not be enforced in New Zealand unless the offender concerned consents.[165] Noted Foreign Affairs Minister Phil Goff, "[i]t simply provides the venue. The legislation preserves the independence of the Pitcairn courts."[166]

Transfer from American Samoa to the State of Hawai'i or to any of the other U.S. territories would require similar political negotiations, requiring, as the Pitcairn Supreme Court stated, "the correct application of the provisions of the law of both jurisdictions."[167]

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[163] *See* Hon. Keith Locke MP, Green Party, Pitcairn Trials Bill, 2002 (NZ): Second Parliamentary Reading (Dec. 10, 2002) ("On the one hand the Green Party supports the main purpose of the bill, which is to assist bringing to justice those believed to be responsible for sex offences. . . . On the other hand, we are not convinced that having the trials in New Zealand is the best solution . . . ."), *available at* http://www.greens.org.nz/searchdocs/speech5928.html; *see also* Hon. Keith Locke MP, Green Party, Pitcairn Trials Bill, 2002 (NZ): Third Parliamentary Reading (Dec. 17, 2002), *available at* http://www.greens.org.nz/searchdocs/speech5929.html; Hon. Phil Goff, N.Z. Minister of Foreign Affairs, Pitcairn Trials Bill, 2002 (NZ): Third Parliamentary Reading (Dec. 17, 2002), *available at* http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=15753 [hereinafter Goff Third Reading].

[164] *See* Goff Third Reading, *supra* note 163; *see also* Chris Double, *The Pitcairn Court Is Allowed to Sit on New Zealand Soil Due to the "Pitcairn Trials Bill" Introduced into New Zealand Law*, PITCAIRN NEWS, Dec. 5, 2005, *available at* http://www.pitcairnnews.co.nz/051205.html.

[165] John Tulloch, *Pitcairn Trials Bill Introduced*, BEEHIVE.GOVT.NZ (New Zealand Government website), Oct. 14, 2002, *available at* http://www.beehive.govt.nz/ViewDocument.aspx?DocumentID=15183; *see also*, Pitcairn Trials Bill, 2002 (NZ) 1-4, *available at* http://www.beehive.govt.nz/Documents/Files/PitcairnTrialsBill.pdf [hereinafter Pitcairn Trials Bill].

[166] *See* Tulloch, *supra* note 165 (citing Goff as explaining that the Bill "parallels the process of the recent Lockerbie trial which was conducted under British law in a British Court but held in the Netherlands").

[167] *7 Named Accused*, Trials No. 1-55/03, para. 220.

At the outset, it might appear that transfer of venue to another U.S. territory would require very little bureaucracy. As we have seen, until Congress provides American Samoa with an organic act, Executive Order No. 10,264, allows the Secretary of the Interior to "take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government in American Samoa," thus granting ultimate authority over the territory to the Secretary as he or she sees fit.[168] Turning to Executive Order No. 10,077, we find that in 1949 President Truman similarly authorized that the "Secretary of the Interior shall take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government on the Island of *Guam.*"[169] Were this the end of the line, transfer of venue to Guam could be very easy. The High Court, with permission of the Secretary of the Interior to transfer a case out of American Samoa, would need only approach the same Secretary in his capacity as administrator of Guam to compel the government of Guam to formulate a means to receive the case for prosecution there, and would not be required to endure the bureaucratic hoops that Pitcairn experienced with New Zealand.

Yet, given subsequent Congressional legislation narrowing the Secretary's authority in Guam and the other territories, transfer of venue to the territories would require much more than the consent of one person. While American Samoa is still governed under Executive Order 10,264, in 1950 Guam moved away from Executive Order 10,077 and became self-governing with Congressional passage of an Organic Act under 48 U.S.C. § 1421 et. seq.[170] According to § 1421a:

> Guam is declared to be an unincorporated territory of the United States . . . The government of Guam shall consist of three branches, executive, legislative, and judicial, and *its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.*[171]

While the meaning of the Secretary's supervisory powers under § 1421a are somewhat vague on their face, it is clear that the Secretary's administrative authority over the civil government of Guam under the Organic Act does not provide the Secretary with the power to create laws in the territory, but only

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[168] 16 Fed. Reg. 6,419.

[169] Exec. Order No. 10,077, 14 Fed. Reg. 5,533 (Sept. 7, 1949) (emphasis added).

[170] *See, e.g.*, IT & E Overseas, Inc. v. RCA Global Commc'ns Inc., 747 F. Supp. 6 (D.D.C. 1990) (finding that "[u]nder the Organic Act of Guam, enacted in 1950, Guam is self-governing"); *see also In re* Request of Governor Felix P. Camacho Relative to the Interpretation and Application of Sections 6 and 9 of the Organic Act of Guam, 2004 Guam 10, ¶ 24 ("A stated purpose of the Organic Act was to establish democratic local government for the island." (internal citations omitted)).

[171] 48 U.S.C. § 1421a (2000) (emphasis added).

with the power to review them. Indeed, under § 1423(a), Congress provided that "[t]he legislative power and authority of Guam shall be vested in a legislature . . . ." The Secretary's authority was correspondingly limited by § 1423i, which provides that "[a]ll laws enacted by the legislature shall be reported by the Governor to the head of the department or agency designated by the President under section 1421a of this title."[172] Moreover, given that the same tempered language of § 1421a has been applied to the other territories, such as the Northern Mariana Islands,[173] and that the Department of the Interior has itself defined its civil administrative power over the territories as simply pertaining to "administrative responsibility for coordinating *federal policy*,"[174] the High Court will still be required to obtain the consent of the receiving territory's legislature before it can properly move a criminal trial there.

With little bureaucratic advantage in transferring venue to the territories, American Samoa may prefer the State of Hawai'i, with its shared Polynesian heritage and estimated 15,000 Samoan residents,[175] as the obvious venue alternative. In addition to the expected political wrangling in the Hawaiian legislature, however, American Samoa may face state constitutional problems by attempting to move venue there.

In the Pitcairn case, the New Zealand legislature did not create a new, limited court with jurisdiction over Pitcairn matters, but passed a venue act providing that "Pitcairn Courts may sit in New Zealand and apply Pitcairn law, and that their proceedings are not justiciable in the New Zealand courts."[176] To do the same, the Hawaiian legislature would have to pass legislation granting the High Court of American Samoa the right to sit in Hawai'i and conduct a criminal jury trial with a Hawaiian jury following both the procedural and substantive laws of American Samoa. This, however, may not

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[172] *Id.* §§ 1423a, 1423i (2000). Although the Secretary must receive the enacted laws, § 1423i makes clear that "[t]he Congress of the United States," and not the Secretary, "reserves the power and authority to annul the same."

[173] *See, e.g.*, Exec. Order No. 12,572, 51 Fed. Reg. 40,401 (Nov. 3, 1986), in which President Ronald Reagan stated that "the relations of the United States with the Government of the Northern Mariana Islands shall, in all matters not the program responsibility of another Federal department or agency, be under the general administrative supervision of the Secretary of the Interior."

[174] Office of Insular Affairs, U.S. Dep't of the Interior, Office of Insular Affairs Responsibilities, http://www.doi.gov/oia/Firstpginfo/oiaoffice.html (last visited Jan. 26, 2007) (emphasis added).

[175] *See* Office of Insular Affairs, U.S. Dep't of the Interior, ASG Main Page, http://www.doi.gov/oia/Islandpages/asgmain.htm (last visited Jan. 26, 2007) (stating that as of 1990, "[i]t is estimated that 15,000 Samoans reside in Hawaii and 32,000 in California and 4,000 in Washington").

[176] Pitcairn Trials Bill, *supra* note 165, at 3.

be possible under Hawaiian law. The Supreme Court of Hawai'i has observed that "[l]egislative power is defined as the power to enact laws and to declare what the law shall be."[177] Under article III, section 1 of the Hawai'i State Constitution, the scope of the state legislature's lawmaking power is extended "to all rightful subjects of legislation *not inconsistent with this constitution or the Constitution of the United States*."[178] This seemingly broad grant of legislative authority is severely diminished in the case of an American Samoa "venue bill" because article I, section 10 of the Hawai'i State Constitution's Bill of Rights provides:

> [n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a finding of probable cause after a preliminary hearing held as provided by law or upon information in writing signed by a legal prosecuting officer under conditions and in accordance with procedures that the legislature may provide.[179]

In the face of this state constitutional guarantee, American Samoa's indictment process may fall below Hawaiian requirements of probable case. American Samoan law provides for neither a grand jury nor a hearing to show probable cause before criminal indictment and instead explains that "[t]he prosecution of felonies may be initiated only by criminal information."[180] While this in itself falls within the requirements of section 10 of Hawai'i's Bill of Rights, the High Court has observed that "the information need not comply with traditional common law standards" and will be acceptable to indict a defendant so long as it "state[s] the essential facts in a way that gives the defendant fair notice of what he is being charged with."[181] Although the High Court is satisfied that such a "fair notice" requirement provides an adequate foundation upon which the territory may bring criminal charges, Judge Samuel P. King, sitting by designation on the Appellate Division of the High Court from the U.S. District Court for the District of Hawai'i has disagreed, arguing instead that current territorial practice is insufficient and that "American Samoa [must]

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[177] Sherman v. Sawyer, 63 Haw. 55, 57, 621 P.2d 346, 348 (1980); Bissen v. Fujii, 51 Haw. 636, 638, 466 P.2d 429, 431 (1970).

[178] HAW. CONST. art. III, § 1 (emphasis added).

[179] HAW. CONST. art. 1, § 10 (emphasis added).

[180] AM. SAMOA CODE ANN. § 46.1220 (2004); Am. Sam. Gov't v. Tauasosi, 3 Am. Samoa 2d 66, 70 (Trial Div. 1986) ("Indictment by a grand jury is not required by law."); Williams v. Am. Sam. Gov't, 2 Am. Samoa 2d 9, 11 (1984) ("The right of a defendant to prosecution by grand jury indictment rather than by information is not a fundamental right under the United States Constitution.").

[181] *Tauasosi*, 3 Am. Samoa 2d at 70; AM. SAM. TRIAL CT. R. CRIM. P. 7 (requiring the prosecution to state only a "plain, concise and definite written statement of the essential facts constituting the offense charged").

provide a judicial hearing on probable cause before a defendant may be placed on trial."[182]

Although Judge King's position failed to persuade a majority on the High Court, his logic may be effective to bar the Hawai'i legislature from passing legislation allowing an American Samoan criminal action to go forward in a Hawaiian venue. Were the Hawai'i legislature to open the Hawaiian forum to American Samoa and allow American Samoa to apply its own rules of criminal procedure inside the state, the state legislature would, unless convinced of the sufficiency of Samoan safeguards, be passing legislation that forces a defendant "to answer for a capital or otherwise infamous crime" without a "grand jury or upon a finding of probable cause," in violation of the state Bill of Rights.[183] In turn, because article III, section 1 of the Hawai'i Constitution prohibits passage of legislation "inconsistent with this constitution or the Constitution of the United States," the Hawai'i legislature would have to either refuse to accept the transfer of venue, or condition any American Samoan "venue bill" on the rule that the original territorial criminal indictment against the defendant comports with constitutional standards under Hawai'i law. Therefore, unless American Samoa amplifies its procedural safeguards in the criminal indictment process, it may find that Hawai'i will reject the case of a high profile criminal defendant on the grounds that the criminal action was not properly initiated by the prosecution, and therefore cannot take place in Hawai'i.[184]

Consequently, no matter where American Samoa seeks to transfer the case of a defendant exposed to intense pretrial publicity, it will have to deal with the political wrangling of the legislature in the receiving forum. While Hawai'i's shared Polynesian background makes it an ideal cultural alternative, given the specific constitutional hurdles imposed by the Hawai'i Constitution and the rigid application of federal constitutional provisions to the states in general, the High Court may be better suited to seek a change of venue in the more relaxed legal environment of other U.S. territories, like Guam and the

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[182] *Williams*, 2 Am. Samoa 2d at 11 (King, J., concurring).

[183] HAW. CONST. art. 1, § 10.

[184] *See, e.g.*, Am. Sam. Gov't v. Foma'i, 1 Am. Samoa 2d 61, 62 (Trial Div. 1982) (noting that if the right to a grand jury were deemed to apply in American Samoa, under the present state of law "a criminal could never be tried here"). Interestingly, American Samoa would experience the same problem in Hawai'i if the substantive criminal charge were in violation of AM. SAMOA CODE ANN. § 46.3902 (2004), which prohibits all abortion unless the life or the health of the mother is implicated. If the state legislature attempted to pass legislation opening the Hawaiian venue to the prosecution of such cases, it would, in effect, be allowing the criminalization of a right to an abortion that is, at present, protected under the U.S. Constitution. Roe v. Wade, 410 U.S. 959 (1973). The Hawaiian legislature would be prohibited from exercising its lawmaking powers in this manner by the state constitution. HAW. CONST. art. III, § 1 (prohibiting the passage of a law inconsistent with federal constitutional rights).

Northern Mariana Islands, where it can be assured that the *Insular Cases* doctrine will protect application of its procedural and substantive laws abroad.[185]

*3. Presidential treaty power and the international receiving venue*

If the High Court does not wish to either amend its indictment procedure or send a defendant to distant, culturally distinct U.S. territories in Micronesia, it may instead opt to remain on the Samoan archipelago and transfer venue just more than sixty miles west to the independent nation of Samoa.[186]

Under Article II, Section 2 of the U.S. Constitution, the President "shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."[187] Although the Governor of American Samoa may have a close personal relationship with the government of Independent Samoa, Article II has been interpreted to mean that the conduct of foreign affairs is a function of the Executive, with foreign relations resting solely in the hands of the President.[188]

The President then, perhaps at the behest of the Secretary of the Interior or the Governor of American Samoa, could enter into treaty negotiations with Independent Samoa to allow cases arising under American Samoan law to proceed with a criminal jury trial in Independent Samoa following both the procedural and substantive laws of American Samoa. Although such a treaty would undoubtedly fail to top either the President or the Senate's foreign relations policy list, were it to go forward, it would resemble the negotiations that occurred between the governments of the United Kingdom and New Zealand in the Pitcairn case, and would require similar domestic implementing legislation by both the American and Independent Samoan governments. Given the convenient geographic proximity and cultural similarities to its international Polynesian neighbors, the treaty option, if politically feasible, would likely be the most preferable to both defendants and the High Court.

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[185] *See, e.g.*, Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1138 n.8 (D. N. Mar. I. 1999) (stating that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law" in the Northern Mariana Islands).

[186] *See* MICHELLE BENNETT ET AL., *supra* note 8, at 9-10 (discussing both the geographic statistics of the islands, but also noting the "[t]he Samoan islands constitute a homogeneous nation politically divided").

[187] U.S. CONST. art. II, § 2.

[188] *See* Flota Maritima Browning De Cuba, Sociadad Anonima v. Motor Vessel Ciudad De La Habana, 335 F.2d 619 (4th Cir. 1964); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).

### C. Solution Three: The Federal Court System

In addition to reinterpreting existing legal precedent to get around section 46.0602 and avoid transfer, or seeking to effectuate the change of venue statute by moving cases offshore, the territory may pursue a third option, which will only be available in cases where a defendant has violated federal law. Under this third approach, local prosecutors can work in conjunction with federal prosecutors to charge foreseeably high profile territorial defendants under federal law, thereby allowing trial to proceed in the United States District Court for the District of Hawai'i and away from a potentially biased jury pool in American Samoa. This result could be achieved by either maintaining the somewhat awkward existing relationship between American Samoa and the federal court system, by providing the territory with federal criminal jurisdiction, or by expanding the jurisdiction of the United States District of Hawai'i to include American Samoa.

#### *1. The status quo and its effect on venue*

In addition to its already unique legal position as an unincorporated territory of the United States, American Samoa remains an aberration even among its territorial colleagues, holding the unique distinction of being the only U.S. territory without a presiding federal district court.[189] Not surprisingly, this creates somewhat of a legal conundrum. Indeed, while 18 U.S.C. § 5 maintains that federal criminal laws are applicable in "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone," including American Samoa,[190] 18 U.S.C. § 3231 contradictorily provides that "district courts of the United States shall have original jurisdiction, *exclusive of the courts of the States*, of all offenses against the laws of the United States,"[191] therefore precluding any Samoan court from prosecuting a defendant for the violation of federal criminal law absent congressional approval.[192] In general, the limitations posed by § 3231 create

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[189] *See* 28 U.S.C. §§ 81-144 (2000). American Samoa also does not come within the jurisdiction of the District of Hawai'i. 28 U.S.C. § 91 (2000); *see also* United States v. Lee, 159 F. Supp. 2d 1241, 1244 (D. Haw. 2001).

[190] *See* 18 U.S.C. § 5 (2000); *see also Lee*, 159 F. Supp. 2d at 1244 ("There is no dispute that these laws [Title 18] apply in American Samoa, a United States territory.").

[191] 18 U.S.C. § 3231 (2000)(emphasis added); *see also* Meaamaile v. American Samoa, 550 F. Supp. 1227, 1235-36 (D. Haw. 1982) (noting that the High Court of American Samoa is a legislative, not an Article III court).

[192] Other U.S. territories have worked around § 3231 thanks to acts of Congress. For example, under § 1424(b), "[t]he District Court of Guam *shall have the jurisdiction of a district court of the United States.*" § 1424(b) (emphasis added); *see also Lee*, 159 F. Supp. 2d at 1245 ("[American Samoa's courts] have never been given the powers that the 'district courts' in the

a distinction without a difference for most local defendants, for "American Samoan law has . . . incorporated all of Title 18 of the United States Code, making violations of Title 18 violations of American Samoan law."[193] That is, although a defendant may not be subject to prosecution in the territory for violations of federal law, his conduct will be simultaneously susceptible to prosecution under local statute, and thus triable in the High Court under Samoan law.[194]

Interestingly, although § 3231 clearly creates a systemic jurisdictional problem for the High Court, the court can use this jurisdictional deficiency to its advantage when dealing with the transfer of venue problem posed by a defendant exposed to intense pretrial publicity. Indeed, that § 3231 can be effectively used to facilitate off-island venue transfer in highly publicized cases is well illustrated in the federal criminal matter of *United States v. Lee*.[195]

According to the FBI, in the late 1990s South Korean garment factory owner Kil Soo Lee developed a "business plan to mass produce clothing for top U.S. retailers" and chose American Samoa as his favored location because it was remote and "he could use the 'Made In America' label on his clothes but not draw attention to his operation."[196] Lee then formed "Daewoosa Samoa Ltd."[197] in the territory, enticing more than 250 Chinese and Vietnamese employees, mostly women, to make clothing in his factory "with promises of a steady job that could help support their children and families back home."[198] Upon arrival in American Samoa, however, the workers "were required to sign a three-year contract with a $5,000 penalty for breaching the contract" and surrender alien registration cards and passports to Lee.[199] They were then

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statutorily defined 'districts' have. American Samoa's courts therefore lack the power to prosecute violations of Title 18.").

[193] *Lee*, 159 F. Supp. 2d at 1245.

[194] *See, e.g.*, Am. Sam. Gov't v. King, 4 Am. Samoa 785, 786 (Trial Div. 1973). Jake King was tried under then-applicable AM. SAMOA CODE ANN. § 18.0405 (1961), which stated that "[a]ny act or failure to act with respect to the American Samoa income tax which constitutes a criminal offense under chapter 75 of subtitle A of the United States Internal Revenue Code of 1954, as adopted by this chapter, shall be an offense against American Samoa." King v. Morton, 520 F.2d 1140, 1142 n.1 (D.C. Cir. 1975).

[195] 159 F. Supp. 2d 1241 (D. Haw. 2001).

[196] FBI Headline Archives, *Anatomy of an International Human Trafficking Case: Kil Soo Lee and the Case of the Samoan Sweatshop*, July 16, 2004, http://www.fbi.gov/page2/july04/kisoolee071604.htm (last visited Jan. 26, 2007) [hereinafter *FBI Part 1*].

[197] *Sweatshop Owner's Appeal Alleges Abduction by FBI*, HONOLULU STAR-BULL., Mar. 28, 2006, *available at* http://starbulletin.com/2006/03/28/news/story08.html [hereinafter *Sweatshop Owner's Appeal*].

[198] *FBI Part 1*, *supra* note 196.

[199] Debra Barayuga, *Victims Call Factory 'Slavery': 300 Ex-Workers Say They Finally Know Freedom with the Sentencing of a Brutal Former Employer*, HONOLULU STAR-BULL., July 3, 2005, *available at* http://starbulletin.com/2005/07/03/news/story1.html; *see also FBI*

forced to work under extremely low-paying conditions in a "gated compound" monitored by security guards, and threatened with "beatings, starvation, false arrests, sexual assaults, debt repayment schemes, deportation, and other tactics" if they failed to complete work in a satisfactory manner.[200] By the time of Lee's arrest nearly two years later, the "average weight of the workers . . . was 76 pounds, with most losing 18 to 25 pounds" each.[201] According to the Department of Justice, Lee's conduct "amounted to nothing less than modern-day slavery"[202] and was "the largest human trafficking case investigated by the FBI and prosecuted by the Department of Justice."[203]

Had Lee been tried in American Samoa under Samoan law, he could have no doubt advanced an even stronger case than Richard Majhor for transfer of venue off-island due to pretrial publicity and jury bias. Indeed, not only did the horrific nature of the alleged conduct make Lee the subject of regional and worldwide media attention, including press accounts from the *Honolulu Star-Bulletin*,[204] the *New York Times*,[205] and the British Broadcasting Corporation,[206] but so too did local controversy that the wife of then Lieutenant Governor, and now Governor, Togiola Tulafano, served as a member of the Daewoosa board of directors, and Togiola as its attorney, bring high profile local personalities

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*Part 1*, *supra* note 196.

[200] *FBI Part 1*, *supra* note 196.

[201] Debra Barayuga, *Owner Imprisoned in 'Slavery' Case*, HONOLULU STAR-BULL., June 23, 2005, *available at* http://starbulletin.com/2005/06/23/news/story6.html (noting further additional horrific treatment by Lee, including a woman "whose left eye was gouged by a Samoan worker ordered by Lee to attack the Vietnamese workers," and who was "attacked with a PVC pipe after a supervisor noticed she was not working"); *see also FBI Part 1*, *supra* note 196 (stating that "[i]n November 2000, Lee ordered his guards to beat or kill any workers who weren't producing clothes fast enough").

[202] *US Factory Boss Guilty of "Slavery,"* BBC NEWS, Feb. 22, 2003, (statements of Lou deBaca, U.S. Dep't of Justice), *available at* http://news.bbc.co.uk/2/hi/americas/2789629.stm [hereinafter *Factory Boss Guilty*].

[203] *Id.* After the guilty verdict, then Attorney General John Ashcroft stated that "[t]oday's conviction demonstrates that the Department of Justice is firmly committed to ensuring that those who traffic in human lives are aggressively investigated, swiftly prosecuted and firmly punished." *Id.*; *see also* U.S. DEP'T OF JUSTICE FACT SHEET ON WORKER EXPLOITATION (Mar. 27, 2001) http://usinfo.state.gov/eap/Archive_Index/U.S._Department_of_Justice_Fact_Sheet_on_Worker_Exploitation.html (last visited Jan. 26, 2007).

[204] *See* Barayuga, *supra* note 201.

[205] *See* Steven Greenhouse, *Beatings and Other Abuses Cited at Samoan Apparel Plant That Supplied U.S. Retailers*, N.Y. TIMES, Feb. 6, 2001, at A14 (describing Lee's workers as "walking skeletons").

[206] *See Factory Boss Guilty*, *supra* note 202.

into the forum of public opinion.[207] Thanks to 18 U.S.C. § 3231, however, the High Court had no occasion to even worry about the issue of venue.

In *Lee*, the U.S. District Court for the District of Hawai'i recognized that American Samoan law has incorporated Title 18 of the United States Code, and made violations of Title 18 separate and independent violations of American Samoan law.[208] Noting, however, that Lee was indicted by *federal* authorities for alleged violations of 18 U.S.C. §§ 1584, 1589, and 1594, for knowingly and willfully holding workers in involuntary servitude and obtaining the labor of the workers by threats of harm, abuse, and physical restraint, the court observed that the High Court of American Samoa was incapable of hearing the case, because under § 3231, "the courts of American Samoa have jurisdiction to prosecute violations of American Samoan law only."[209] The court dismissed Lee's arguments to the contrary.[210] Lee, in an attempt to move the trial back to American Samoa, maintained that in line with § 3231, the language of 48 U.S.C. § 1661, under which Congress vested "*all* civil, *judicial*, and military powers" [211] over the territory in the President, involved a congressional delegation of judicial authority to the High Court to hear "all" federal cases, including those involving federal crimes.[212] The *Lee* court flatly rejected this position, noting that that although § 1661:

> gave the President the right to designate those who would have "all" judicial powers in American Samoa, Congress never expressly turned over to the executive branch jurisdiction over federal crimes. . . . The delegation of "all" judicial powers in American Samoa was not an implicit limitation on or repeal of § 3231. Instead, Congress was conferring the power to establish courts in American Samoa with jurisdiction over matters not otherwise in the exclusive jurisdiction of other courts.[213]

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[207] VIETNAM LABOR WATCH, REPORT ON THE WORKING CONDITIONS OF VIETNAMESE WORKERS IN AMERICAN SAMOA (Feb. 6, 2001), *available at* http://samoa.saigon.com/samoa/overview/reports/default.htm. This report states:

> Ms. Mary Tulafono, the wife of the Lieutenant Governor of American Samoa, Togiola Tulafono [now Governor], is a director and a board member of the company Daewoosa. The Lieutenant Governor, himself, was one of the three people who incorporated Daewoosa according to the company's articles of incorporation. . . . Daewoosa's previous attorney was Lieutenant Governor Togiola Tulafono. Daewoosa then retained another lawyer, Mr. Aitofele T. Sunia, the brother of Governor of American Samoa Tauese Sunia. When public scrutiny was brought to this case, Ms. Tulafono resigned from the board. The brother of the Governor of American Samoa has also resigned as attorney for the Daewoosa Company.

[208] 159 F. Supp. 2d 1241, 1245 (D. Haw. 2001).

[209] *Id.*; *see also* 18 U.S.C. § 3231 (2000).

[210] *Lee*, 159 F. Supp. 2d at 1245.

[211] 48 U.S.C. § 1661(c) (2000).

[212] *Lee*, 159 F. Supp. 2d at 1247.

[213] *Id.* The court noted that, were Congress to have truly delegated "all" judicial authority

Left with the strange dilemma that federal criminal law is applicable in American Samoa, but not triable there, the *Lee* court in turn observed that Article III of the U.S. Constitution provides that "[t]rial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."[214] Pointing to 18 U.S.C. § 3238, the court noted that Congress has directed that where an alleged offense is not committed in an area that is a "district," the trial "shall be in the district in which the offender . . . is arrested or is first brought."[215] Because Lee was arrested by federal authorities and flown from American Samoa to Hawai'i, the court concluded that the United States District for the District of Hawai'i was the district in which Lee was "first brought" within the meaning of § 3238, and therefore the appropriate venue for trial involving American Samoan defendants charged with federal crimes.[216] Lee was subsequently convicted and sentenced to forty years imprisonment.[217]

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to the territorial courts, the High Court of American Samoa would be allowed to hear appeals from patent infringement decisions—decisions which even the Ninth Circuit has no authority to hear. *Id.* As an aside, both *Majhor* and *Lee* are clearly motivated by avoiding conviction rather than pursuing the truly proper venue. Indeed, Majhor demanded trial in Hawai'i, rejecting the American Samoan forum, while Lee, who would no doubt challenge the partiality of a Samoan jury were he there, demanded trial in American Samoa, rejecting the Hawaiian forum.

[214] *Id.* at 1244 (quoting U.S. CONST. art. III, § 2, cl. 3).

[215] *Lee*, 159 F. Supp. 2d at 1244. The statute goes on to say that if the alleged crime was not committed in any district, and if the alleged offender was "not arrested or 'first brought' into a district, an indictment or information may also 'be filed in the district of the last known residence of the offender . . . , or[,] if no such residence is known[,] the indictment or information may be filed in the District of Columbia.'" *Id.* at 1244 n.2 (quoting 18 U.S.C. § 3238 (2000)); *see also* United States v. Erdos, 474 F.2d 157, 160 (4th Cir. 1973) (finding that "[v]enue, in cases of crimes committed outside any district, is controlled by 18 U.S.C. § 3238").

[216] *Lee*, 159 F. Supp. 2d at 1249. It is noteworthy that all U.S. mainland flights from American Samoa travel through Hawai'i, making Hawai'i the venue in which federal criminal defendants are generally "first brought" within the meaning of 18 U.S.C. § 3238. The court in *Lee* recognized, however, that federal proceedings involving American Samoan defendants could theoretically be initiated in any number of federal districts elsewhere in the United States, noting that, "the Ninth Circuit has not indicated whether it considers a defendant to be 'first brought' to Hawaii even if the defendant's plane merely stops in Hawaii en route to another district." *Id.* at 1249 n.4. For all practical and historical purposes, however, the District of Hawai'i is the district in which federal criminal charges will be brought against an American Samoan defendant.

[217] *See Sweatshop Owner's Appeal*, *supra* note 197. The trial court opinion was affirmed at *United States v. Lee*, 472 F.3d 638 (9th Cir. 2006). The Ninth Circuit also noted that "[b]ecause Samoa is not within any judicial district, venue was proper in the District of Hawaii in accordance with § 3238." *Lee*, 472 F.3d at 645.

From a jurisdictional point of view, the lack of a federal court in American Samoa may be highly objectionable in that territorial defendants charged with federal crimes are put in the awkward position of never having the opportunity to be heard before a jury of their Samoan peers.[218] Yet, as *Lee* demonstrates, the seeming pitfalls of this legal paradox provide a formula by which the High Court can effectively overcome the practical difficulties of enforcing the change of venue provision under section 46.0602. Indeed, where the court foresees the likelihood that tremendous pretrial publicity and prospective venue problems will surround a particular case, it can use § 3231 limitations to its advantage as a "preemptive venue tactic" by sitting back and allowing the federal government to take custody of the defendant and prosecute him before an impartial jury in the District of Hawai'i. In short, problems with jurisdiction create solutions for venue.

### 2. *Expanding federal jurisdiction in American Samoa or Hawai'i*

Rather than having to resort to the somewhat convoluted process of extradition to Hawai'i before initiation of federal criminal proceedings, were Congress to either expressly expand the jurisdiction of the High Court, or establish a United States District Court for the "District of American Samoa," as it did for Guam in 48 U.S.C. § 1424(b),[219] the territory may be better served in overcoming both the jurisdictional hurdles *and* venue consequences created by 18 U.S.C. § 3231.

At the outset, despite the jurisdictional gains available to the territory were a federal court created, the longstanding absence of a local federal district has not been the result of Congressional oversight, but rather reaction to public opinion. Indeed, in February 2006, U.S. Congressman Eni Faleomavaega, American Samoa's non-voting representative to Congress, introduced H.R. 4711 to the U.S. House of Representatives proposing to provide a federal district court for American Samoa.[220] Noted Faleomavaega, in reaction to the § 3231 jurisdictional limitations:

> [E]stablishing a federal district court in American Samoa is essential to resolving the constitutional and jurisdictional uncertainties that have arisen in our Territory. By establishing a federal court in American Samoa, the process of

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[218] *See* Letter from Eni Faleomavaega, U.S. Congressman, to James Sensenbrenner, U.S. Congressman (Feb. 9, 2006) ("Currently, federal cases originating in American Samoa are tried in the federal districts of Hawaii or Washington, DC, thousands of miles from our district, creating serious constitutional issues regarding the Sixth Amendment guarantee of a trial by a jury of one's peers."), *available at* http://www.asbar.org [hereinafter Eni Letter].

[219] 48 U.S.C. § 1424(b) provides that "[t]he District Court of Guam shall have the jurisdiction of a district court of the United States."

[220] H.R. 4711, 109th Cong. (2006).

> prosecuting federal crimes will be simplified, the financial and emotional burden of defending a federal court case will be eased, appeals of convictions based on a lack of federal jurisdiction will be more difficult, and justice will be served in American Samoa on a timelier basis.[221]

Aumua Amata Coleman, daughter of former territorial Governor Tali Peter Coleman, and prominent local Republican, quickly responded, perhaps ignorant of the deference to local culture advanced by the *Insular Cases*, that "should a U.S. Federal District Court be placed in American Samoa, we would quickly lose control of its lands" and similarly, "when we hold hearings about having a Federal District Court established in our islands, we are having a hearing about whether it is time to end our special Samoan relationship with our land."[222] Within a month of introducing H.R. 4711 to committee Faleomavaega withdrew the bill in reaction to public fears and concerns expressed by traditional Samoan leaders.[223]

Although by adding a federal court to the territory a defendant could be charged and tried in the district in which the offense was committed, with regard to the issue of transfer of venue, the addition of a federal district may somewhat limit the transfer of certain defendants off-island when an impartial local jury cannot be had. In general, were a federally charged defendant to

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[221] *See* Eni Letter, *supra* note 218.

[222] Press Release, Aumua Amata, Aumua Amata Urges "Extreme Caution" on Hearings for U.S. Federal District Court in American Samoa, (Feb. 15, 2006), *available at* http://www.asbar.org. Amata's fears that the U.S. Constitution will override local racially restrictive land laws simply by introducing a federal court to the territory are popular, but appear unfounded. *See* AM. SAMOA CODE ANN. § 37.0204(b) (2004) ("It is prohibited to alienate any lands except freehold lands to any person who has less than one-half native blood."); *see, e.g.*, Presiding Bishop v. Hodel, 637 F. Supp. 1398, 1411 n.23 (D.D.C. 1986) (indicating that traditional "strict scrutiny" constitutional review principles may find that American Samoa "has demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and in preserving the Fa'a Samoa . . . [and that] the prohibition against the alienation of land to non-Samoans . . . [is] necessary to the safeguarding of those interests" (internal quotation marks omitted) (quoting Craddick v. Territorial Registrar, 1 Am. Samoa 10 (1980))), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987). Additionally, given the application of the *Insular Cases* in *King v. Morton*, 520 F.2d 1140 (D.C. Cir. 1975) and in *Wabol v. Villacrusis*, 958 F.2d 1450, 1451 (9th Cir. 1990) (upholding racially restrictive land restrictions in the Northern Mariana Islands), a federal court would appear to have little impact on Samoan land ownership laws.

[223] Press Release, U.S. Congressman Eni Faleomavaega, Faleomavaega Informs ASG of Status of Federal District Court Bill, (Mar. 16, 2006) ("Faleomavaega announced that as a result of recent Fono Resolutions and opinions expressed by several traditional leaders opposing this legislation he will request the Chairman of the House Judiciary Committee not to conduct any hearings on H.R. 4711 at this time."), *available at* http://www.asbar.org. Instead Faleomavaega maintained that he would defer the bill until after a General Accounting Office study analyzes the efficacy of providing a federal district in the territory or expanding the jurisdiction of the High Court to include federal criminal matters. *Id.*

advance a claim that no impartial jury exists in the United States District of American Samoa, the new federal court, bound by Federal Rule of Criminal Procedure 21, could "transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there."[224] Because the adequacy of a motion for change of venue is within the discretion of court,[225] and because the court may transfer the case to any district of its own choosing,[226] the practical result would be the same as in *United States v. Lee*, for the federal defendant could be transferred by the District of American Samoa to the District of Hawai'i where an impartial jury could be empanelled.

Yet, while a federal court would appear to be an improvement upon the status quo in that the territory need no longer send *all* federal defendants to Hawai'i, but only those facing prejudice, there are possible limitations. As discussed with regard to Marlon Uli, the language of Federal Rule of Criminal Procedure 21 allows the court to transfer venue *only* "[u]pon the *defendant's* motion"[227] and not on a motion by the prosecution, or *sua sponte*. The Fourth Circuit has observed that because the Sixth Amendment to the Constitution provides that a defendant has a right to be tried in the district where the crime was allegedly committed, both the Constitution and the language of the Rule provide that "a change of venue under Rule 21 cannot be imposed on a defendant against his will," and that "[a]bsent the request [by the defendant], a change of venue may not be ordered."[228] Once again, such an interpretation of a federal court's limited power to transfer venue could seriously handicap a Samoan court if a clearly guilty but extremely influential defendant demanded that trial go forward in American Samoa. Indeed, under such a scenario, despite the fact that the court, the prosecution, and possibly the defendant have concluded that no jury in American Samoa would convict the

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[224] FED. R. CRIM. P. 21(a).

[225] United States v. Marcello, 280 F. Supp. 510 (E.D. La. 1968); *see also* United States v. Williams, 523 F.2d 1203 (5th Cir. 1975) ("[A]bsent an abuse of discretion, the district court's ruling [on a motion for change of venue] will not be disturbed on appeal.").

[226] *See Marcello*, 280 F. Supp. at 510; *see also In re* Application to Take Testimony in Criminal Case Outside Dist., 102 F.R.D. 521 (E.D.N.Y. 1984) (explaining that there is no limit on what district the court may transfer the case to); Holdsworth v. United States, 179 F.2d 933 (1st Cir. 1950) (holding that a motion to transfer criminal prosecution begun in federal district court in Massachusetts to Maine was a matter of discretion for the Massachusetts judge to whom the motion was presented, and transfer order could not be reviewed by the district court in Maine); *see also* FED. R. CRIM. P. 21, advisory committee note ("It is also made clear that on a motion to transfer under this subdivision the court may select the district to which the transfer may be made.").

[227] FED. R. CRIM. P. 21(a) (emphasis added).

[228] United States v. Abbott Laboratories, 505 F.2d 565, 572 (4th Cir. 1974).

defendant of the alleged crimes, by taking advantage of his right to avoid triggering Rule 21, the United States District Court for the District of American Samoa could be forced to dismiss the case, so as to not impose an unfair or partial trial against the defendant,[229] or be left to presume "that the jury in the district where the crime was committed is impartial if the defendant refuses to move for a change of venue."[230] Consequently, it remains to be seen whether the creation of a new district in American Samoa would subsequently lead to incorporation under the *Insular Cases* of a defendant's Sixth Amendment and Rule 21 rights to venue in the district where the crime was allegedly committed, or whether the court would conclude that a defendant's constitutional right to an impartial jury surpasses his right to the venue of his choice. Until those issues are resolved, extradition to Hawai'i under the status quo may remain the best guarantee that federal defendants, such as a hypothetical Marlon Uli or powerful Samoan figure, receive an impartial jury trial in the District of Hawai'i.

Although the jurisdictional gains of a local federal district court would likely outweigh the negative consequences of this unlikely scenario, the remaining alternatives could put American Samoa within the federal criminal system but also ensure that a local defendant could not fully exploit Rule 21 to obtain a favorably disposed jury pool. The most obvious solution, and the one that would satisfy both traditional leaders like Amata Coleman and those concerned that the introduction of a federal court would bring excessive bureaucracy, would be for Congress to simply expand the High Court's jurisdiction to hear "all offenses against the laws of the United States"[231] so as to overcome the barriers of § 3231. In such a situation, a defendant like Lee would no longer need to make the tenuous argument that the judicial powers vested by Congress in the President under 48 U.S.C. § 1661 implicitly include jurisdiction over federal crimes, but rather could now prove that the High

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[229] *See* United States v. Engleman, 489 F. Supp. 48 (E.D. Mo. 1980) (observing that a trial judge has a nondelegable responsibility under the Federal Rules of Criminal Procedure, Rule 21, and U.S. Constitution Amendment VI to ensure that a defendant receives a fair and impartial trial). It is unclear whether this duty would compel the court to override the defendant's right to venue by transferring the case and ensuring an impartial trial, or if the court would be best left to enforce both by dismissing the case outright. The *Abbott* court cautions, however, that "a defendant, who declines to request a change of venue but who seeks dismissal of an indictment against him . . . [must] demonstrate the existence of actual prejudice far more convincingly." 505 F.2d at 572.

[230] Scott Kafker, Comment, *The Right to Venue and the Right to an Impartial Jury: Resolving the Conflict in the Federal Constitution*, 52 U. CHI. L. REV. 729, 732 (1985) (observing that where a defendant fails to move for transfer of venue some courts have resorted to dismissing the case altogether, while others have presumed jury impartiality based on the fact that the defendant has made no Rule 21 motion).

[231] 18 U.S.C. § 3231 (2000).

Court does in fact have such authority expressly.[232] Moreover, with regard to the venue problems posed by a defendant charged under federal law who seeks to take advantage of local jury bias in his favor, the High Court could feasibly render decisions on substantive federal criminal law, but continue to apply its own rules of criminal procedure. Because, as noted earlier, American Samoa Code section 46.0602 departs from the strict language of Rule 21 by allowing transfer of venue "by order of the Chief Justice or the Associate Justice," and not solely on motion of the defendant,[233] the High Court would no longer be forced to wait for a venue motion initiated by the defendant, but could, on its own accord, transfer matters of federal criminal law to the District of Hawai'i when appropriate.[234]

Finally, although perhaps somewhat unsatisfactory, Congress could simply pass legislation that, in effect, codifies the status quo. As we may recall, *United States v. Lee* concluded that because American Samoa was not a "district" under federal law, the District of Hawai'i may serve as the district in which a defendant is "first brought" under 18 U.S.C. § 3238.[235] Were Congress to find it inappropriate to either create a federal district court in American Samoa, or confer to the High Court of American Samoa jurisdiction

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[232] United States v. Lee, 159 F. Supp. 2d 1241, 1247 (D. Haw. 2001); *see also* 48 U.S.C. § 1661(c) (2000).

[233] *See supra* note 72 and the accompanying text discussing this issue. Once again, AM. SAMOA CODE ANN. § 46.0602 (2004), involving transfer of venue in territorial *criminal* actions follows the language of 28 U.S.C. § 1404(a) (2000), covering transfer of venue in federal *civil* actions. Although it remains unclear why the territorial legislature chose this language over FED. R. CRIM. P. 21, because courts interpreting § 1404(a) have determined that "[a] transfer can be made upon motion by either of the parties or by the court *sua sponte*," local rules are more liberal, and allow for court initiated transfer. Clisham Mgmt. Inc., v. Am. Steel Bldg. Co., 792 F. Supp. 150, 157 (D. Conn. 1992).

[234] The problem, however, is that if the court were to retain its territorial criminal procedural law when sitting on federal criminal matters, it may once again have to abandon the language of § 46.0602 requiring transfer "to any court in which it might have been brought originally" in order to effectuate the rule. Indeed, given the Article III, Section 2, and Amendment VI venue rights of the Federal Constitution, that a crime be originally prosecuted in the state or *district* in which the crime was alleged to have occurred, American Samoa—now vested with federal jurisdiction—may be the only location which could hear the crime "originally," making transfer to Hawai'i difficult. *See, e.g.*, United States v. Evans, 62 F.3d 1233, 1236 (9th Cir. 1995) ("A defendant has a constitutional right to be tried in the state and district where the crime is alleged to have been committed."). On the other hand, the mere expansion of the High Court's jurisdiction may not warrant interpreting the High Court as a "district" for Article III or Sixth Amendment purposes. The High Court could rationally conclude that it is not a "district," and that therefore the defendant can be alternatively tried in the district in which he is "first brought" under 18 U.S.C. § 3238, allowing the District of Hawai'i to serve as a federal district that could have original jurisdiction over the case within the meaning of § 46.0602 and thus serve as an appropriate venue alternative.

[235] *See Lee*, 159 F. Supp. 2d at 1249.

over federal crimes, but simultaneously wish to provide American Samoans with access to the federal district court system, it could simply extend the jurisdiction of the United States District Court for the District of Hawai'i to include the authority to preside over federal crimes originating in American Samoa. Indeed, Congress has already granted the District of Hawai'i jurisdiction to hear maritime criminal cases beyond its borders pursuant to 48 U.S.C. § 644a, providing in part:

> The jurisdiction of the United States District Court for the District of Hawaii is extended to all civil and criminal cases arising on or within the Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Palmyra Island, Baker Island, Howland Island, Jarvis Island, and . . . [to] Canton and Enderbury Islands . . . .[236]

While this solution would no doubt be a significant improvement for parties who have up until now been denied the opportunity to remove *civil* proceedings to federal court, when applied to criminal matters, the practical result would be the same as the *status quo*, forcing all federal criminal defendants, including those who would be denied an impartial jury in the territory, to undergo trial by jury in the District of Hawai'i.

## IV. CONCLUSION

American Samoa, although far from the shores of the mainland United States, has sought to conform its territorial system of criminal justice to the substantive and procedural laws found elsewhere in America. Yet, while this legal allegiance no doubt reflects a recognition of its political association with the U.S., some laws that may seem practical and effective in the states may in fact be difficult, if not impossible to implement in the territories. American Samoa's change of venue statute serves as such an example. On its face, there is nothing terribly unusual about American Samoa Code section 46.0602. Indeed, it simply allows the High Court to transfer a matter to another court "in the interest of justice and for the convenience of the parties and witnesses."[237] But upon considering the geographic location of the territory, the size of its population, and the lack of an alternative territorial venue, it

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[236] 48 U.S.C. § 644a (2000). This section further states that "[t]he laws of the United States relating to juries and jury trials shall be applicable to the trial of such cases before said district court." *Id.*; *see also* 28 U.S.C. § 91 (2000) (stating that "Hawaii constitutes one judicial district which includes the Midway Islands, Wake Island, Johnston Island, Sand Island, Kingman Reef, Palmyra Island, Baker Island, Howland Island, Jarvis Island, Canton Island, and Enderbury Island"). *But, c.f.*, Yandell v. Transocean Air Lines, 253 F.2d 622 (9th Cir. 1957) (discussing some jurisdictional limitations of section 644a).

[237] AM. SAMOA CODE ANN. § 46.0602 (2004).

becomes apparent that section 46.0602 is as much an obstacle in practice as it is a solution on paper.

At the outset, given the small and relatively confined population of the island territory, concerns of jury bias and the need for change of venue are no doubt more frequent in American Samoa than in the well populated and diverse communities in the mainland. Not only does the territory have only 57,291 residents, with forty percent concentrated in an 8.5 square mile area, but so too do statutory restrictions on eligibility for jury service automatically bar an estimated seventy-two percent of the population from serving on any jury. Moreover, although American Samoa has demonstrated in the thirty years since *King v. Andrus* that local culture is generally no obstacle to the effective implementation of trial by jury, the erroneous acquittal in the Marlon Uli murder case raises once again the issue that this small island community may, under certain circumstances, be manipulated by public opinion or social influences when trying to reach a verdict.

The irony, of course, is that just as American Samoa is potentially one of the most likely jurisdictions to warrant a transfer of venue in highly publicized criminal matters, so too is it the jurisdiction that may be least equipped to effectuate such a transfer. The High Court could order transfer to Hawai'i, but in so doing, it would, at the very least, need to obtain the permission of the territorial legislature, the Secretary of the Interior, the Hawai'i legislature, and potentially have to tackle further constitutional barriers—no easy task. While alternative venues may also exist, such as fellow territories or other Polynesian nations, they too will require significant bureaucratic wrangling before such transfers may take place.

Consequently, the easiest options, and perhaps the best, are for the territory to pursue legal avenues presently available at home and adopt solutions that require few negotiations with other sovereign entities. Indeed, with the language of the *Insular Cases* at its fingertips, the High Court can reasonably construe a defendant's right to a jury as a limited right, thereby allowing it to authorize a bench trial in place of a change of venue where pretrial publicity has rendered an impartial jury impossible. Similarly, by taking advantage of the current jurisdictional limitations imposed by 18 U.S.C. § 3231 or by convincing Congress to expand the High Court's authority to hear federal criminal matters, the High Court can work in conjunction with the United States District Court for the District of Hawai'i to ensure that cases triable under federal law that run a risk of tremendous local pretrial publicity, such as that of Kil Soo Lee, are initiated in Hawai'i before they implicate the need for a court ordered change of venue under section 46.0602. Ultimately, while jury trials are not inherently impossible in American Samoa, I have attempted to demonstrate that unique problems of jury partiality may arise in the territory in light of the island's geography, demographics, and heightened susceptibility

to pretrial publicity, and that judicial and strategic solutions exist that can guide the High Court and parties alike in resolving territorial transfer of venue problems when they occur.

# Postmodernism, Representation, Law

Reza Dibadj*

"What are we calling postmodernity? I'm not up to date."
—Michel Foucault[1]

## I. INTRODUCTION

Postmodernism suffers from a bad rap. Commentators variously describe it as "a nickname attributed to characters of shadowy reputation"[2] and as a phenomenon "more kitschy than monstrous, so distressing to its critics."[3] One even goes so far as to call postmodernism an "overripe bouillabaisse."[4] Is such criticism warranted? After all, the postmodern label has been used to discuss a spellbinding array of issues in the legal literature: academic freedom,[5] professional ethics,[6] U.S. Supreme Court jurisprudence,[7] religion,[8] the Internet,[9] stem cell research,[10] and even the asterisk footnote,[11] to name a few. At one level, then, it is difficult to take seriously a concept that is so loosely

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[1] 2 MICHEL FOUCAULT, *Structuralism and Post-Structuralism, in* AESTHETICS, METHOD, AND EPISTEMOLOGY 433, 447 (James D. Faubion ed., Robert Hurley et al. trans., The New Press 1998) (1994).

[2] CHARLES LEMERT, POSTMODERNISM IS NOT WHAT YOU THINK, at ix (1997); *see also* ANDREAS HUYSSEN, AFTER THE GREAT DIVIDE 199 (1986).

[3] IHAB HASSAN, THE POSTMODERN TURN: ESSAYS IN POSTMODERN THEORY AND CULTURE 24 (2d ed. 2001).

[4] Dennis W. Arrow, *Spaceball (Or, Not Everything That's Left Is Postmodern)*, 54 VAND. L. REV. 2381, 2389 (2001).

[5] *See, e.g.*, David Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 CAL. L. REV. 1377 (1998).

[6] *See, e.g.*, Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305 (2000).

[7] *See, e.g.*, Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673 (2000).

[8] *See, e.g.*, Ruti Teitel, *A Critique of Religion As Politics in the Public Sphere*, 78 CORNELL L. REV. 747, 751 (1993) ("In a postmodern legal order, the perceived lack of authoritative standards nurtures the turn to religion.").

[9] *See, e.g.*, CHRISTOPHER BUTLER, POST-MODERNISM: A VERY SHORT INTRODUCTION 117 (2002) ("The Internet is at present a typically postmodernist phenomenon—it is (currently) a non-hierarchized, indeed disorganized, collage.").

[10] *See, e.g.*, Lars Noah, *A Postmodernist Take on the Human Embryo Research Debate*, 36 CONN. L. REV. 1133 (2004).

[11] *See, e.g.*, Charles A. Sullivan, *The Under-Theorized Asterisk Footnote*, 93 GEO. L.J. 1093, 1101 (2005).

thrown about; at another, what is it about postmodernism that is so fascinating?[12]

This Article seeks to go beyond cute rhetorical labels to consider what, if anything, postmodernism might mean, and why legal scholars should care. I cover an eclectic mix of characters, from postmodernism's principal theorists to some of its most flamboyant practitioners. I discuss Lyotard and Warhol, Baudrillard and Madonna, Foucault and Venturi, Derrida and Snoop Doggy Dog, Rorty and Gehry, to name just a few. At times, the journey might seem amusing, perhaps even strange. But it is important to remember throughout that one simple question drives the Article: does any of this matter to law, and if so, how should it be applied?

My thesis is that once one clears the underbrush of jargon and pessimism, postmodernism can most usefully be understood as a movement that struggles with how to represent a messy, chaotic world where simple, reassuring stories will not do. After discussing postmodernism's attention to the context in which signs and symbols appear and how they are mediated, I develop two main points. First, scattered strands of postmodern legal scholarship might regroup to question how law decontextualizes and mediates power relations. Doing so would enable a more constructive agenda toward reform. Second, postmodernism offers a chance at mapping new topologies within which to represent reality more accurately and engage more fully in the world in which we live. I emphasize network theory and participatory democracy.

The Article is structured into three principal parts. Part II sets the stage by offering a conventional analysis of postmodernism. It begins by defining postmodernism as a reaction to modernism and its meta-narratives, but then suggests that postmodernists have made two nearly fatal errors: their writing is jargon-filled, and they do not offer a program for constructive social change. Under this prevailing reading, then, postmodernism is not of much use.

Part III suggests a different tack on postmodernism by arguing that the movement can perhaps be best understood as a struggle with how to represent a world devoid of accurate meta-narratives. It argues that postmodernism's greatest contribution is to signal attention to the context in which messages appear, as well as how they are mediated as signs and symbols. Examples from popular culture, art, and architecture provide illustrations.

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[12] Stephen Feldman notes:

> The most obvious problem with the various criticisms of postmodernism is the wild inconsistency. How can a theory or jurisprudential approach that is bereft of meaningful content undermine the Western legal system? How can a movement that is already over and done lead to political quiescence? In fact, why bother criticizing postmodernism if it is already a joke?

Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2357 (2001).

Finally, and most importantly, Part IV relates the representational insight to law. It argues that for postmodernism to become relevant, two things should happen. First, existing legal scholarship grouped under the "postmodern" rubric should shift from its various fragmented, critical visions to analyze how law decontextualizes and mediates power relations. Doing so would enable a shift to a more constructive agenda that could put forward specific reforms. Second, new topologies within which to represent law and the social interactions it regulates must emerge. To start the conversation, I grapple with network theory and participatory democracy.

In sum, I have two main goals: defining and illustrating a different take on postmodernism, and highlighting why such a conception should be useful to legal scholars.

## II. POSTMODERNISM

Before offering an alternative view on postmodernism and how it might inform legal discourse, it is worthwhile to begin by understanding postmodernism as scholars have conventionally interpreted it. The usual analysis revolves around defining postmodernism through its relationship to modernity and its narratives, then promptly dismissing the movement for its jargon and critical stance.

### *A. What Is "Postmodernism"?*

Defining postmodernism is inherently treacherous.[13] It is a concept "not widely accepted or even understood today."[14] Oddly enough, the "term gets used everywhere, but no one can quite explain what it is."[15] Given the complexities inherent in grappling with postmodernism,[16] some prominent

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[13] *Cf.* PAULINE MARIE ROSENAU, POST-MODERNISM AND THE SOCIAL SCIENCES, at ix (1992) ("Past experience tells me that detached efforts to evaluate post-modern modes of thought are quintessentially 'no win' ventures.").

[14] Frederic Jameson, *Postmodernism and Consumer Society*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 111, 111 (Hal Foster ed., 1983).

[15] TIM WOODS, BEGINNING POSTMODERNISM 1 (1999); *see also* HASSAN, *supra* note 3, at 117 ("[P]ostmodernism suffers from a certain semantic instability: that is, no clear consensus about its meaning exists among scholars.").

[16] *See, e.g.*, GARY MINDA, POSTMODERN LEGAL MOVEMENTS 2 (1995) ("Postmodernism is an elusive term not easily defined or captured by standard dictionaries or interpretive strategies."); WOODS, *supra* note 15, at 14 ("[I]t seems symptomatic of postmodernism's character that there is a lack of short, pithy definition."); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508 (1992) ("[T]here is no single principle on which postmodernism is grounded or which comprises its essence.").

commentators have, perhaps wisely, even ducked the delicate issue of trying to define the term.[17] A working definition, however, is a necessary starting point—I focus on two interrelated concepts: modernity and narrative.

Postmodernism is perhaps first best approached through understanding its curious relationship to modernity. In turn, modernity reflects a belief in clear epistemological foundations grounded in reason.[18] Historically,

> the modern period spanned the mid-Enlightenment to the 1960s and early 1970s. It was characterized by the power of reason and the inherent dignity and uniqueness of individuals as ends in themselves. A basic tenet of modernism held that the faculty of reason could operate as a neutral court of appeal to weed out beliefs and practices based on superstition and blind tradition.[19]

Related characteristics of modernity include a belief in progress,[20] often through technology.[21]

The modern stance, however, is not without its harsh critics. To some observers, the past century has been a deeply disturbing one:

> What was progress in the modern age? At first, it was the conquest of Brazil and the Congo, then of the plains of Argentina and the Dakotas, then of the ores and fossil fuels that joined railroads and highways, then of the stellar skies through which men flew only to burn each other at war. Ultimately, for the middle classes, reason was the move to the suburbs, or to the receding countryside, there to await the coming of Pizza Hut, the Gap, Radio Shack, and Barnes & Noble. But the day is coming and now is when one can order pizza, jeans, pagers, and cook books without stirring from the worn comforts of home. That will be the day when time, encountering the stupid resistance of real space, curves back

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[17] *See, e.g.*, FOUCAULT, *supra* note 1, at 448 ("[I] do not understand what kind of problem is common to the people we call 'post modern' or 'poststructuralist.'"); HUYSSEN, *supra* note 2, at 183 ("I will not attempt here to define what postmodernism *is*. The term '*post*modernism' itself should guard us against such an approach as it positions the phenomenon as relational.").

[18] *See, e.g.*, MINDA, *supra* note 16, at 224 ("A central characteristic of modernity is the belief in epistemological foundations—the idea that knowledge can be justified only if it rests on indubitable foundations."); DOUGLAS E. LITOWITZ, POSTMODERN PHILOSOPHY AND LAW 9 (1997) ("A distinguishing feature of modernism, then, is the reliance on sweeping metaphysical and/or epistemic claims to undergird positions in political and legal philosophy.").

[19] LITOWITZ, *supra* note 18, at 7; *see also* Francis J. Mootz, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 295 (1993).

[20] *See, e.g.*, LEMERT, *supra* note 2, at 4 ("*Modernism*—that is, roughly: the culture of the modern world—had always extended the ethical promise that if people worked hard at legitimate enterprises things would get better, for their children, if not themselves.").

[21] *See, e.g.*, Rey Chow, *Postmodern Automatons*, *in* FEMINISTS THEORIZE THE POLITICAL 101, 101 (Judith Butler & Joan W. Scott eds., 1992) ("In this paper, I follow an understanding of 'modernism' that is embedded in and inseparable from the globalized and popularized usages of terms such as 'modernity' and 'modernization,' which pertain to the increasing technologization of culture.").

> upon itself, breaking the seal of confidence, opening the cracks for beasts and other things.[22]

Clearly, though, modernism was not intended to lead to the exploitation of the earth, war, urban sprawl, social isolation, and a plethora of other contemporary ills. What has gone wrong? A group of intellectuals sought to explore this question and began trying to understand the assumptions underlying modernism.[23] As Michel Foucault sums up:

> I belong to a generation of people who witnessed the collapse, one after another, of most of the utopias that had been constructed in the nineteenth and at the beginning of the twentieth century, and who also saw the perverse and sometimes disastrous results that could ensue from projects that were extremely generous in their intentions.[24]

Bruno Latour reflects similar concerns when he laments that "we moderns from the western world seem to have lost some of our self-confidence. Should we *not* have tried to put an end to man's exploitation of man? Should we *not* have tried to become nature's masters and owners?"[25] In large measure bred from this disillusionment,

> [p]ostmodernism, if it is about anything, is about the prospect that the promises of the modern age are no longer believable because there is evidence that for the vast majority of people worldwide there is no realistic reason to vest hope in any version of the idea that the world is good and getting better. The modern age is (some would say, was) about the inevitability of human progress.[26]

Postmodernism, descriptively enough, is thus at one level a reaction to modernism.[27] More technically, as Pierre Schlag notes, postmodernism

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[22] LEMERT, *supra* note 2, at 163.

[23] *Cf.* HUYSSEN, *supra* note 2, at 183 ("[P]ostmodernism's critical dimension lies precisely in its radical questioning of those presuppositions which linked modernism and the avant-garde to the mindset of modernization.").

[24] 3 MICHEL FOUCAULT, *What Is Called "Punishing"?*, *in* POWER 382, 384 (James D. Faubion ed., Robert Hurley et al. trans., The New Press 2000) (1994).

[25] BRUNO LATOUR, WE HAVE NEVER BEEN MODERN 9 (Catherine Porter trans., Harvard Univ. Press 1993) (1991).

[26] LEMERT, *supra* note 2, at xii; *see also* LITOWITZ, *supra* note 18, at 10.

[27] *See, e.g.*, FREDERIC L. JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM 1 (1991) ("As the word itself suggests, this break is most often related to notions of the waning or extinction of the hundred-year-old modern movement (or to its ideological or aesthetic repudiation)."); Steven Connor, *Introduction*, *in* THE CAMBRIDGE COMPANION TO POSTMODERNISM 1 (Steven Connor ed., 2004) ("One might almost say that the derivative character of postmodernism, the name of which indicates that it comes after something else—modernism, modernity, or the modern—guarantees it an extended tenure that the naming of itself as an *ex nihilo* beginning might not."); Hal Foster, *Postmodernism: A Preface*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, *supra* note 14, at ix, xii ("The

"questions the integrity, the coherence, and the actual identity of the humanist individual self—the knowing sort of self produced by Enlightenment epistemology."[28]

While it might be tempting to suggest that postmodernism is simply a rejection of modernism, such a characterization would be too crude. It is perhaps better viewed as a movement that has internalized modernism,[29] and desires to reflect upon[30]—or even surpass[31]—its precursor.[32] As Jean-François Lyotard asks, "[w]hat, then, is the postmodern? What place does it or does it not occupy in the vertiginous work of the questions hurled at the rules of image and narration? *It is undoubtedly part of the modern.*"[33] Thus, at its

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postmodernism of reaction is far better known: though not monolithic, it is singular in its repudiation of modernism."); *cf.* HASSAN, *supra* note 3, at 121 (diagramming several contrasts between modernism and postmodernism).

[28] Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 173 (1990); *see also* Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 757 (1992) ("Postmodernism . . . is essentially a methodological and metaethical enterprise that challenges the dominance of subject-centered and foundational/universalistic modes of thought that trace their roots beyond Kant to Descartes."); ROSENAU, *supra* note 13, at 13 ("[P]ost-modernists share a skepticism about the possibility of truth, reason, and moral universals, a conviction that terms like good and bad are inappropriate, and an insistence that subjective and conflicting interpretations are the closest humans can come to 'understanding'." (citations omitted)); Francis J. Mootz, *Postmodern Constitutionalism as Materialism*, 91 MICH. L. REV. 515, 525 (1992) (noting the "antifoundationalist epistemology of postmodernism").

[29] *See, e.g.*, LEMERT, *supra* note 2, at 24 ("If the world is postmodern (and many think it is), then it is also somehow still modern."); FOSTER, *supra* note 27, at ix (explaining that "modernism is now largely absorbed").

[30] *See, e.g.*, JAMES STEELE, ARCHITECTURE TODAY 21 (1997) ("Classicism has also been the wellspring for Post-Modernism, which should not be surprising, since this movement is a commentary on, rather than a refutation of, the Modernism it is often erroneously characterized as replacing."); LEMERT, *supra* note 2, at 75 ("The more sensible postmodernists, being generally respectful of much in modernity, are rigorously skeptical of the prospects that modernity's grand ideals ever will, or ever were truly meant to, become the true *manifest* structure of world things.").

[31] *See, e.g.*, Foster, *supra* note 27, at ix ("[I]f the modern project is to be saved at all, it must be exceeded.").

[32] One commentator even amusingly suggests that "in its wider popular reception it [postmodernism] appears to be a rather vague, nebulous, *portemanteau* word for everything that is more modern than modern." WOODS, *supra* note 15, at 3.

[33] JEAN-FRANÇOIS LYOTARD, *Answering the Question: What Is Postmodernism?*, *in* THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 79 (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979) (emphasis added). *Cf.* ROBERT VENTURI ET AL., LEARNING FROM LAS VEGAS: THE FORGOTTEN SYMBOLISM OF ARCHITECTURAL FORM, at xii (2d ed. 1977) ("Because we have criticized Modern architecture, it is proper here to state our intense admiration of its early period when its founders, sensitive to their own times, proclaimed the right revolution. Our argument lies mainly with the irrelevant and distorted prolongation of that old revolution today."); HUYSSEN, *supra* note 2, at 189 ("The ire of the postmodernists was directed not so much against modernism as such, but rather against a certain austere image

simplest level, the polemic of postmodernism "is part of a never-ending dialogue with Modernism."[34]

A related angle from which to start absorbing postmodernism is that of the narrative. Modernity, after all, rests on "[e]nlightenment metanarrative (reason, history, science, self, knowledge, power, gender, and the inherent superiority of Western culture)."[35] To the extent that postmodernism challenges the underlying epistemology of modernity, it must necessarily reject these meta-narratives. Hence, Lyotard's pithy summary: "[s]implifying to the extreme, I define *postmodern* as incredulity toward metanarratives."[36] In an analogous vein, the pragmatic philosopher[37] Richard Rorty seeks "to undermine the reader's confidence in 'the mind' as something about which one should have a 'philosophical' view, in 'knowledge' as something about which there ought to be a 'theory' and which has 'foundations,' and in 'philosophy' as it has been conceived since Kant."[38] Put simply, one way to conceive of postmodernism is as a reaction to modernism and its meta-narratives.

### *B. Mistakes*

To the extent that these overarching concerns are worth pondering, postmodern thinkers have not helped themselves. Put simply, they have committed two major blunders: their prose is jargon-filled and they lack a positive program for reform. As a consequence, postmodernism has become problematic.

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of 'high modernism,' as advanced by the New Critics and other custodians of modernist culture.").

[34] CHARLES JENCKS, THE NEW PARADIGM IN ARCHITECTURE at vii (7th ed. 2002); *see also* WOODS, *supra* note 15, at 6 ("The relationship is something more akin to a continuous engagement, which implies that postmodernism needs modernism to survive, so that they exist in something more like a host-parasite relationship.").

[35] Jane Flax, *The End of Innocence*, *in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 21, at 445, 450; *see also* LEMERT, *supra* note 2, at 39 ("Modernity, thus, is that culture which believes certain *metanarratives*, or widely shared stories, about the value and 'truth' of science, and truth itself. This is an important way in which science is discourse.").

[36] LYOTARD, *supra* note 33, at xxiv; *see also* MINDA, *supra* note 16, at 3 ("Postmodernism is an aesthetic practice and condition that is opposed to 'Grand Theory,' structural patterns, or foundational knowledges.").

[37] "[P]ragmatic philosophers are skeptical primarily *about systematic philosophy*, about the whole project of universal commensuration." RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 368 (1979).

[38] *Id.* at 7.

*1. Jargon*

Postmodernism suffers from a self-inflicted wound: insuperable jargon. At least one entire law review article has been devoted solely to parodying this flaw.[39] Instead, I offer only a small number of examples to make a simple point: word choice and phraseology in postmodern discourse have not been paragons of clarity and have thus hampered serious consideration of its underlying ideas.

Some words, perhaps designed to impress, end up bordering on the absurd. "Morphogenesis,"[40] "autonymy,"[41] "paralogy,"[42] "cratylism,"[43] "trans-avantgardism,"[44] "adlinguisticity,"[45] "ethnomethodology,"[46] and "scopophilia"[47] are debated. Phenomena are "bimorphic,"[48] "ontonominative"[49] and "fulginous."[50] Look out for "subaltern counterpublics,"[51] "eschatalogical schemata,"[52] "lexical neoevents,"[53] "libidinal cathexion,"[54] and "dystopian horizon[s]."[55]

When words are strung together into phrases and clauses, the result is even more jarring. For instance, commentators variously speak of "a rejection of subjectivism as a cryptometaphysics,"[56] or hope for "an interest in some new 'fideology,' less a science than pragmatics or maieutics of belief."[57]

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[39] *See* Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997); *see also* Arrow, *supra* note 4, at 2398 (ridiculing "pomo's jargon—its primary tool"). For a response to Arrow, see Feldman, *supra* note 12.

[40] LYOTARD, *supra* note 33, at 61.

[41] *Id.* at 38.

[42] *Id.* at 61.

[43] JAMESON, *supra* note 27, at xiii.

[44] LYOTARD, *supra* note 33, at 71.

[45] *Id.* at 72.

[46] ROSENAU, *supra* note 13, at 13.

[47] Chow, *supra* note 21, at 107.

[48] Cindy Patton, *Refiguring Social Space*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS 216, 239 (Linda Nicholson & Steven Seidman eds., 1995).

[49] *Id.*

[50] JEAN BAUDRILLARD, SIMULATIONS 132 (Paul Foss et al. trans., Semiotext(e) 1983) (1981).

[51] Nancy Fraser, *Politics, Culture, and the Public Sphere: Toward a Postmodern Conception*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS, *supra* note 48, at 287, 291.

[52] JAMESON, *supra* note 27, at xi.

[53] *Id.* at xiii.

[54] *Id.* at 251.

[55] *Id.* at 35.

[56] LEMERT, *supra* note 2, at 108.

[57] HASSAN, *supra* note 3, at 23.

Sometimes the phrasing is so unusual, that even a passage mostly devoid of jargon becomes a challenge to decipher. Take as an illustration a paragraph from Frederic Jameson's well-known book, *Postmodernism, or, the Cultural Logic of Late Capitalism*:

> But I would have been tempted myself to correlate this peculiar third stage, in which an inner-worldly object comes to do double duty as the nascent universal equivalent, with the symbol and the symbolic moment of thought: culturally in the various modernist efforts to endow this or that sensory representation of a worldview with a kind of universal force (those new universal "myths" Mr. Eliot thought he saw emergent in Joyce); but philosophically in the universalizing turn of *pensée sauvage* on the point of reaching conceptual abstraction, as in the pre-Socratics where a single inner-worldly element ("all is water; all is fire") is posited as the ground of being.[58]

Needless to say, even the most famous postmodern thinkers are not immune. Jean Baudrillard writes, for example, that "[h]ere not only the syntagmatic dimension is abolished, but the paradigmatic as well. Since there no longer is any formal flection or even internal reflection, but contiguity of the same—flection and reflection zero."[59] Take as another example a passage from an important article by Jacques Derrida:

> If we wish to speak of injustice, of violence or of a lack of respect toward what we still so confusedly call animals—the question is more topical than ever, and so I include in it, in the name of deconstruction, a set of questions on carno-phallogocentrism—we must reconsider in its totality the metaphysico-anthropocentric axiomatic that dominates, in the West, the thought of just and unjust.[60]

Even readers who might otherwise be intrigued by postmodernism could be forgiven for giving up at this point.

Interestingly, at least two arguments have been deployed to justify the jargon. The first, and most playful, suggests that postmodernism is an insider's club where "postmodernists write obscurely on purpose so that no one outside their cult can understand them."[61] This claim if true, however, is thoroughly self-defeating. Simply put, to the extent that postmodernists care about their ideas having any influence, purposeful obscurity is patently counterproductive. To the extent that they do not want their ideas to gain traction, then they should simply conserve their energies and stop writing.

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[58] JAMESON, *supra* note 27, at 235.

[59] BAUDRILLARD, *supra* note 50, at 144.

[60] Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 921, 953 (Mary Quaintance trans., 1990).

[61] Flax, *supra* note 35, at 446.

The second, more serious claim is that the postmodern style in itself is designed to reflect a challenge to clear modernist discourse. Namely, that the "often obscure, not to say obfuscating, modes of speech and writing of these intellectuals were sometimes even intended to signify a defiance of that 'Cartesian' clarity of exposition which they said arose from a suspect reliance upon 'bourgeois' certainties concerning the world order."[62] As Lyotard argues:

> The postmodern would be that which, in the modern, puts forward the unpresentable in presentation itself; that which denies itself the solace of good forms, the consensus of a taste which would make it possible to share collectively the nostalgia for the unattainable; that which searches for new presentations, not in order to enjoy them but in order to impart a stronger sense of the unpresentable.[63]

To what extent, though, is this stance a cop out? After all, it is woefully unclear why a scholar who disagrees with modernism could not express her disagreement in understandable prose. Indeed, the pressing challenge with postmodernism is to present its complex ideas clearly and concisely. Pompous word choices and odd phraseology conveniently obfuscate rather than elucidate.

### 2. *Lack of constructive agenda*

Beyond its often inscrutable prose, postmodernism suffers from a more serious problem: a seeming inability to put forth an agenda for social change. It is one thing to point to modernity's ills, yet quite another to offer a program to address them. Put bluntly, postmodernists become very agitated pointing out the exploitation of people and nature, but for the most part remain curiously unconcerned about what to do about it.

This weakness originates in a disbelief in epistemological foundations. As Lyotard himself asks, "[w]here, after the metanarratives, can legitimacy reside?"[64] At least on one reading of postmodernism, maybe nowhere. Ihab Hassan colorfully summarizes the unsettling undercurrents beneath the postmodern ethos:

> indeterminacy and immanence; ubiquitous simulacra, pseudo-events; a conscious lack of mastery, lightness and evanescence everywhere; a new temporality, or rather intertemporality, a polychronic of history; a patchwork or ludic,

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[62] BUTLER, *supra* note 9, at 9.

[63] LYOTARD, *supra* note 33, at 81. *Cf.* Schanck, *supra* note 16, at 2524 ("That terminology is only part of the elaborate system of terms developed by Derrida that contribute to the opaqueness and unintelligibility of most of his writings.").

[64] LYOTARD, *supra* note 33, at xxiv-xxv.

> transgressive, or deconstructive, approach to knowledge and authority; an ironic, parodic, reflexive, fantastic awareness of the moment; a linguistic turn, semiotic imperative, in culture; and in society generally, the violence of local desires diffused into a technology both of seduction and force. In short, I see a pattern that many others have also seen: a vast, revisionary will in the Western world, unsettling/resettling codes, canons, procedures, beliefs—intimating a posthumanism?[65]

Its jargon aside, this description may be fine as far as it goes if postmodernists are satisfied with critique and deconstruction.[66] But such "radical chic"[67] does not offer a constructive agenda,[68] and might ironically even degenerate into an indirect apologia for the status quo.[69]

After all, on some readings, there is precious little room for either theory or truth in postmodernism. Theory is labeled a "'totalizing, logocentric project,' a meta-narrative."[70] Moreover,

> [a]ll criteria for distinguishing between truth and falsehood, for evaluating theory, require that one choose between categories, or they expect one to establish a hierarchy of values that designates some as good and others as bad. Post-modernists reject such distinctions and rather emphasize multiple realities and the view that no single interpretation of any phenomenon can be claimed as superior to any other. If this is the case, if there is no single best answer to every question, then there is no room for truth.[71]

Pessimism inevitably follows from indeterminacy: postmodernism eschews the "vision of redemption of modern life through culture."[72] As if such a

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[65] HASSAN, *supra* note 3, at 24; *see also* Paul Sheehan, *Postmodernism and Philosophy*, *in* THE CAMBRIDGE COMPANION TO POSTMODERNISM, *supra* note 27, at 32 ("Thus far we have seen philosophical postmodernism described as postmetaphysical, anti-anthropocentric, counter-humanist, non-narrative and hyperrealist."); Connor, *supra* note 27, at 20, 32 (describing the "'postmodern' vocabulary of de-centered multiple selves impelled by unconscious structures").

[66] *Cf.* ROSENAU, *supra* note 13, at 6 ("The post-modern goal is not to formulate an alternative set of assumptions but to register the impossibility of establishing any such underpinning for knowledge, to 'deligitimate all mastercodes.'" (citations omitted)).

[67] Nick Lee & Paul Stenner, *Who Pays? Can We Pay Them Back?*, *in* ACTOR NETWORK THEORY AND AFTER 90, 92 (John Law & John Hassard eds., 1999).

[68] *Cf.* Linda Nicholson & Steven Seidman, *Introduction*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS, *supra* note 48, at 1, 9 ("Postmodernism, it was claimed, could show only what was wrong: it could provide no positive directions either intellectually or politically."). Bruno Latour goes further to suggest that "[t]he postmoderns, always perverse, accept the idea that the situation is indeed catastrophic, but they maintain that it is to be acclaimed rather than bemoaned!" LATOUR, *supra* note 25, at 123.

[69] *See, e.g.*, WOODS, *supra* note 15, at 253.

[70] ROSENAU, *supra* note 13, at 81 (citations omitted); *see also id.* at 85.

[71] *Id.* at 80; *see also id.* at 136-37.

[72] HUYSSEN, *supra* note 2, at 210. After all, "[c]ulture is talk, often talk of hope." LEMERT, *supra* note 2, at 100.

nihilistic stance were not enough, it comes bundled with an inherent contradiction. On the one hand, postmodernists claim that theory and truth are vapid concepts; on the other, they trumpet the superiority of their own vision. As Frederic Jameson amusingly points out, "even the most thoroughgoing existentialisms or nihilisms—which affirm the meaninglessness of life or the world and the senselessness of questions about 'meaning'—also end up projecting their own meaningful vision of the world as something lacking meaning."[73] As one commentator sums up, "[t]here is simply no logical escape from this contradiction except to remain silent."[74]

Wrought from indeterminacy and contradiction, an unsympathetic "postmodern person" emerges. After all, if we live in a "fragmented, decentered, playful, anarchical, ironic, indeterminate"[75] world, then why not be narcissistic? As one scholar describes it:

> The culturally and socially constructed postmodern subject is one who constantly makes inane decisions or choices without firm (modernist) reasons or foundations in a quest for individual distinction. What brand of jeans should I wear? Which type of soda should I drink? Which television channel should I jump to next? And next, and next . . . ? Which store in the mall should I shop in next, and next, and next . . . ? Which microwavable dinner should I choose? Which breakfast cereal? Which cup of South American java? Bizarrely, in the postmodern era, one seeks personal uniqueness by relentlessly choosing from a variety of mass-produced and mass-advertised products that ostensibly cater to those who are radically different. The fragmentation of American culture has mixed with capitalist commercialism to commodify radicalism.[76]

Commentators note how the postmodern subject "tends to excessive self-criticism, cynicism, indifference, narcissism, hedonism, apathy, egotism, [and] anti-intellectualism. . . . S/he has little affection for a humanist stance, for any belief in the idea of progress, for any need to contribute to society."[77] These descriptions strike a chord—think, for example, of the highly amusing, but ultimately unsympathetic, characters portrayed on popular television shows such as *Seinfeld* and *Curb Your Enthusiasm.*

To enter a dialogue with modernity is one thing, but not to offer a constructive program for betterment is quite another. As one scholar notes,

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[73] JAMESON, *supra* note 27, at 245.

[74] ROSENAU, *supra* note 13, at 90. For additional amusing contradictions, *see id.* at 176-77.

[75] LEMERT, *supra* note 2, at 36.

[76] Feldman, *supra* note 7, at 710-11.

[77] ROSENAU, *supra* note 13, at 55 (citation omitted); *see also id.* at 53-54; LEMERT, *supra* note 2, at 87.

"postmodernists are good critical deconstructors, and terrible constructors."[78] The prognosis for postmodernism would appear grim:

> Although a thirteen-letter word, 'postmodernism' continues to be treated as a four-letter word in many quarters. Anxieties about its conservative political complicity, its reactionary aesthetic ideology, and its philosophical contradictions continue to dog its diagnostic or forensic utility in analysing contemporary culture. Unable to shrug off a residual connotation of decadence and degeneration, postmodernism nevertheless remains a hotly contested concept, a concept in which many people are still trying to look for the stigmata of the new consciousness in contemporary cultural production.[79]

Rather than succumb to the prevailing ethos, my project in the remainder of this Article is different. I plan to show that postmodernism does contain within it an important insight that can serve as the root of a program for constructive social change.

## III. REPRESENTATION

Conventional analysis of postmodernism leaves us at a seeming dead end. But there is another approach to postmodernism that focuses on the question of "representation." It allows us to sidestep conventional postmodern analysis that laments the state of the world, but then does nothing about it.[80] Before discussing the concept of "representation" as it relates to postmodernism, it might be worthwhile to broach the notion at a higher level of abstraction. As Richard Rorty observes, "[p]hilosophy's central concern is to be a general theory of representation, a theory which will divide culture up into the areas which represent reality well, those which represent it less well, and those which do not represent it at all (despite their pretense of doing so)."[81] Not just philosophy, but every discipline—political and literary theory, economics, and law for example—for centuries evolved formal representational paradigms. Take for example, liberal democracy, canons of interpretation, efficient markets, or liberty of contract.

By the late twentieth century, however, many of these paradigms were being deeply questioned. As Gary Minda chronicles:

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[78] BUTLER, *supra* note 9, at 116; *see also* LATOUR, *supra* note 25, at 61 (lamenting the "self-inflicting defeat of the postmodern project"); Jürgen Habermas, *Modernity—An Incomplete Project*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, *supra* note 14, at 3, 11.

[79] WOODS, *supra* note 15, at 257-58.

[80] *Cf.* LATOUR, *supra* note 25, at 115 ("Haven't we shed enough tears over the disenchantment of the world?").

[81] RORTY, *supra* note 37, at 3.

> The Age of Anxiety reflected a common condition prevailing within both the fine arts and the academic disciplines of literary theory, philosophy, social sciences, and the law throughout the 1970s and 1980s. *This condition was brought about by what contemporary social critics have called a "crisis of representation" in the traditional representational structures utilized by artistic, philosophical, literary, social, and scientific languages to control, predict, and describe the social and physical worlds.* By the early 1970s, the representational structures of modern discourse seemed incapable of maintaining their distinctive knowledge claims of universal truth.[82]

The "crisis of representation" Minda describes provides a crucial postmodern paradigm within which to conceptualize reality. To be more precise, "representation" is a broad concept with several facets:

> It is *delegation*; one individual represents another in parliament. It is *resemblance*; a painting represents on the canvas what the painter observes. It is *replication*; the photograph (image) represents the person photographed (object). It is *repetition*; a writer puts on paper the word (language) that represents his/her idea or thought (meaning). It is *substitution*; a lawyer represents a client in court. It is *duplication*; a photocopy represents the original.[83]

If we want to begin an agenda for constructive social change, then perhaps we had first better unmask how these representations occur. This is exactly where postmodernism can help. It repeatedly reminds us that the accuracy of representation depends on two crucial factors: the context in which a message appears, and the way it is mediated to reach an audience. I explain these concepts in some detail, using examples from fields in which postmodern thought has made its largest inroads, notably architecture, art, and popular culture.

### *A. Context*

The "meta-narratives" discussed in Part I are, after all, themselves nothing more than modernist theories of representation expounding simple universal truths. Postmodernism first challenges these "meta-narratives" because it warns that any story depends on its context. Knowledge is thus "always

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[82] MINDA, *supra* note 16, at 62 (emphasis added); *see also* ROSENAU, *supra* note 13, at 106 ("Some anthropologists reduce the whole of the post-modern challenge to this crisis of representation."); Gregory L. Ulmer, *The Object of Post—Criticism*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, *supra* note 14, at 83, 83 ("The issue is 'representation'—specifically, the representation of the object of study in a critical text.").

[83] ROSENAU, *supra* note 13, at 92.

contingent, always dependent on context, and always 'local' rather than 'universal,' as it is so often assumed to be."[84]

### *1. Toward culture and history*

Culture and history are the elements that comprise context. First, and most simply, postmodernism warns that any theory only exists within a particular cultural rubric; in other words, that "all values and goals are socially and culturally contingent."[85]

Perhaps more complicated is the relation of history to context, something which has concerned theorists such as Lyotard[86] and Foucault.[87] On the one hand, the movement looks backward to history. As Richard Rorty argues:

> One way to see how analytic philosophy fits within the traditional [modernist] Cartesian-Kantian pattern is to see traditional philosophy as an attempt to escape from history—an attempt to find nonhistorical conditions of any possible historical development. From this perspective, the common message of Wittgenstein, Dewey, and Heidegger is a historicist one. Each of the three reminds us that investigations of the foundations of knowledge or morality or language or society may be simply apologetics, attempts to externalize a certain

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[84] Schanck, *supra* note 16, at 2510; *see also* WOODS, *supra* note 15, at 14 ("Postmodern knowledge is provisional and dependent upon the context of inquiry."); Mootz, *supra* note 28, at 515 ("Postmodern thought recognizes that all understanding is context-specific.").

[85] Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer's Toolbox*, 85 VA. L. REV. 151, 159 (1999); *see also* ROSENAU, *supra* note 13, at 111 ("Reality is the result of the social processes accepted as normal in a specific context." (footnote omitted)). Douglas Litowitz even goes so far as to suggest that "[a]t its core, postmodernism is a project of debunking, de-centering, relativizing, and contextualizing social practices, institutions, and theories that appeal to universal and infallible foundations." Douglas Litowitz, *In Defense of Postmodernism*, 4 GREEN BAG 2D 39, 46 (2000); *see also* J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1985 (1992) (noting the "fragmented, decentered, diffused" nature of postmodernity). Postmodernism itself is the product of a particular cultural milieu that emerged following World War II. *See, e.g.*, Jameson, *supra* note 14, at 124-25 ("[A] new kind of society began to emerge (variously described as postindustrial society, multinational capitalism, consumer society, media society and so forth). . . . [marking] a radical break with that older prewar society in which high modernism was still an underground force.").

[86] *See, e.g.*, LYOTARD, *supra* note 33, at 21 ("A fourth aspect of narrative knowledge meriting careful examination is its effect on time.").

[87] Foucault's mentor, Georges Canguilhem, was a historian of science who "reversed the problem: he centered the main part of this work on the history of biology and on that of medicine, knowing very well that the theoretical importance of the problems raised by the development of a science is not necessarily in direct proportion with the degree of formalization it has attained." 2 MICHEL FOUCAULT, *Life: Experience and Science*, *in* AESTHETICS, METHOD, AND EPISTEMOLOGY, *supra* note 1, at 465, 470.

> contemporary language-game, social practice, or self-image. The moral of this book is also historicist . . . .[88]

On the other hand, however, postmodernists often relish being futuristic[89]—an element that some commentators have taken to be a repudiation,[90] or even ridicule,[91] of historicism. Such a position, however, does not square with either Rorty's observations or postmodernism's frequent attempts to root itself in tradition.[92] A more nuanced approach suggests that postmodernism looks both backward and forward because it recognizes that a temporal dimension can serve as a powerful contextual tool within a theory of representation. The postmodern creator can conveniently use "forms and images . . . stored for instant recall in the computerized memory banks of our culture."[93] Juxtaposing historical elements that have seemingly no relation to each other can help shock the audience into questioning fundamental assumptions about historical progress.[94] Perhaps most importantly, such incongruities create a forum for discussion, most readily in the context of artistic creation:

> History is taken as a crucial site of debate and contest. In a context where the art world sees the past as a supermarket which the artist raids for whatever goodies

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[88] RORTY, *supra* note 37, at 9-10.

[89] *See, e.g.*, HUYSSEN, *supra* note 2, at 191 ("[T]he postmodernism of the 1960s was characterized by a temporal imagination which displayed a powerful sense of the future and of new frontiers, of rupture and discontinuity, of crisis and generational conflict, an imagination reminiscent of earlier continental avant-garde movements such as Dada and surrealism rather than of high modernism.").

[90] *See, e.g.*, ROSENAU, *supra* note 13, at 63 ("The skeptical post-modernists criticize conventional history and relegate it to a peripheral role in the larger scope of human affairs."); Jameson, *supra* note 14, at 125 (stating "our entire contemporary social system has little by little begun to lose its capacity to retain its own past, has begun to live in a perpetual present and in a perpetual change").

[91] *See, e.g.*, JAMESON, *supra* note 27, at 64 ("The postmodern thus invites us to indulge in a somber mockery of historicity in general, wherein the effort at self-consciousness with which our own situation somehow completes the act of historical understanding, repeats itself drearily as in the worst kinds of dreams.").

[92] *See, e.g.*, HUYSSEN, *supra* note 2, at 170 ("My hypothesis that postmodernism always has been in search of tradition while pretending to innovation also is borne out by the recent shift toward cultural theory which distinguishes the postmodernism of the 1970s from that of the 1960s.").

[93] *Id.* at 196.

[94] At least one commentator suggests that this mixture is at the core of postmodern thought:

> In the simplest of terms, some say that postmodernism is about this odd fact that historical aspects of the world that do not belong together are, today, jumbled up with each other. Postmodernism, though it is a very complicated thing to understand, has mostly to do with such an idea.

LEMERT, *supra* note 2, at 20. *Cf.* Connor, *supra* note 27, at 17 ("Postmodernism was always a phenomenon of cultural interference, the crossing or conjugation of ideas and values.").

> he or she wants, arguments about the use, abuse, popularisation, aestheticisation and dehistoricisation of the past recur with unerring regularity, as differing camps attempt to claim the theoretical high ground concerning the significance of different models of pastness.[95]

Thus, just as postmodernism engages in a dialogue with modernity, it also does with history. Some commentators even use historicism to frame the entire postmodern project. For instance, Frederic Jameson notes that:

> It is safest to grasp the concept of the postmodern as an attempt to think the present historically in an age that has forgotten how to think historically in the first place. In that case, it either "expresses" some deeper irrepressible historical impulse (in however distorted a fashion) or effectively "represses" and diverts it, depending on the side of the ambiguity you happen to favor.[96]

Ahistorical modern meta-narratives seem terribly out of place in such a world. Reality is much more nuanced, messy and path-dependent.

### 2. *Postmodern architecture*

Postmodern architecture provides perhaps the best illustration of the move toward recognizing context. Charles Jencks famously relates its birth to the destruction of a well-known housing project designed in the 1950s by Minoru Yamasaki:

> Modern architecture died in St. Louis, Missouri on July 15, 1972 at 3:32 pm (or thereabouts) when the infamous Pruitt-Igoe scheme, or rather several of its slab blocks, were given the final *coup de grâce* by dynamite. Previously it had been vandalized, mutilated and defaced by its inhabitants, and although millions of dollars were pumped back, trying to keep it alive . . . , it was finally put out of its misery. Boom, boom, boom.[97]

Pruitt-Igoe's pathetic destruction has become the symbol of a transition away from the ahistorical modern meta-narrative that the project has come to symbolize. The idea that "clean lines, purity and simplicity of form would play a social and morally improving role in [our] society,"[98] became viewed as naïve—"the modern machine for living, as Le Corbusier had called it with the technological euphoria so typical of the 1920s, had become unlivable, the modernist experiment, so it seemed, obsolete."[99] At the vanguard of postmodern architecture, Robert Venturi bemoaned the "selectiveness of

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[95] WOODS, *supra* note 15, at 254-55.

[96] JAMESON, *supra* note 27, at ix.

[97] JENCKS, *supra* note 34, at 9.

[98] WOODS, *supra* note 15, at 93.

[99] HUYSSEN, *supra* note 2, at 186.

content and language"[100] of modernism, declaring famously that "[l]ess is a bore."[101]

Instead of "formalism as unconnected with experience,"[102] Venturi and other architects turned toward tradition,[103] arguing "for an architecture which is rooted in the regional and the historical."[104] Postmodern architecture celebrates "a play of ('historicist') allusion and quotation that has renounced the older high modernist rigor and that itself seems to recapitulate a whole range of traditional Western aesthetic strategies."[105] Consider that

> Nothing could be further from Mies van der Rohe's functionalist glass curtain walls than the gesture of random historical citation which prevails on so many postmodern façades. Take, for example, Philip Johnson's AT&T highrise, which is appropriately broken up into a neoclassical mid-section, Roman colonnades at the street level, and a Chippendale pediment at the top.[106]

Postmodern architecture has, in turn, become a harbinger for other architectural forms,[107] such as contemporary vernacular,[108] expressionism,[109] ecological architecture,[110] and participatory architecture.[111] The architectural

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[100] ROBERT VENTURI, COMPLEXITY AND CONTRADICTION IN ARCHITECTURE 17 (2d ed. 1977).

[101] *Id.*

[102] *Id.* at 18.

[103] *See, e.g.*, Foster, *supra* note 27, at xi.

[104] WOODS, *supra* note 15, at 97.

[105] Frederic Jameson, *Foreword* to JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE, *supra* note 33, at vii, xviii.

[106] HUYSSEN, *supra* note 2, at 184. For detailed examples of this phenomenon, see VENTURI, *supra* note 100, at 88-104; VENTURI ET AL., LAS VEGAS, *supra* note 33, at 104-05.

[107] *Cf.* JENCKS, *supra* note 34, at 2 ("Post-Modernism is a broad category that includes a diverse set of architects . . . the student movement, post-industrial society, the electronic revolution, contextualism, adhocism, metabolism and more 'isms' than one cares to remember. It is thus a rainbow coalition that resists the excesses of Modernism—a *critical*, not anti-Modernism.").

[108] *See* STEELE, *supra* note 30, at 226 ("There has long been a trend in many developing countries, fuelled by architects concerned about their national cultural identity, to find a more authentic regional voice for their architecture.").

[109] *See id.* at 254 ("The recent trend toward expression in architecture is really a resurgence of a clearly established historical position, which began in the early parts of this century with the impulse to stress the spiritual rather than the rational and purely functional aspects of building.").

[110] *See id.* at 284 ("The wider scope that this new architectural stance illustrates goes beyond simple energy-saving considerations such as the solar heating of individual buildings, to include a more pervasive attitude towards social interrelationships, international interaction and resource depletion, which has inevitably generated an altered aesthetic.").

[111] *See* JENCKS, *supra* note 34, at 2 ("From participatory architecture to close consultation with the client is the route traveled, it insists on the wider ecological and urban tissue in which buildings are placed even if it cannot do much about these large issues on a global scale.").

theorist James Steele summarizes well how historicism and culture form the root of postmodern architecture:

> At source, this populist expansion and refinement of Post-Modernism relies on a fusion of deep seated cultural nostalgia reasserted in a historic language that is more uniformly specific than Post-Modernism and more recognizably referential. Where Post-Modernism has become known through an assemblage of stylistic bits and pieces that may have some meaning for the architect and may be intended as an in-joke to others, this new variant is "themed" from popular historical sources.[112]

Steele concludes that "[p]ost-Modernism seemed to open the way for an exploration of an architecture more rooted in, and expressive of, American culture than modernism could ever offer."[113]

In sum, the postmodern turn in architecture rejects "the totalising impulse of modernist architecture—reductivism, determinism and mechanism."[114] It recognizes that "architecture is a social language."[115] Language, like any representational tool, requires context for it to become meaningful. As Venturi pithily observes, "[w]e look backward at history and tradition to go forward; we can also look downward to go upward."[116]

### *B. Mediation*

Closely related to context is the notion of mediation. Postmodernism accepts "knowledge as mediated by the current social, cultural, linguistic, and historical condition of our time."[117] Semiotics, the study of signs and symbols, helps us understand mediation. From semiotics emerges an appreciation for deconstruction and simulacra. I address each in turn, highlighting theoretical underpinnings, followed by illustrations from popular culture and postmodern art and architecture.

#### *1. Semiotics, deconstruction, simulacra*

To understand the importance of mediation, a starting point is to acknowledge that much of the knowledge we absorb in life occurs indirectly

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[112] STEELE, *supra* note 30, at 345.

[113] *Id.* at 181.

[114] WOODS, *supra* note 15, at 91. By contrast, typical postmodern concerns include "contextualism, symbolic form, a cosmic metaphor, an equal emphasis on past, present and future as if all these times were valid, and so on." JENCKS, *supra* note 34, at 3.

[115] JENCKS, *supra* note 34, at 17.

[116] VENTURI ET AL., *supra* note 33, at 3.

[117] MINDA, *supra* note 16, at 233; *see also* Schanck, *supra* note 16, at 2509.

through signs and symbols, rather than directly through first-hand experience.[118] As one scholar suggests:

> It is impossible not to recognize how our lives are inextricably bound up with signs and texts, and this too is a recurrent theme in postmodernist writing: informational systems, textual representations, visual and electronic media, and advertising cultures surround us at every turn. Everything is constantly and insistently *mediated* to us by all types of print and visual media, to the extent that people have begun to theorise the disappearance of the world and the appearance of the *word* and *image*. This has led some to urge the necessity of rematerialising the world (showing the material processes that go into making meanings and values), while others have described the world in which our consciousnesses are trapped in an arena of simulations, forgeries and fabrications.[119]

If we understand the world largely through signs and symbols, then we had better fathom whether these are reliable and unambiguous. This is where the famous concept of deconstruction is most germane.[120] Its central insight is that a sign or symbol—be it word or image—can be analyzed to show that "its apparent thesis, a particular proposition within the work, or a meaning usually attributed to it can also support contrary or alternative theses, propositions, or meanings. The specific result is a debunking or an undermining of the work as it has been traditionally understood."[121] The inherent ambiguities and contradictions that deconstruction seeks to show are at the root of why it can too often become an infuriating concept.[122]

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[118] *Cf.* RORTY, *supra* note 37, at 12 ("It is pictures rather than propositions, metaphors rather than statements, which determine most of our philosophical convictions.").

[119] WOODS, *supra* note 15, at 255-56; *see also* LEMERT, *supra* note 2, at 74 ("To discuss social structures is sooner or later to discuss the languages, signs, spectacles, discourses, rhetorics, images, and all the other media by which structures are conjured up and held enticingly before the believing or unbelieving public.").

[120] Postmodernism is of course about much more than deconstruction. Unfortunately, however, some commentators seem to equate postmodernism with deconstruction. *See, e.g.*, Judith Butler, *Contingent Foundations: Feminism and the Question of "Postmodernism", in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 21, at 3, 17 ("I don't know what postmodernism is, but I do have some sense of what it might mean to subject notions of the body and materiality to a deconstructive critique.").

[121] Schanck, *supra* note 16, at 2524. *Cf.* Butler, *supra* note 9, at 16 ("The central argument for deconstruction depends on relativism, by which I mean the view that truth itself is always relative to the differing standpoints and predisposing intellectual frameworks of the judging subject.").

[122] *Cf.* LEMERT, *supra* note 2, at 65 (defining deconstruction as "a social-theoretical attitude that has led to the use of irony to rethink, rewrite, and reconstrue the basic features of modernity and modernism; the most misunderstood and misused term associated with postmodernism").

Jacques Derrida is deconstruction's high priest.[123] Of his jargon-filled and oblique writings, perhaps the most helpful here is the pseudo-novel *The Postcard*.[124] In the novel, the seemingly simple task of corresponding with a friend provides a convenient excuse for Derrida to expound upon the ambiguities and contradictions inherent in communication. A passage early on in the book summarizes Derrida's concerns:

> Who is writing? To whom? And to send, to destine, to dispatch what? To what address? Without any desire to surprise, and thereby to grab attention by means of obscurity, I owe it to whatever remains of my honesty to say finally that I do not know. Above all I would not have had the slightest interest in this correspondence and this cross-section, I mean in their publication, if some certainty on this matter had satisfied me.
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> That the signers and the addressees are not always visibly and necessarily identical from one *envoi* [dispatch] to the other, that the signers are not inevitably to be confused with the senders, nor the addressees with the receivers, that is with the readers (*you*, for example), etc.—you will have the experience of all of this, and sometimes will feel it quite vividly, although confusedly. This is a disagreeable feeling that I beg every reader, male and female, to forgive me. To tell the truth, it is not only disagreeable, it places you in relation, without discretion, to tragedy. It forbids that you regulate distances, keeping them or losing them. This was somewhat my own situation, and it is my only excuse.[125]

Tellingly, Derrida acknowledges that readers will find him "disagreeable" at times, but that somehow this sacrifice must be made to appreciate what he is questioning.[126] Through deconstruction, texts like *The Postcard* become "a locus of polysemy, dissemination, and multiple meanings."[127] These ambiguities and frustrations "dramatically revise the conventional roles of author, text, and reader. They diminish the importance of the author and amplify the significance of the text and the reader."[128] Deconstructing signs is messy work and writers like Derrida need all the help they can get.

A perhaps less annoying, but more shocking, concept that emerges from a focus on semiotics is the simulacrum. The key notion is that the sign or

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[123] *Cf.* Ulmer, *supra* note 82, at 87 ("Derrida is the 'Aristotle' of montage.").

[124] *See* JACQUES DERRIDA, THE POSTCARD (Alan Bass trans., Univ. of Chicago Press 1987) (1980).

[125] *Id.* at 5.

[126] *Id.*

[127] LITOWITZ, *supra* note 18, at 15. *Cf.* WOODS, *supra* note 15, at 52 (explaining that postmodern fiction "first appeared in the 1960s to describe fiction which sought to subvert its own structural and formal bases, and which implied that reality only existed in the language that described it, with meaning inseparably linked to writing and reading practices").

[128] ROSENAU, *supra* note 13, at 25. *Cf.* 2 MICHEL FOUCAULT, *What Is an Author?*, *in* AESTHETICS, METHOD, AND EPISTEMOLOGY, *supra* note 1, at 205 (James D. Faubion, ed., Robert Hurley et al. trans., The New Press 1998) (1994).

symbol itself becomes "reality,"[129] making "reality" itself an artifice.[130] As Jean Baudrillard argues in his typical postmodern locution:

> No more mirror of being and appearances, of the real and its concept. No more imaginary coextensivity: rather, genetic miniaturisation is the dimension of simulation. The real is produced from miniaturised units, from matrices, memory banks and command models—and with these it can be reproduced an indefinite number of times. It no longer has to be rational, since it is no longer measured against some ideal or negative instance. It is nothing more than operational. In fact, since it is no longer enveloped by an imaginary, it is no longer real at all. It is a hyperreal, the product of an irradiating synthesis of combinatory models in a hyperspace without atmosphere.[131]

Baudrillard concludes that "production is dead, long live reproduction."[132] To believe Baudrillard, signs and symbols have mediated reality so convincingly that reality itself need no longer exist.

### 2. *Popular culture, postmodern art, and architecture*

At this point, my discussion of mediation may seem overly theoretical. After all, it is not a bit fanciful to intimate that abstruse continental philosophers such as Baudrillard and Derrida might possibly describe accurately the world in which we live? Perhaps counterintuitively, I argue that semiotics, and the deconstruction and simulacra that semiotic analysis lets us decipher, do a remarkably good job at describing much contemporary cultural production.

I use popular culture, art, and architecture as examples. First, take popular culture. Signs delivered by the media represent the world to us.[133] More

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[129] *See, e.g.*, ROSENAU, *supra* note 13, at 110 ("For the skeptics post-modern signs are not representative of reality; rather they produce reality." (citation omitted)); James D. Faubion, *Introduction*, *in* 2 AESTHETICS, METHOD, AND EPISTEMOLOGY, *supra* note 1, at xiii, xvii.

[130] *See, e.g.*, LEMERT, *supra* note 2, at 39 ("One of the consequences of such a theory as Lyotard's is the assumption that if what modern knowledge says about reality is no longer held to be automatically true, then in this sense 'reality' itself is held in some doubt. Postmodernism is about this incredulity and its effects throughout society.").

[131] BAUDRILLARD, *supra* note 50, at 3.

[132] *Id.* at 126; *see also* LEMERT, *supra* note 2, at 27 ("Those who agree with Baudrillard believe that today the world of culture is entirely cut loose from any necessary basis in reality. Social life, according to this school of postmodern thought, is much more a spectacle that stimulates reality, than reality itself."); JAMESON, *supra* note 27, at 21 ("This approach to the present by way of the art language of the simulacrum, or of the pastiche of the stereotypical past, endows present reality and the openness of present history with the spell and distance of a glossy mirage.").

[133] *See, e.g.*, LEMERT, *supra* note 2, at 28 ("[T]oday, culture is, as cultural theorists would put it, mediated. The media, notably television, are literally media (or, more simply, tools)

generally, as capitalism evolves and more manufacturing gets outsourced to the developing world, industrialized nations increasingly consist of economies "driven by sign, style, and spectacle rather than by the production of goods."[134] Channels such as MTV deconstruct signs in their celebration of "pastiche, fragmentation, and mediazation."[135] And what would Derrida think of the cartoon series *The Simpsons* which

> works with a knowing, ironic self-conscious referentiality, as when episodes introduce cartoon versions of real people into the plot-lines, or when episodes are based upon famous American texts, as when Edgar Allen Poe's poem "The Raven" forms the basis for a ghost story in which Homer and Bart figure as characters.[136]

Most stunningly, popular culture is replete with simulacra. As Frederic Jameson observes:

> Many analyses have shown how the news broadcasts are structured exactly like narrative serials; meanwhile, some of us in that other precinct of an official, or "high," culture, have tried to show the waning and obsolescence of categories like "fiction" (in the sense of something opposed to either the "literal" or the "factual"). But here I think a profound modification of the public sphere needs to be theorized: the emergence of a new realm of image reality that is both fictional (narrative) and factual (even the characters in the serials are grasped as real "named" stars with external histories to read about), and which now—like the former classical "sphere of culture"—becomes semiautonomous and floats above reality, with this fundamental historical difference that in the classical period reality persisted independently of the sentimental and romantic "cultural sphere," whereas today it seems to have lost that separate mode of existence.[137]

The evening news becomes sensationalist, and soap opera stars develop a life of their own as chronicled in popular publications such as *Soap Opera Digest* and *Soap Opera Weekly*. Simulacra become surreal, as for example, when in covering wars embedded reporters themselves become the story[138] or individuals see their own lives pass on television.[139] Indeed, "[p]ostmodern

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through which we gain a 'sense of the world.'").

[134] Connor, *supra* note 27, at 4. *See generally* JAMESON, *supra* note 27.

[135] Balkin, *supra* note 85, at 1970.

[136] WOODS, *supra* note 15, at 215.

[137] JAMESON, *supra* note 27, at 277.

[138] *See, e.g.*, ANDERSON COOPER, DISPATCHES FROM THE EDGE (2006).

[139] *See* BAUDRILLARD, *supra* note 50, at 149 (explaining the "hyperspace of representation—where each is already technically in possession of the instantaneous reproduction of his own life, where the pilots of the Tupolev that crashed at Bourget could see themselves die live on their own camera"). For a very recent example, refer to Stuart Pfeifer et al., *Disabled Airliner Creates a 3-Hour Drama in Skies*, L.A. TIMES, Sept. 22, 2005, at A1 ("The plight of JetBlue Flight 292 became a national spectacle as television stations carried live

theorists of television suggest that we no longer live in reality, but in images or representations of that reality."[140] Of course, simulacra are not limited to audiovisual media: Think of escapist amusement parks,[141] simulated tourist landmarks,[142] and tabloid journalism.[143] The everyday world has become deeply mediated, to the point of often exhibiting a "hyperreality in which simulation of reality is more real than the thing itself."[144] Popular culture, then, can be conceptualized as a series of semiotic systems that frequently engage in deconstruction and generate simulacra.

Similarly, postmodern art plays with signs and symbols. After all, "[i]n accordance with Warhol's slogan, 'All is pretty,' the Pop artists took the trivial and banal imagery of daily life at face value, and the subjugation of art by the laws of a commodity producing capitalist society seemed complete."[145] Warhol's work, for instance, focuses on turning symbols that represent commodities into works of art.[146]

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images of the crippled jet. *In a twist that some described as bizarre, passengers themselves avidly watched the newscasts on seatback screens.*" (emphasis added)).

[140] WOODS, *supra* note 15, at 198 (emphasis omitted).

[141] As Baudrillard observes:

> Disneyland is not the only one. Enchanted Village, Magic Mountain, Marine World: Los Angeles is encircled by these "imaginary stations" which feed reality, reality-energy, to a town whose mystery is precisely that it is nothing more than a network of endless, unreal circulation—a town of fabulous proportions, but without space or dimensions.

BAUDRILLARD, *supra* note 50, at 26; *see also* D.J. Waldie, *Summerized*, L.A. TIMES, July 28, 2006, at B13 ("Last year, Los Angeles welcomed 25 million tourists . . . . They stayed in their own private Southern California, a fantasia of images compounded from nearly 100 years of the most successful marketing campaign in history.").

[142] *See, e.g.*, BAUDRILLARD, *supra* note 50, at 18 (discussing how tourists are permitted only to visit a replica of the caves of Lascaux, and lamenting that "the very memory of the original caves will fade in the mind of future generations, but from now on there is no longer any difference: the duplication is sufficient to render both artificial").

[143] *See, e.g.*, John Fiske, *Admissible Postmodernity: Some Remarks on Rodney King, O.J. Simpson, and Contemporary Culture*, 30 U.S.F. L. REV. 917, 920 (1996) (noting how tabloids "use computers to enhance and modify photographs to produce composigraphs, images that look like photographs [but] explicitly lack the modernist relationship between the lens and its object").

[144] LEMERT, *supra* note 2, at 27 (emphasis omitted).

[145] HUYSSEN, *supra* note 2, at 148; *see also* BAUDRILLARD, *supra* note 50, at 151 ("Art can become a reproducing machine (Andy Warhol), without ceasing to be art, since the machine is only a sign.").

[146] *See, e.g.*, JAMESON, *supra* note 27, at 9 ("Andy Warhol's work in fact turns centrally around commodification, and the great billboard images of the Coca-Cola bottle or the Campbell's soup can, which explicitly foreground the commodity fetishism of a transition to late capital, *ought* to be powerful and critical political statements."). *Cf.* WOODS, *supra* note 15, at 166-67.

Crucially, postmodernism art, like *The Simpsons*, deconstructs the boundary between high and low art. It is fascinated with "artifice, schlock and kitsch"[147] and celebrates "the value of the old cliché used in a new context to achieve a new meaning—the soup can in the art gallery—to make the common uncommon."[148] Consider, for example, contemporary urban music such as rap and hip-hop. Not only musical techniques, but even artists' names, provide grist for the postmodern mill:

> Snoop Doggy Dogg [a prominent and controversial rap artist] is a play on names in which a child's cartoon figure names a music that samples the most extreme forms of political and sexual expression. In fact, hip-hop music's use of sampling is a near perfect illustration of the postmodern form. Here elements from different musics, from political discourse and TV sitcoms, from artificial street sounds and the manipulation of the recording discs themselves are packed into a dense, mixed-up sound effect through which a nonetheless clear message is conveyed.[149]

One might argue that precious little separates Derridean language games from those of artists like Snoop Doggy Dogg. As Frederic Jameson summarizes:

> one fundamental feature of all the postmodernisms enumerated above: namely, the effacement in them of the older (essentially high-modernist) frontier between high culture and so-called mass or commercial culture, and the emergence of new kinds of texts infused with the forms, categories, and contents of that very culture industry so passionately denounced by all the ideologues of the modern, from Leavis and the American New Criticism all the way to Adorno and the Frankfurt School. The postmodernisms have, in fact, been fascinated precisely by this whole "degraded" landscape of schlock and kitsch, of TV series and *Reader's Digest* culture, of advertising and motels, of the late show and the grade-B Hollywood film, of so-called paraliterature, with its airport paperback categories of the gothic and the romance, the popular biography, the murder mystery, and the science fiction or fantasy novel: materials they no longer simply "quote," as a Joyce or a Mahler might have done, but incorporate into their very substance.[150]

Postmodern art, then, becomes fascinated with the permeability between high and low cultural production. It becomes a principal locus of deconstruction.[151]

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[147] WOODS, *supra* note 15, at 49.

[148] VENTURI ET AL., *supra* note 33, at 72; *see also* ROSENAU, *supra* note 13, at 14 (noting the "cut-and-paste character of post-modernism").

[149] LEMERT, *supra* note 2, at 23.

[150] JAMESON, *supra* note 27, at 2-3.

[151] Indeed, Andreas Huyssen views this division as essential to understanding the entire postmodern project:

> What I am calling the Great Divide is the kind of discourse which insists on the categorical distinction between high art and mass culture. In my view, this divide is much more important for a theoretical and historical understanding of modernism and its

Not only are deconstructive tendencies pronounced, but simulacra become the order of the day. Distinguishing between original and fake art becomes problematic. Think of Warhol's famous representation of Marilyn Monroe.[152] Similarly, the very notion of original musical creation becomes questionable in an era of synthesizers and other digital gizmos.[153] In their semiotic deconstruction of gender and sexuality, artists such as Madonna and Michael Jackson represent some Baudrillardean hyperreality.[154] The deconstruction of high versus low art, the simulacra of the fake over the original—postmodernism repeatedly questions the clean, reassuring divisions of modernism. The very notion of art and creation become problematic—as Baudrillard summarizes it, "art is everywhere, since artifice is at the very heart of reality."[155]

Take postmodern architecture as a final example. It too is essentially about mediating signs and symbols. Robert Venturi's manifesto *Learning from Las Vegas* is, by its own admission, at its core simply "a treatise on symbolism in architecture."[156] Its central concern is about viewing architecture as a semiotic system:

> We feel too that architects, bar a few diehards, are coming to realize that what we learned from Las Vegas, and what they by implication should learn too, is not to place neon signs on the Champs Elysées or a blinking "2 + 2 = 4" on the roof of the Mathematics Building, but rather *to reassess the role of symbolism in architecture, and, in the process, to learn a new receptivity to the tastes and values of other people and a new modesty in our designs and in our perception*

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aftermath than the alleged historical break which, in the eyes of so many critics, separates postmodernism from modernism.

HUYSSEN, *supra* note 2, at viii.

[152] *See* BAUDRILLARD, *supra* note 50, at 136 ("This is what Andy Warhol demonstrates also: the multiple replicas of Marilyn's face are there to show at the same time the death of the original and the end of representation."). Simulacra are not limited to Pop art: even Rodin's famous sculpture, *The Gates of Hell*, lacks an original. *See* ROSALIND E. KRAUSS, THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 152 (1984) (emphasis omitted):

> Due to the double circumstance of there being no lifetime cast and, at the time of death, of there existing a plaster model still in flux, we could say that all the casts of The Gates of Hell are examples of multiple copies that exist in the absence of an original.

[153] *See, e.g.*, WOODS, *supra* note 15, at 175 ("[T]echnological developments (such as drum machines and digital music computers) have brought about 'sampling' and sequencing, which have eroded the divisions between originals and copies, and between human and machine performed music.").

[154] *See, e.g.*, LEMERT, *supra* note 2, at 39 ("One could say that Madonna and Michael Jackson exhibit a certain inexpressible incredulity toward modern sexual morality—by making themselves the be-all and end-all of sexual and gender possibilities they point beyond themselves to something more real than reality.").

[155] BAUDRILLARD, *supra* note 50, at 151.

[156] VENTURI ET AL., *supra* note 33, at xvi; *see also id.* at 13 ("Symbol dominates space.").

> *of our role as architects in society.* Architecture for the last quarter of our century should be socially less coercive and aesthetically more vital than the striving and bombastic buildings of our recent past. We architects can learn this from Rome and Las Vegas and from looking around us wherever we happen to be.[157]

Venturi is obviously not looking to a hero or meta-narrative for deliverance. Instead, he muses whether it is "from the everyday landscape, vulgar and disdained, that we can draw the complex and contradictory order that is valid and vital for our architecture as an urbanistic whole."[158] He wonders whether "there is an individual need for intimacy and detail, unmet by Modern design but satisfied by the five-eighths scale reproductions in Disneyland, by the caricatures of human scale in the patios of garden apartments, and by seven-eighths scale furnishings of the fancy interiors of Levittown model homes."[159] Much like the Pop artists, postmodern architects seem to believe that "low-brow" culture must be part of any meaningful representation of reality.

Perhaps even more interesting than its relatively straightforward celebration of kitsch is postmodern architecture's complex blending of high and low art.[160] The quintessential example still remains Philip Johnson's AT&T building "with its celebrated split pediment being tagged as a 'Pop icon of a "Chippendale Highboy"' . . . [where] Johnson set about creating an architecture of bricolage . . . , which plays with historical implication and latent and manifest symbolism."[161] As Robert Venturi wittily remarks:

> Modern architecture has not so much excluded the commercial vernacular as it has tried to take it over by inventing and enforcing a vernacular of its own, improved and universal. It has rejected the combination of fine art and crude art. The Italian landscape has always harmonized the vulgar and the Vitruvian: the *contorni* around the *duomo*, the *portiere's* laundry across the *padrone's portone*, *Supercortemaggiore* against the Romanesque apse. Naked children have never played in *our* fountains, and I.M. Pei will never be happy on Route 66.[162]

Postmodern architecture, then, can be conceived of as semiotic discourse, notably between high and low art.[163] What would I.M. Pei do on Route 66?

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[157] *Id.* at xvi-xvii (emphasis added).

[158] VENTURI, *supra* note 100, at 104.

[159] VENTURI ET AL., *supra* note 33, at 148.

[160] *See, e.g.*, WOODS, *supra* note 15, at 113 ("[W]hereas modernist architecture tended to adopt its sources from 'high culture', postmodernists erase the high modernist distinction between high and low culture, often exploiting the latter for its aesthetic effects."); STEELE, *supra* note 30, at 172-99.

[161] WOODS, *supra* note 15, at 98; *see also* discussion *supra* note 106 and accompanying text.

[162] VENTURI ET AL., *supra* note 33, at 6.

[163] *Cf.* WOODS, *supra* note 15, at 99 ("[T]he architectural term [postmodernism] has come to refer to buildings which treat architecture as a language or a discourse."); HUYSSEN, *supra*

Finally, at its margins, architecture too contains simulacra. When Baudrillard was writing twenty-five years ago, he could already refer to Disneyland and surrounding fantasy parks in Southern California.[164] A recent and well-known survey of contemporary architecture not only devotes serious attention to the various simulated worlds of Las Vegas casinos,[165] but also spends several pages chronicling the influence of the Disney corporation in commissioning architecture—including for its own putatively utopian town, Celebration, Florida.[166] Architecture has increasingly fueled "a world transformed into sheer images of itself and for pseudo-events and 'spectacles.'"[167] Mediation has reached its apogee.

### *C. Science Meets the Narrative*

Foucault, Derrida, and Baudrillard may be one thing, but readers might justifiably ask at this point why I have gone into seemingly bizarre digressions—Madonna, Snoop Doggy Dogg, Venturi, and Warhol, to name a few. The point is that these flamboyant practitioners are postmodern precisely because they struggle with the concept of representation. For better or worse, and whether their audience agrees with them or not, these artists push spectators and listeners out of their comfort zone and make them begin to question the context in which their work appears, and how their message gets mediated. Their seemingly bizarre representations question the meta-narratives of the genres in which they create.

Lest all of this sound fanciful and limited to artistic creation and interpretation, it is not. Even the meta-narratives of "hard" science have recently come under fire:

> General relativity theory undermined the belief that objects are arrayed against the neutral and absolute backdrop of space (through which time "flows") by substituting in its stead an image of four-dimensional reality. Quantum physics has also disintegrated the subject/object distinction by establishing that observation creates the field of observation. A more radical quantum philosophy agrees that there are no "real" building blocks of nature, but argues further that our world is a relational and holistic system that is not subject to unlimited

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note 2, at 187 ("It has become commonplace in postmodernist circles to favor a reintroduction of multivalent symbolic dimensions into architecture, a mixing of codes, an appropriation of local vernaculars and regional traditions.").

[164] *See* BAUDRILLARD, *supra* note 50, at 23 ("Disneyland is a perfect model of all the entangled orders of simulation. To begin with it is a play of illusions and phantasms: Pirates, the Frontier, Future World, etc."); *see also supra* note 142.

[165] *See* STEELE, *supra* note 30, at 349-50 (discussing casinos such as "New York, New York," "Bellagio" [Italy], "Paris," and "Venice").

[166] *See id.* at 355-67.

[167] JAMESON, *supra* note 27, at 18.

> dissection, and in which the dissection of the world into constituent parts is always an abstraction from reality.[168]

Thus even the most seemingly objective of disciplines, physics, has become postmodern. As in Derrida's *The Postcard*,[169] the boundary between observer and observed has become blurred;[170] as in Venturi's *Learning from Las Vegas*,[171] the world simply cannot be represented as a simple sequence of autonomous structures.[172]

If not a Newtonian or Miesian meta-narrative, then how to represent reality? Though much more chaotic and messy, a series of local narratives might be helpful. As Jerry Frug points out

> Identifying the self requires the invention of a narrative: the selection, editing, and unifying of countless aspects of memory and desire. It requires the transformation of the multiplicity of one's life into a single account—more accurately, into a series of accounts, since the attempt to establish one's identity has elements of both the synchronic (identity at any particular moment) and the diachronic (continuity over time).[173]

As Part IV argues, law too could benefit from new representational accounts that privilege rich local narratives over arid formalistic meta-narratives. Much like art and architecture have grappled with new forms of representation, so too should law. For too long in the law, the law has persisted in imposing its own Miesian glass houses on a world that more closely resembles Las Vegas or Route 66.

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[168] Mootz, *supra* note 19, at 285. *Cf.* JENCKS, *supra* note 34, at 7 ("Modernism, in the end, is based on the Newtonian mechanistic paradigm and Adam Smith's economics that grew directly *and* explicitly from it.").

[169] *See generally* DERRIDA, *supra* note 124.

[170] *See* Mootz, *supra* note 19, at 269-70 ("The shift from the Newtonian/Cartesian paradigm of nature as a machine transparent to the human mind is giving way to a post-Einsteinian physics that views reality as an undifferentiated whole in which we are situated as participants rather than as observers.").

[171] *See generally* VENTURI ET AL., *supra* note 33.

[172] *See id.* at 290 ("What some mystics and sociologists have long argued for turns out to be suggestively reinforced, if not confirmed, by physics. Individuals exist, but they are socially defined and holistically situated.").

[173] Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 258 (1993); *see also* MINDA, *supra* note 16, at 248 ("This emerging postmodern temperament . . . uses the techniques of metaphor, narrative, and storytelling for discovering surprising new insights; it embraces a new neopragmatic position, and it justifies the use of 'situated' and 'local' critiques as a means for decentering foundational theories.").

## IV. LAW

Postmodernism is helpful to law precisely because it represents a movement seeking to represent reality more accurately than existing modernist paradigms. Much like architecture has confronted the failure of modernisms such as Pruitt-Igoe,[174] so too we must ask how poorly designed laws have contributed to a litany of evils creating political disenfranchisement and economic inequality. Perhaps from more accurate representations of the world in which we actually live will emerge more socially just law.

Applying the insights of a movement formed within artistic and literary spheres to law is necessarily tentative.[175] Nonetheless, I develop two main points. First, existing legal scholarship grouped under the "postmodern" rubric should shift from its fragmented, critical visions to one that explores how law decontextualizes and mediates power relations. Such a focus would permit a shift to a more constructive agenda that could put forward specific reforms. Second, postmodernism offers a chance at mapping new topologies within which to represent reality more accurately and engage more fully in the world. To start the conversation, I grapple with network theory and participatory democracy.

### *A. Unifying Postmodern Legal Scholarship*

To form a baseline, it is important to discuss briefly the evolution of existing postmodern legal scholarship. The legal realists of the early twentieth century came first. In reaction to the formalisms of legal scientism,[176] they became interested in both the context in which law appears and how it is mediated. Realists, after all, "wanted to replace the conceptualism of Langdellian formalism with a realistic understanding that analyzed law and legal reasoning within its specific historical and social contexts."[177] As William Eskridge and Gary Peller note, these scholars reflected "skepticism about the possibility of representation, a continual argument that the interpreter was constructing what she purported merely to represent."[178]

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[174] *See, e.g.*, JENCKS, *supra* note 34, at 264 ("Post-Modernism in architecture has been the response to the failure [of] urban planning, of Pruitt-Igoe, and other misconceived social housing of the fifties and sixties.").

[175] *Cf.* WOODS, *supra* note 15, at 226 ("Owing to their different paradigms of exploration, the artistic and literary spheres do not always offer an easy analogy for discourses in the social sciences, and consequently the new discourses for postmodernity are not as fully worked out in the social sciences.").

[176] *See, e.g.*, C. C. Langdell, *Harvard Celebration Speeches*, *in* 3 L.Q. REV. 123, 124 (1887) (declaring "law is science").

[177] MINDA, *supra* note 16, at 29.

[178] William N. Eskridge, Jr. & Gary Peller, *Moderation As a Postmodern Cultural Form*, 89

By the 1950s and 60s, the legal process school had subdued the realists.[179] In reaction to the new formalisms of legal process, a second wave of postmodern legal scholarship emerged in the 1970s and 80s, led by law and economics ("L&E") and critical legal studies ("CLS").[180] Unfortunately, these movements too have become problematic. To be sure, L&E has been very influential in facilitating a move from formalistic doctrinal to economic analysis. Ironically, however, contemporary law and economics is actually far more modern than postmodern. As I have detailed elsewhere, it has become largely acontextual and enamored of its own neoclassical formalisms.[181] For its part, CLS focuses unnecessarily heavily on deconstruction, to the detriment of the more holistic representational insights of postmodernism.[182] To boot, CLS—even more than postmodernism—became engulfed in its own annoying jargon of celebratory radicalism.[183] Thus, while like its counterparts in architecture this second wave of postmodernism challenged modern meta-narratives,[184] it has for the most part become content to wallow in

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MICH. L. REV. 707, 768 (1991).

[179] Process scholars in the 1950s and 1960s responded to the realists by arguing that even though particular decision-makers might be unreliable or oppressive, the overall process of lawmaking and administration could be legitimized if particular procedures were developed to manage it. *See, e.g.*, G. Edward White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 655 (1984).

[180] *Cf.* MINDA, *supra* note 16, at 191 ("The legal movements of the 1970s and 1980s have come to represent the intellectual themes of *postmodernism—antifoundationalism, antiessentialism, social construction*, and *deconstruction*.").

[181] *See, e.g.*, Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics,"* 2003 UTAH L. REV. 1155 (2003) [hereinafter Dibadj, *CLE*]; Reza Dibadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325 (2006) [hereinafter Dibadj, *Weasel Numbers*] Much of mainstream law and economics bears a humorous similarity to Pierre Schlag's description of the now-discredited nineteenth century science of phrenology:

> In the later stages of phrenology, any distinction between phrenological knowledge and its advertisements for itself collapsed. Phrenology became a discourse of self-celebration. The ironic result was that, as phrenological knowledge became increasingly stressed and less credible, the normative claims about its usefulness and moral worth became increasingly inflated and more grandiose.

Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 892 (1997).

[182] *Cf.* Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 733-34 (2005) ("Although deconstructive arguments appear in critical race theory, feminist, and postmodern legal scholarship, deconstruction first emerged most clearly in the work of the Critical Legal Studies movement."). For a detailed discussion of CLS, see Dibadj, *CLE*, *supra* note 181. The law and literature movement has similarly struggled to move beyond thought-provoking criticism. *See, e.g.*, Thomas Morawetz, *Ethics and Style: The Lessons of Literature for Law*, 45 STAN. L. REV. 497 (1993) (book review).

[183] *See* Dibadj, *CLE*, *supra* note 181.

[184] *Cf.* LITOWITZ, *supra* note 18, at 7 ("In legal theory, the modern approach generally took the form of an attempt to justify a legal arrangement by reference to ahistorical and acontextual truisms about human nature, God, reason, and natural law.").

deconstructive critique and self-congratulatory formalism. Postmodernism's potential to put forward a new representational paradigm remained unfulfilled.

Beginning in the late 1980s and 1990s, a third wave of postmodern scholarship began to emerge. It consists mostly of "outsider scholarship"—notably, feminist,[185] critical race,[186] and gaylegal[187] work—and reexamines "law as an essentially cultural medium of a multicultural community."[188] Less prominent within this third wave are unabashedly theoretical writings about the relation of topics as fascinating and varied as Gadamerian hermeneutics,[189] Lacanian psychoanalysis,[190] and Derridean deconstruction[191] to jurisprudence. Needless to say, these efforts are not without their serious detractors. One commentator has labeled them as "monotonic and divulsive ululations about victimology, class warfare, anti-individualist biopolitics, and 'Marginalized Others.'"[192] Others suggest that works with a postmodern outlook will "have very little influence on legal scholarship or much of anything else."[193]

These criticisms, however, would appear too harsh. They ignore that the third wave builds on its predecessors in that "it opens up the range of conversation in legal theory by holding out a perspective that is other, that negates the system,"[194] while simultaneously displaying comfort with "irony,

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[185] *See, e.g.*, Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992); Tracy E. Higgins, *"By Reason of their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536 (1995). Of course, not all feminist scholarship is postmodern. While modernist feminists believe there is an essentialist conception of woman, the "perspective of postmodern feminists is that no essential commonality exists among women." MINDA, *supra* note 16, at 143.

[186] *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED (1987).

[187] *See, e.g.*, William N. Eskridge Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

[188] MINDA, *supra* note 16, at 189.

[189] *See* Mootz, *supra* note 19; Mootz, *supra* note 28. For a less optimistic take on Gadamer, see Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243, 2251 (1993).

[190] *See* Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998); Jeanne L. Schroeder, *The Vestal and Fasces: Property and the Feminine in Law and Psychoanalysis*, 16 CARDOZO L. REV. 805 (1995).

[191] *See* Derrida, *supra* note 60; David Gray Carlson, *On the Margins of Microeconomics*, 14 CARDOZO L. REV. 1867 (1993).

[192] Arrow, *supra* note 4, at 2428 (footnotes omitted).

[193] Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1888 (1993); *see also* Jay P. Moran, *Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction, and Some Insights from Thomas Pynchon's Fiction*, 6 S. CAL. INTERDISC. L.J. 155, 157 (1997) ("My thesis is that the use of postmodern theory in contemporary legal scholarship has accomplished very little. . . . [T]he proliferation of postmodern theory among legal scholars is symptomatic of what others label an overall contamination in higher education." (footnote omitted)).

[194] LITOWITZ, *supra* note 18, at 179.

contradiction, [and] fluidity."[195] In a nutshell, it struggles more deeply with the quintessentially postmodern question of representation.[196]

Despite this overarching ambition, even the third wave of postmodern legal scholarship does evince serious flaws. It spends a disproportionate amount of energy on insightful criticism, as opposed to specific plans for reconstruction.[197] Deconstruction, as we have seen, can get annoying very quickly.[198] Second, in the "shattering of this idea of a dominant language or discourse for law,"[199] the third wave has created often incompatible voices. As Gary Minda laments, "a staggering proliferation of jurisprudential discourses now exists: economic, political, literary, gender, racial, and so forth."[200] Where to go from here?

Some attempt at unification within postmodern legal movements is urgently needed. Its scholars need to develop a more systemic, less fragmented framework—one focused more on reconstruction, less on deconstruction. The approach I advocate suggests that these movements have one thing in common: a concern about how law misrepresents reality by ignoring context and mediation. Put more bluntly, their foundational focus is on how modernist

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[195] Jack Van Doren, *Environmental Law and the Regulatory State: Postmodernism Rears Its "Ugly" Head?*, 13 N.Y.U. ENVTL. L.J. 441, 479 (2005); *see also* Feldman, *supra* note 7, at 673 ("Postmodern jurisprudents celebrate the multiplicity of textual meanings in legal documents. They relish the deconstruction of a previously accepted and supposedly authoritative textual interpretation.").

[196] *Cf.* MINDA, *supra* note 16, at 75 (arguing that these movements sought a "new representational mode for understanding the relation between law and society . . . one constructed from the social and economic context in which the legal system operates").

[197] Douglas Litowitz, for instance, labels postmodernism as "'negative jurisprudence'. . . a theory of law which generates critical insights about the law but does not offer a positive plan for action." LITOWITZ, *supra* note 18, at 39; *see also* Douglas Litowitz, *Postmodernism Without the "Pomobabble,"* 2 FLA. COASTAL L.J. 41, 74 (2000) [hereinafter Litowitz, *Postmodernism*] ("[P]ostmodern theory has two major drawbacks: (1) it takes an overly external perspective on law, and (2) it is too dismissive of foundations to offer a program for reform.").

[198] *Cf.* Pierre Schlag, *A Brief Survey of Deconstruction*, 27 CARDOZO L. REV. 741, 742 (2005) ("Deconstruction, of course, never made much headway in the American legal academy. It was at most an irritant."). Interestingly, Derrida has tried to relate deconstruction directly to justice. *See* Derrida, *supra* note 60, at 955 ("One must be *juste* [fair or just] with justice, and the first way to do it justice is to hear, read, interpret it, to try to understand where it comes from, what it wants of us, knowing that it does so through singular idioms.").

[199] MINDA, *supra* note 16, at 195-96; *see also id.* at 193 ("In viewing law as an essentially cultural medium, postmodern scholars became skeptical about the possibility of legal values such as objectivity, neutrality, and rationality which were deeply reflexive of the faith in law's autonomy.").

[200] *Id.* at 195-96. *Cf.* BUTLER, *supra* note 9, at 57 ("Postmodernist thought, in attacking the idea of a notional centre or dominant ideology, facilitated the promotion of a politics of difference.").

discourse legitimates power relations by making them seem natural, even inevitable.[201]

Of all the postmodern thinkers, Foucault's insights are perhaps the most useful here.[202] The overarching and pervasive theme in Foucault's prolific writings is to "try to bring to light what has remained until now the most hidden, the most occulted, the most deeply invested experience in the history of our culture—power relations."[203] Foucault asks questions that postmodern legal theorists should squarely focus on: "Who exercises power? How? On whom?"[204] There are at least three reasons why this project is one around which perhaps a fourth wave of postmodern legal scholarship might coalesce.

First, it is important to remember that Foucault is less worried about blatant or direct expressions of power, as he is about how social institutions indirectly shape behavior that privileges one group over another.[205] This is exactly what legal reformers should be squarely focused on. Foucault is concerned both with the context through which power is exercised, and how this power is mediated:

> Obviously, it is a matter not of examining "power" with regard to its origin, its principles, or its legitimate limits, but of studying the methods and techniques used in different institutional contexts to act upon the behavior of individuals taken separately or in a group, so as to shape, direct, modify their way of conducting themselves, to impose ends on their inaction or fit it into overall strategies, these being multiple consequently, in their form and their place of exercise; diverse, too, in the procedures and techniques they bring into play.

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[201] *Cf.* Feldman, *supra* note 189, at 2245 (footnote omitted) ("[P]ostmodern theories suggest otherwise: power, in various forms (or forces), is so pervasive and persistent that the political dialogue must always be, in part, distorted and exclusive."); Linda Nicholson & Steven Seidman, *Introduction*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS, *supra* note 48, at 1, 7 (Linda Nicholson & Steven Seidman eds., 1995) ("[Postmodernism addresses] this common problem I saw in Marxism, feminism, and liberal understandings of reason and knowledge: the tendency in elements of all to forget that what they were calling 'reason' or 'history' or 'women' came out of a particular context and were implicated in relations of power.").

[202] Of course, other postmodern philosophers have been concerned with power as well. *See, e.g.*, LYOTARD, *supra* note 33, at 46 ("Scientists, technicians, and instruments are purchased not to find truth, but to augment power."); BAUDRILLARD, *supra* note 50, at 88 ("But simulacra are not only a game played with signs; they imply social rapports and social power.").

[203] 3 MICHEL FOUCAULT, *Truth and Juridical Forms*, *in* POWER, *supra* note 24, at 1, 17.

[204] MICHEL FOUCAULT, *On Power*, *in* POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984, 96, 103 (Lawrence D. Kritzman, ed., Alan Sheridan et al. trans. 1988).

[205] *See, e.g.*, 3 MICHEL FOUCAULT, *The Subject and Power*, *in* POWER, *supra* note 24, at 326, 340 ("[W]hat defines a relationship of power is that it is a mode of action that does not act directly and immediately on others. Instead, it acts upon their actions: an action upon an action, on possible or actual future or present actions.").

> These power relations characterize the manner in which men are "governed" by one another; and their analysis shows how, through certain forms of "government," of madmen, sick people, criminals, and so on, the mad, the sick, the delinquent subject is objectified. So an analysis of this kind implies not that abuse of this or that power has created madmen, sick people, or criminals, there where there was nothing, but that the various and particular forms of "government" of individuals were determinant in the different modes of objectivation of the subject.[206]

To understand these relationships, Foucault is almost Holmesian in his warning that "we must look not to philosophers but to politicians."[207] He is not only focused on theory, but also on praxis.

Second, there is a remarkable parallel between the subjects in Foucault's work and those in "outsider scholarship." Both, albeit in very different ways,[208] are focused on discourses and narratives of those traditionally relegated to the margins of society. Foucault, for example, focuses much of his inquiry on psychiatric and penal institutions.[209] Through this decentered discourse, he then develops more general insights about power. Similarly, "outsider" scholarship focuses on people whom mainstream legal discourse has sidelined for a long time—women, racial and ethnic minorities, gays, to name only a few. Both efforts are focused on how meta-narrative delegitimates "the other."[210] "Outsider" scholarship might unite behind the

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[206] 2 MAURICE FLORENCE [MICHEL FOUCAULT], *Foucault*, *in* AESTHETICS, METHOD, AND EPISTEMOLOGY, *supra* note 1, at 459, 463. The objectification of the subject is a recurring theme in Foucault's work. He even goes so far as to suggest that "a critical history of thought would be an analysis of the conditions under which certain relations of subject to object are formed or modified, insofar as those relations constitute a possible knowledge [*savoir*]." *Id.* at 459. *See generally* FOUCAULT, *supra* note 205.

[207] FOUCAULT, *supra* note 203, at 12. *Cf.* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[208] The analogy, of course, is not meant to be exact: the people whom Foucault studies are at the margins for completely different reasons than the groups chronicled in "outsider" scholarship.

[209] *See* MICHEL FOUCAULT, *Politics and Reason*, *in* POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984, *supra* note 203, at 57, 71 ("[T]he problem deals with the relations between experiences (like madness, illness, transgression of laws, sexuality, self-identity) knowledge (like psychiatry, medicine, criminology, sexology, psychology), and power (such as the power which is wielded in psychiatric and penal institutions, and in all other institutions which deal with individual control)."); *see also* FOUCAULT, *supra* note 203, at 77.

[210] *Cf.* Robert Eaglestone, *Postmodernism and Ethics Against the Metaphysics of Comprehension*, *in* THE CAMBRIDGE COMPANION TO POSTMODERNISM, *supra* note 27, at 182, 184 ("[P]ostmodernism is, first, the disruption of the metaphysics of comprehension, which is the gesture that characterizes western thought. This disruption stems from an encounter with otherness." (emphasis omitted)); ROSENAU, *supra* note 13, at 136 (stating that postmodernists "hint that studying the local, the decentered, the marginal, and the excluded is superior to

notion that, like Foucault, it is telling stories—narratives—about those on the outskirts of power. It would be in excellent company. After all, the difference between central and marginal, mainstream and "other," closely parallels the exploration of high versus low culture in postmodern art and architecture.[211]

Third and ultimately, through his emphasis on specific institutions and social outsiders, Foucault is exposing the assumptions that legitimate the status quo, something which must unite all "outsider" scholarship. Foucault reminds us "of Maurice Merleau-Ponty's teaching and of what was for him the essential philosophical task: never to consent to being completely comfortable with one's own presuppositions."[212] After all,

> [e]ach society has its regime of truth, its "general politics" of truth—that is, the types of discourse it accepts and makes function as true; the mechanisms and instances that enable one to distinguish true and false statements; the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.[213]

If one simply substitutes the word "justice" for "truth" in Foucault's description we have a surprisingly insightful description of the legal system. Just like postmodern philosophers try to decipher the "general politics" of truth, postmodern legal scholars must uncover the "general politics" of justice.

All of this brings us back to representation: context and mediation. After all, trying to uncover hidden assumptions partly reflects the postmodern desire to understand context.[214] And Foucault's enthusiasm for deconstructing truth

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examining what is at the center").

[211] *Cf.* WOODS, *supra* note 15, at 58 (observing how postmodernists study "the contradictions and contingencies of high and pop cultures, motivated by a creative tension animated by the self-assertion of non-hegemonic cultures and the decentering of traditional notions of subjectivity").

[212] 3 MICHEL FOUCAULT, *For an Ethic of Discomfort*, *in* POWER, *supra*, note 24, at 443, 448. *Cf.* BUTLER, *supra* note 9, at 29 ("Postmodernism thus involved a highly critical epistemology, hostile to any overarching philosophical or political doctrine, and strongly opposed to those 'dominant ideologies' that help to maintain the status quo."); ROSENAU, *supra* note 13, at 9 ("Those applying the post-modernism of the humanities to the social sciences do not seek to 'improve and perfect' the social sciences so much as to make their underlying assumptions explicit and undermine their foundational claims.").

[213] 3 MICHEL FOUCAULT, *Truth and Power*, *in* POWER, *supra* note 24, at 111, 131; *see* LYOTARD, *supra* note 33, at xxv ("The philosopher at least can console himself with the thought that the formal and pragmatic analysis of certain philosophical and ethico-political discourses of legitimation, which underlies the report, will subsequently see the light of day."); BAUDRILLARD, *supra* note 50, at 31-32 ("We are in a logic of simulation which has nothing to do with a logic of facts and an order of reasons.").

[214] *Cf.* Feldman, *supra* note 85, at 177 ("These modernists misleadingly ignore their context and implicitly assume certain answers to 'large-scale questions' that remain hidden in the background.").

reflects how putatively objective truth is not objective at all, but rather mediated "via language and symbol systems that are affected by power relations."[215] One might then posit that the various postmodern points of view—crit, critical race, feminist, gaylegal, and the like—rather than emphasizing their differences, might instead squarely focus on these two essential representational questions.

It is not enough, however, simply to proclaim that "[w]hat we need is a new economy of power relations."[216] Fortunately, specific suggestions for reform already exist as a starting point. The legal realists, for instance, relied on a semiotic analysis to suggest a move away from "individualist pretensions of liberty of contract approaches . . . [since] the finding of contractual obligation rested on the congruence of external, formal signs, not on any internal will of the parties."[217] Similarly, Foucault goes back to theorists such as Beccaria to note, quite shockingly, that prison "appeared at the beginning of the nineteenth century, as a de facto institution, almost without theoretical justification."[218] If Foucault is correct to observe that "penal law is part of the social game in a society like ours,"[219] then this would have dramatic impact on prison law and sentencing reform.[220]

The examples of liberty of contract and penal law provide only two vivid illustrations of how an understanding of context and mediation might lead to specific changes. As Douglas Litowitz observes:

> In fact, mainstream legal theory is replete with the evils proscribed by postmodernism: the notion of individuals preexisting in society and standing outside social relations; the notion of an autonomous self with innate desires; a "natural" drive to exchange for mutual gain; a legal subject who freely enters into consensual relationships; and the notion that existing structures of family and marriage are reasonable and inevitable.[221]

Litowitz provides a number of additional useful examples: "standard-form contracts that nobody reads are presumed voluntary, criminal law is based on

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[215] Litowitz, *supra* note 197, at 44; *see also* FOUCAULT, *supra* note 203, at 15 ("There cannot be particular types of subjects of knowledge, orders of truth, or domains of knowledge except on the basis of political conditions that are the very ground on which the subject, the domains of knowledge, and the relations with truth are formed.").

[216] FOUCAULT, *supra* note 205, at 328.

[217] Eskridge & Peller, *supra* note 178, at 767-68.

[218] Foucault, *supra* note 24, at 56.

[219] *Id.* at 392.

[220] *Cf.* Joan Petersilia & Robert Weisberg, *Why Rush to Build Prisons When Other Options Cost Less?*, SACRAMENTO BEE, July 23, 2006, at E2 ("Our dysfunctional system has no coherent plan for translating expenditures into the proper incapacitation of truly dangerous inmates, the realistic rehabilitation of potentially nondangerous inmates and the release, at least from state prisons, of prisoners who exhibit no risk of harm to public safety whatsoever.").

[221] Litowitz, *supra* note 197, at 49.

freedom of choice to the exclusion of environmental factors, and employment at will is the norm."[222] Not only are individuals often poorly represented—taken out of context and mediated into an ideal—but so are entities, notably the market. As Frederic Jameson wonders, "[i]s market discourse merely a rhetoric? It is and isn't (to rehearse the great formal logic of the identity of identity and nonidentity); and to get it right, you have to talk about real markets just as much as about metaphysics, psychology, advertising, culture, representations, and libidinal apparatuses."[223] Indeed, if often "no free market exists today in the realm of oligopolies and multinationals"[224] then what implications for antitrust policy?[225]

Emphasis on representational questions can therefore help get beyond the fallacies that too frequently form the foundation of current law and public policy. For instance, I have attempted elsewhere to show that many of the foundational bases upon which mainstream law and economics rests—the Coase Theorem, Adam Smith's "invisible hand," the Tiebout hypothesis, and the like—have been taken out of context and mediated to serve an agenda that advocates *laissez-faire* public policy. Coase, Smith, Tiebout, and others actually did not say what they are widely reported as saying.[226] Their work has been misrepresented as part of a power game[227] to loosen regulatory laws and their enforcement, thereby allowing companies and markets to escape government oversight. In a nutshell, the result has too frequently been widening income inequality and broadening economic insecurity. As a consequence, the deregulatory zeal that has captured experts and laypersons alike is based on faulty propositions that must be urgently amended.[228]

The criticism that postmodern legal scholarship cannot suggest constructive legal change thus in itself becomes a disingenuous canard to justify the status quo. Consider the striking parallel between our problems in law and those in architecture:

> [T]here are two forms of getting to know architecture. Children, as indeed tourists, learn the cultural signs that make any urban place particular to a social group, an economic class and real, historical people. But professionals and

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[222] Litowitz, *supra* note 85, at 45.

[223] JAMESON, *supra* note 27, at 264; *see also supra* note 190.

[224] JAMESON, *supra* note 27, at 266. *Cf.* BAUDRILLARD, *supra* note 50, at 133.

[225] *See generally* Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745 (2004).

[226] *See* Dibadj, *Weasel Numbers*, *supra* note 181, at 1370-71 (discussing Adam Smith and Coase); Reza Dibadj, *Delayering Corporate Law*, 34 HOFSTRA L. REV. 469 (2005) (discussing Tiebout).

[227] *Cf.* Butler, *supra* note 120, at 5 ("But if I understand part of the project of postmodernism, it is to call into question the ways in which such 'examples' and 'paradigms' serve to subordinate and erase that which they seek to explain.").

[228] I develop this theme in a new book. *See* REZA DIBADJ, RESCUING REGULATION (2006).

> modern architects spend their time unlearning these particular signs while they master the science of building and the arcana of an advanced industrial civilization. Furthermore, following modern novelists, sociologists and idealistic planners, they have constructed the ideal type of the universal man, the abstract client, the average user. This Mythic Modern Man may not exist, except as a historical fiction, but he became a logical necessity for architects and others who wanted to generalize a statistical average and design for the unknown client, the absent user.[229]

We have spent far too much time in law perfecting our "Mythic Modern Man"—the reasonable person in torts, the perfectly informed shareholder in corporate law, the contracting party with free will, and so on. These are our utopian glass houses and housing projects. Instead, if we would be willing to question our basic representational assumptions in law—to become "children" and "tourists" for a bit—then meaningful legal reforms just might emerge. Just like postmodern architecture might have a lot to learn from how things actually work in Las Vegas or on Route 66, so too postmodern law might have a lot to learn from the underfunded legal aid bureau, or the overcrowded county jail.[230]

### *B. Exploratory Topologies*

Unifying existing postmodern legal scholarship toward legal reform is only part of the picture. A more fundamental task would be to explore the actual topologies from which contextual and mediated messages emerge.[231] Once these configurations are understood and their pathologies mapped, legal reform becomes much easier to develop and justify.

The central problem is that our current representational techniques in the law are underdeveloped. Again, the analogy to architecture proves apt. Consider Robert Venturi's struggle at trying to map Las Vegas with modernist tools:

> The representation techniques learned from architecture and planning impede our understanding of Las Vegas. They are static where it is dynamic, contained where it is open, two-dimensional where it is three-dimensional—how do you

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[229] JENCKS, *supra* note 34, at 19.

[230] *Cf.* VENTURI ET AL., *supra* note 33, at 161 ("Meeting the architectural implications and the critical social issues of our era will require that we drop our involuted, architectural expressionism and our mistaken claim to be building outside a formal language and find formal languages suited to our times.").

[231] *Cf.* Nicholson & Seidman, *supra* note 201, at 26 ("A postmodern conceptualization deviates from a modern one in understanding the categories by which social life is organized as historically emergent rather than naturally given, as multivalent rather than unified in meaning, and as the frequent result and possible present instrument in struggles of power.").

> show the Aladdin [casino] sign meaningfully in plan, section, and elevation, or show the Golden Slipper [casino sign] on a land-use plan?[232]

Analogies to the architect's "plan, section, and elevation" exist in other disciplines as well.[233] In economics, it might consist of neoclassical price theory with its neatly intersecting supply and demand schedules at equilibrium. In art, it might be the "modernist grid"[234] that traps a number of otherwise brilliant artists such that "their work virtually ceases to develop and becomes involved, instead, in repetition."[235] The grid has proven a similarly constricting metaphor in the law. As Pierre Schlag observes, "[i]n the *grid aesthetic*, law is pictured as a two-dimensional area divided into contiguous, well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like are further divided into elements, and so on and so forth."[236] Schlag's description should be particularly familiar to legal educators and law students—after all, the "law school curriculum remains largely grid-like. Then there are the grids of student study aids—the outlines and decision trees laid out in Gilbert's, Emanuel's, Barron's, and the like."[237]

Simple modernist topology, then, shares characteristics across disciplines. It is two-dimensional and orderly, clear and well-organized—like a Mondrian or a Mies. As Frederic Jameson notes, the grid's logic aims for "reorganization of some older sacred and heterogeneous space into geometrical and Cartesian homogeneity, a space of infinite equivalence and extension . . . ."[238] Unfortunately, the modernist grid—like the architect's "plan, section, and elevation"—is static and flat. Neither is adequate. As Robert Venturi warns his colleagues, "the medium of architecture must be re-examined if the increased scope of our architecture as well as the complexity of its goals is to be expressed. Simplified or superficially complex forms will not work."[239] His insight applies directly to the law: too often not having met our goals of social justice, we need to reexamine the "forms" through which we conceptualize the world the law is regulating.

Can postmodernism offer a better representational tool? As discussed in Part I, conventional interpretations, which wallow in jargon and critique, are unlikely to be helpful. As Bruno Latour laments:

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[232] VENTURI ET AL., *supra* note 33, at 75.

[233] *Id.*

[234] KRAUSS, *supra* note 152, at 162.

[235] *Id.* at 160 ("Exemplary artists in this respect are Mondrian, Albers, Reinhard, and Agnes Martin.").

[236] Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2002).

[237] *Id.* at 1068.

[238] JAMESON, *supra* note 27, at 410.

[239] VENTURI, *supra* note 100, at 19.

> Are you not fed up with language games, and with the eternal skepticism of the deconstruction of meaning? Discourse is not a world unto itself but a population of actants that mix with things as well as with societies, uphold the former and the latter alike, and hold on to them both. Interest in texts does not distance us from reality, for things too have to be elevated to the dignity of narrative. As for texts, why deny them the grandeur of forming the social bond that holds us together?[240]

Are there narrative tools that might steer "a course between the Scylla of essentialism and the Charybdis of free-wheeling Deconstruction"?[241] Is there room for a "post-postmodernism" that is at once attentive to postmodernism's insights about representation, yet at the same time shares at least a little bit of modernism's optimism? Can we develop an aesthetic that moves from Schlag's grid,[242] yet at the same time does not devolve into nihilism?

In order to find a representational tool that might generate useful narratives,[243] I turn once again to the architectural analogy. Until recently, architects have faced a wide divide between modern and postmodern work: on the one hand, the austere work of a Mies van der Rohe or a Walter Gropius; on the other, the often irreverent playfulness of a Robert Venturi or a Michael Graves. Aided by computer technology, a group of architects has sought to navigate a path between modernism and postmodernism using new topologies such as "blobs"[244] and "folds"[245] that often mimic "the geometry of nature."[246] As Charles Jencks summarizes:

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[240] LATOUR, *supra* note 25, at 90; *see also* VENTURI, *supra* note 100, at 16 ("I speak of a complex and contradictory architecture based on the richness and ambiguity of modern experience, including that experience which is inherent in art."); ROSENAU, *supra* note 13, at 8 (arguing that postmodernism offers "indeterminacy rather than determinism, diversity rather than unity, difference rather than synthesis, complexity rather than simplification").

[241] Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 313 (1992).

[242] Schlag himself provides a description of three additional aesthetics. In "the *energy aesthetic*, law is cast as the image of energy. Conflicting forces of principle, policy, values, and politics collide and combine in sundry ways." Schlag, *supra* note 236, at 1051 (emphasis added). By contrast, in "the *perspectivist aesthetic*, the identities of law and laws mutate in relation to point of view." *Id.* at 1052 (emphasis added). Finally, in "the *dissociative aesthetic*, identities collapse into each other. Nothing is what it is, but is always already something else." *Id.* (emphasis added).

[243] *Cf.* Patterson, *supra* note 241, at 313 ("Narration is the analytical device through which we realize the aspirations of a practice-based, nonpropositional account of legal knowledge.").

[244] *See, e.g.*, JENCKS, *supra* note 34, at 219 ("[The blob grammar's] power is the ability to gather a set of differential forces, give them weightings and then combine them as a series of smooth spline surfaces.").

[245] *See generally* GREG LYNN, FOLDING IN ARCHITECTURE (2004). Perhaps more than any other architect, Frank Gehry has popularized the fold. *See id.*

[246] JENCKS, *supra* note 34, at 210.

> The emergent grammar is constantly provoking. It varies from ungainly blobs to elegant waveforms, from jagged fractals to impersonal datascapes. It challenges the old languages of Classicism and Modernism with the idea that a new urban order is possible, one closer to the ever-varying patterns of nature. One may not like it at first, and be critical of its shortcomings, but on second glance it may turn out to be more interesting, more in tune with perception than the incessant repetition of colonnades and curtain walls.[247]

This new grammar is only an expression of a much broader phenomenon in architecture and the sciences that "stresses self-organizing systems rather than mechanistic ones. It favors fractal forms, self-similar ones, over those that are endlessly repeated. It looks to notions of emergence, complexity and chaos science more than to the linear, predictable and mechanistic sciences."[248] I offer two examples of such "self-organizing systems" for the law, drawn from both theory and praxis. The former concerns how we might use network theory to represent the law and its underlying social relations more accurately than a grid might. The latter concerns supplementing traditional concepts of liberal democracy with participatory democracy.

### *1. Network theory*

Network theory presents an exciting way to conceptualize and visualize new topologies. While its applications might get quite convoluted, it is important to begin by remembering that its underlying principle is actually very simple: "[a]t its core, network analysis maps and measures relationships between, for example, people, groups, computers, or information."[249] While so far vastly underutilized in the law, network theory has already spurred significant discussion in the scientific community. As the applied mathematician Steven Strogatz recounts with a touch of humor:

> Empirical studies have shed light on the topology of food webs, electrical power grids, cellular and metabolic networks, the World-Wide Web, the Internet backbone, the neural network of the nematode worm *Caenorhabditis elegans*, telephone call graphs, coauthorship and citation networks of scientists, and the

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[247] Charles Jencks, *The New Paradigm in Architecture*, ARCHITECTURAL REV., Feb. 2003, at 72; *see also* JENCKS, *supra* note 34, at 219 ("The blob grammar is contrasted with both Classical design and Post-Modern collage as being more flexible, amorphous, supple, fluid, incomplete, non-ideal and pliable. It is also closer to organic shapes and the body than machine-age architecture. Furthermore, like the fold, it is smooth and continuous not disjointed and disjunctive.").

[248] JENCKS, *supra* note 34, at 1.

[249] James H. Fowler et al., Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents 2 (June 6, 2006) (unpublished manuscript), *available at* http://ssrn.com/abstract=906827 (citations omitted).

> quintessential 'old-boy' network, the overlapping boards of directors of the largest companies in the United States . . . .[250]
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> In our lighter moments we play parlour games about connectivity. 'Six degrees of Marlon Brando' broke out as a nationwide fad in Germany, as readers of *Die Zeit* tried to connect a falafel vendor in Berlin with his favourite actor through the shortest possible chain of acquaintances. And during the height of the Lewinsky scandal, the *New York Times* printed a diagram of the famous people within "six degrees of Monica."[251]

Networks such as those Strogatz describes are mapped in terms of "nodes" and "arcs." For example, legal actors or cases might occupy nodes and be connected to each other via arcs.

Such a tool may seem interesting, but as having little to do with postmodern theory. A careful reading, however, suggests that postmodern theory provides strong support for using networks as a way to provide more accurate narratives about a world where simple theoretical constructs will no longer do. Consider Lyotard who speaks in language stunningly similar to that of network theorists:

> A *self* does not amount to much, but no self is an island; each exists in a fabric of relations that is now more complex and mobile than ever before. Young or old, man or woman, rich or poor, a person is always located at "nodal points" of specific communication circuits, however tiny these may be. Or better: one is always located at a post through which various kinds of messages pass. No one, not even the least privileged among us, is ever entirely powerless over the messages that traverse and position him at the post of sender, addressee, or referent.[252]

Lyotard's concern is very similar to that of Derrida's in *The Postcard*;[253] indeed, if Derrida had more of a constructive bent, perhaps he too would have envisioned network analysis as an approach out of the morass he creates in his pseudo-novel. For his part, Baudrillard emphasizes that individuals are no longer isolated producers or consumers:

> Something has changed, and the Faustian, Promethean (perhaps Oedipal) period of production and consumption gives way to the "proteinic" era of networks, to the narcissistic and protean era of connections, contact, contiguity, feedback and generalized interface that goes with the universe of communication. With the television image—the television being the ultimate and perfect object for this

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[250] Steven H. Strogatz, *Exploring Complex Networks*, 410 NATURE 268, 268 (2001) (citation omitted).

[251] *Id.*

[252] LYOTARD, *supra* note 33, at 15 (citations omitted).

[253] *See supra* note 125 and accompanying text.

> new era—our own body and the whole surrounding universe become a control screen.[254]

Similarly, Foucault wants "to state how a society reflects upon resemblances among things and how differences between things can be mastered, organized into networks, sketched out according to rational schemes."[255] For these postmodern theorists,

> the notion of system modeled (as it was for Descartes) on the orderly relationships inherent in a rational and divinely originated world are displaced by the more episodic and unpredictable connections of network—modeled on information and communication networks which disperse, circulate, and proliferate exchanges in a way that belies any myths of unitary origins, foundations, or essences.[256]

In other words, Lyotard, Baudrillard, and Foucault are each suggesting networks as a tool to represent a world in which simple linear modern meta-narratives will no longer suffice.

More recently, scholars such as Gilles Deleuze, Felix Guattari, and Bruno Latour have built on these insights. Deleuze and Guattari are perhaps best known in philosophical circles for proposing the notion of a "rhizome." The rhizome becomes a metaphor for a nonhierarchical, nonlinear semiotic system: "unlike trees or their roots, the rhizome connects any point to any other point, and its traits are not necessarily linked to traits of the same nature; it brings into play very different regimes of signs, and even nonsign states."[257] As Deleuze and Guattari describe it in their characteristically postmodern prose:

> Unlike a structure, which is defined by a set of points and positions, with binary relations between the points and biunivocal relationships between the positions,

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[254] Jean Baudrillard, *The Ecstasy of Communication*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE, *supra* note 14, at 126, 127. *Cf.* Connor, *supra* note 27, at 3 ("The rise of an economy driven from its peripheries by patterns of consumption rather than from its center by the needs of production generated much more volatile and unstable economic conditions. These erosions of authority were accompanied by a breakdown of the hitherto unbridgeable distinctions between centers and peripheries . . . .").

[255] 2 MICHEL FOUCAULT, *The Order of Things*, *in* AESTHETICS, METHOD, AND EPISTEMOLOGY, *supra* note 1, at 261, 261.

[256] Linda Singer, *Feminism and Postmodernism*, *in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 21, at 464, 466.

[257] GILLES DELEUZE, *Rhizome Versus Trees*, *in* THE DELEUZE READER 27, 35 (Constantin V. Boundas ed., 1993); *see also id.* at 29 ("[A]ny point of a rhizome can be connected to anything other, and must be. This is very different from the tree or root, which plots a point, fixes an order."); *see also* WOODS, *supra* note 15, at 6 ("[The rhizome] is the lateral root structure of certain plants, and the metaphor describes how all social and cultural activities in postmodernism are dispersed, divergent and acentred systems of structures. This contrasts with the organised, hierarchical, 'trunk-and-branch' structure of modernism.").

> the rhizome is made only of lines: lines of segmentarity and stratification as its dimensions, and the line of flight or deterritorialization as the maximum dimension after which the multiplicity undergoes metamorphosis, changes in nature .... In contrast to centered (even polycentric) systems with hierarchical modes of communication and preestablished paths, the rhizome is an acentered, nonhierarchical, nonsignifying system without a General and without an organizing memory or central automaton, defined solely by a circulation of states.[258]

The rhizome presents a provocative, albeit abstract, way of representing reality. It is very far from a grid or architectural plan, and much closer to a messy network with nodes and arcs.

Another important theorist who seeks to go beyond canonical postmodern work is Bruno Latour.[259] Latour's work is more direct and less metaphorical than that of Deleuze and Guattari. His principal concern is with developing "sociotechnological networks"[260] that can represent the "delicate web of relations between things and people."[261] As Latour describes it:

> Natures are present, but with their representatives, scientists who speak in their name. Societies are present, but with the objects that have been serving as their ballast from time immemorial. Let one of the representatives talk, for instance, about the ozone hole, another represent the Monsanto chemical industry, a third the workers of the same chemical industry, another the voters of New Hampshire, a fifth the metereology of the polar regions; let still another speak in the name of the State; what does it matter, so long as they are all talking about the same thing, about a quasi-object they have all created, the object-discourse-nature-society whose new properties astound us all and whose network extends from my refrigerator to the Antarctic by way of chemistry, law, the State, the economy, and satellites. *The imbroglios and networks that had no place now have the whole place to themselves. They are the ones that have to be represented.*[262]

Latour labels his construct "actor-network theory" ("ANT"), although in recognition of Deleuze and Guattari's work, he notes wryly that "ANT should

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[258] DELEUZE, *supra* note 257, at 36.

[259] *See* LATOUR, *supra* note 25, at 46 ("Instead of moving on to empirical studies of the networks that give meaning to the work of purification it denounces, postmodernism rejects all empirical work as illusory and deceptively scientistic." (citation omitted)).

[260] *Id.* at 91.

[261] *Id.* at 39; *see also id.* at 81 ("Nature and Society are no longer explanatory terms but rather something that requires a conjoined explanation.").

[262] *Id.* at 144 (emphasis added); *see also id.* ("Half of our politics is constructed in science and technology. The other half of Nature is constructed in societies. Let us patch the two back together, and the political task can begin again.").

really be called 'actant-rhizome ontology.' But who would have cared for such a horrible mouthful of words . . . ."[263]

ANT, like the rhizome, questions modern tools of representation by suggesting a new framework within which to model reality. As one of its theorists observes,

> we may imagine actor-network theory as a machine for waging war on Euclideanism: as a way of showing, *inter alia*, that regions are constituted by networks. That, for instance, nation states are made by telephone systems, paperwork, and geographical triangulation points . . . . [A]ctor-network theory articulates some of the possibilities which are opened up if we try to imagine that the sociotechnical world is *topologically nonconformable*; if we try to imagine that it is topologically complex, a location where regions intersect with networks.[264]

At a very basic level, network graphs emphasize that entities do not exist in isolation, but are connected to other entities.[265] Over time, their shape and composition can evolve to reflect changes among nodes, permitting dynamic analysis. Networks thus can provide a visual representation of a system such as the law in a way that is much richer than, say, a grid.

More subtly, network theory can provide localized spatial narratives at an intermediate level of analysis that permits analysis of groups and organizations. Traditional legal analysis tends to occur at two extremes: either isolated actors (for example, the tortfeasor or the shareholder), or society at large (for example, the state or the nation). By contrast, the law has not been very sophisticated in analyzing intermediate level entities such as firms.[266] The problem repeats itself in economics: price theory is useful where there are a large number of economic actors, and game theory when there are very few. There is very little in between.[267] This conceptual problem is not

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[263] Bruno Latour, *On Recalling ANT*, *in* ACTOR NETWORK THEORY AND AFTER, *supra* note 67, at 15, 19.

[264] John Law, *After ANT: Complexity, Naming and Topology*, *in* ACTOR NETWORK THEORY AND AFTER, *supra* note 67, at 1, 7. *Cf.* Latour, *supra* note 263, at 20 ("ANT is merely one of the many anti-essentialist movements that seem to characterize the end of the century.").

[265] *Cf.* Mootz, *supra* note 19, at 291 ("[I]ndividuals are constituted socially and legal relations are bound up inextricably with social relations."); ROSENAU, *supra* note 13, at 112 ("The post-modern world is said to be 'intertextual,' and this means, for the skeptical post-modernists, that everything one studies is related to everything else." (citation omitted)).

[266] *See* Reza Dibadj, *Reconceiving the Firm*, 26 CARDOZO L. REV. 1459 (2005).

[267] As one scholar aptly notes,

> [M]ost important and interesting organizational design, conflict, and innovation problems involve numbers that are too large for game theory to handle and too small for price theory to handle. Specifically, the more significant the decision or problem area, the less applicable either set of tools is likely to be. This is because weightier decisions usually involve longer time frames and heterogeneous actors.

limited to law or economics—it is essential to understanding the "crisis of representation" in social theory. As Bruno Latour summarizes it:

> How can one be connected without being either local or global? Modern sociologists and economists have a hard time posing the problem. Either they remain at the 'micro' level, that of interpersonal contacts, or they move abruptly to the 'macro' level and no longer deal with anything, they believe, but decontextualized and depersonalized rationalities. The myth of the soulless, agentless bureaucracy, like that of the pure and perfect marketplace, offers the mirror-image of the myth of universal scientific laws. Instead of the continual progression of an inquiry, the moderns have imposed an ontological difference as radical as the sixteenth-century differentiation between the supralunar worlds that knew neither change nor uncertainty . . . .
>
> Yet there is an Ariadne's thread that would allow us to pass with continuity from the local to the global, from the human to the nonhuman. It is the thread of networks of practices and instruments, of documents and translations. An organization, a market, an institution, are not supralunar objects made of a different matter from our poor local sublunar relations. The only difference stems from the fact that they are made up of hybrids and have to mobilize a great number of objects for their description.[268]

Fortunately, there already exists some very early work in the law giving credence to Latour's approach.

David Post and Michael Eisen wrote a pioneering article in 2000 that sought to represent cases not as simple entries in a grid, but as an evolving and interrelated network. They performed a citation analysis of cases decided in 1930, 1950, 1970, and 1980 by the New York Court of Appeals and the United States Court of Appeals for the Seventh Circuit and found that a very small number of cases received a disproportionately large percentage of citations, whereas the vast majority of cases were cited very infrequently.[269] In other words, there are a few very well connected nodes that determine the topology of the network and very many smaller ones scattered about. Their findings matched those of scientists studying physical phenomenal; namely, that "some nodes are more highly connected than others are. . . . [T]here are a few nodes with many links."[270]

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John Freeman, *Efficiency and Rationality in Organizations*, 44 ADMIN. SCI. Q. 163, 172 (1999).

[268] LATOUR, *supra* note 25, at 121 (citation omitted); *see also id.* at 122 ("The two extremes, local and global, are much less interesting than the intermediary arrangements that we are calling networks."). Similarly, Robert Venturi laments that "Las Vegas space is so different from the docile spaces for which our analytical and conceptual tools were evolved that we need new concepts and theories to handle it." VENTURI ET AL., *supra* note 33, at 75.

[269] *See* David G. Post & Michael B. Eisen, *How Long Is the Coastline of the Law? Thoughts on the Fractal Nature of Legal Systems*, 29 J. LEGAL STUD. 545 (2000).

[270] Strogatz, *supra* note 250, at 274. These networks are best modeled using power-law distributions: a small number of nodes have many arcs connecting them to other nodes, but the

More recent research is confirming Post and Eisen's insight. Thomas Smith has begun mapping the "web of law"—the citation frequency of a broad range of state and federal cases to find similarly skewed patterns.[271] The United States Supreme Court, given its importance, has been the subject of the most detailed analyses to date. Scholars analyzing its citation patterns have found results consistent with Smith's broader inquiry.[272] A common, although perhaps surprising, theme is emerging among this new research. Namely,

> [t]he vast majority of decisions are cited by only a few cases, but there are a few decisions which are widely cited. Similarly, most decisions contain only a few citations, but there are a few decisions that cite a very large number of cases. In other words, the degree distributions exhibit what is called a *power-law tail*.[273]

In turn, this power-law tail "suggests that there is something systematic about the evolution of law that mimics the evolution of other network phenomena."[274] Note that the visual[275] and dynamic[276] representational capabilities of network theory have revealed that the law may be more of a power-law distribution than a grid. An important avenue of future research will be to analyze the structure of legal networks more precisely. Indeed, scholars are already talking about measures such as "*authority scores and hub*

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vast majority of nodes have exponentially fewer connections. Network theorists often label these networks as "'scale-free,' by analogy with fractals, phase transitions and other situations where power laws arise and no single characteristic scale can be defined." *Id.*; *see also* Post & Eisen, *supra* note 269, at 559 ("The idea that legal doctrine and argumentation, like so much of the physical and biological world, is generated by a recursive process and has a kind of fractal structure is certainly a powerful and intriguing metaphor.").

[271] *See* Thomas A. Smith, The Web of Law (Sept. 10, 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=642863.

[272] *See* Seth J. Chandler, The Network Structure of Supreme Court Jurisprudence (June 10, 2005) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=742065; Fowler et al., *supra* note 249.

[273] James H. Fowler & Sangick Jeon, The Authority of Supreme Court Precedent: A Network Analysis 6 (June 29, 2005) (unpublished manuscript), *available at* http://jhfowler.ucsd.edu/authority_of_supreme_court_precedent.pdf.

[274] *Id.* at 33.

[275] Of course, network visualization techniques are being refined. *See, e.g.*, Georg Apitz & Neeti Ogale, Case Cluster: Visualizing Case References Between Supreme Court Cases (May 9, 2006) (unpublished manuscript), *available at* http://www.cs.umd.edu/class/spring2006/cmsc838s/projects/CC/CaseClusterFinal.pdf.

[276] *See, e.g.*, Fowler et al., *supra* note 249, at 24 ("Moreover, unlike existing measures the network measures vary both across time and across cases.").

*scores*"[277] and various measures of "*centrality*."[278] As Seth Chandler observes in the context of his new research analyzing U.S. Supreme Court precedent:

> The Supreme Court network is a large and intricately tangled web, to be sure, but deep within there is structure that our mathematical probes can now discern. Measures such as "betweenness centrality," "closeness centrality," and "Markov Centrality" help us find the cases that lie at the core of a judicial system. Measures such as clustering enable us to understand the degree of interdependence of cases that comprise the database. And notions such as that of a "main core" help identify areas that are particularly complex.[279]

Mathematicians and physicists have studied similar phenomena in physical networks, from which there is much that we in the law might learn.[280]

In my own work, I have also begun using network theory. For instance, to address the debate as to whether standards of heightened scrutiny in corporate law are meaningful, I am creating a series of dynamic network maps of cases from the Delaware Supreme Court and Delaware Court of Chancery that show whether and how standards initially articulated to protect shareholders get watered down across subsequent applications.[281] In more theoretical work, I am collaborating with Stephen Devlin, a professor of mathematics, to see whether we might be able to combine game theory with network theory in the hope of articulating a new framework for devising social welfare functions. In a nutshell, we posit that social interactions can be fruitfully modeled as a network of actors ("nodes") playing games against each other.[282] Consider how similar our use of game theory is to Lyotard's conception of language games:

> Each language partner, when a "move" pertaining to him is made, undergoes a "displacement," an alteration of some kind that not only affects him in his capactiy [sic] as addressee and referent, but also as sender. These "moves" necessarily provoke "countermoves"—and everyone knows that a countermove that is merely reactional is not a "good" move. Reactional countermoves are no

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[277] Fowler & Jeon, *supra* note 273, at 31; *see also id.* at 12 ("A *hub* is a case that cites many other decisions, helping to define which legally relevant decisions are pertinent to a given precedent, while an *authority* is a case that is widely cited by other decisions.").

[278] *Id.* at 11.

[279] Chandler, *supra* note 272, at 23.

[280] *See, e.g.*, M. Girvan & M. E. J. Newman, *Community Structure in Social and Biological Networks*, 99 PROC. NAT'L ACAD. SCI. 7821, 7821 (2002) (discussing typical network characteristics such as the "small world effect," right-skewed degree distributions, and clustering).

[281] *See* Reza Dibadj, The Rhetoric of Fairness 2-3 (Dec. 13, 2006) (unpublished manuscript, on file with author).

[282] *See* Reza Dibadj & Stephen Devlin, The Role of the Network in the Emergence of Cooperation 1 (Feb. 23, 2007) (unpublished manuscript, on file with author).

> more than programmed effects in the opponent's strategy; they play into his hands and thus have no effect on the balance of power. That is why it is important to increase displacement in the games, and even to disorient it, in such a way as to make an unexpected "move" (a new statement).
>
> *What is needed if we are to understand social relations in this manner, on whatever scale we choose, is not only a theory of communication, but a theory of games which accepts agonistics as a founding principle.*[283]

By overlaying network theory upon game theory—in other words, by conceptualizing social relations as individual actors at nodes who play games against each other—Devlin and I are applying a Lyotardian concept to social welfare theory.

For all of its promise, however, network theory presents profound intellectual challenges, and existing efforts are no more than a crude start. We are no longer dealing with reassuring abstractions such as two-dimensional grids or neatly intersecting supply and demand schedules. Rather, we are trying as a first step to understand and represent the messy and chaotic world in which we live using a new tool.[284] As Latour asks, "[h]ow are we to gain access to networks, those beings whose topology is so odd and whose ontology is even more unusual, beings that possess both the capacity to connect and the capacity to divide—that is, the capacity to produce both time and space?"[285] The application of network theory to law has just begun and will take time to develop, given the complexities involved. By analogy to architecture, modeling the realities of Las Vegas and Route 66 will take time.

Despite this challenge, exploring network topologies will very likely generate some remarkable rewards. The first is the opportunity for us as legal academics to collaborate with scholars from a variety of other disciplines in both the physical and social sciences. Network analysis is inherently interdisciplinary and requires insights from a variety of disciplines, including computer science, applied mathematics, sociology, statistical physics, and anthropology.[286]

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[283] LYOTARD, *supra* note 33, at 16 (emphasis added). *Cf.* FOUCAULT, *supra* note 205, at 346 (defining strategy as the ability "to designate the way in which a partner in a certain game acts with regard to what he thinks should be the action of the others and what he considers the others think to be his own").

[284] *Cf.* MINDA, *supra* note 16, at 3 ("Postmodern legal critics employ local, small-scale problem-solving strategies to raise new questions about the relation of law, politics and culture.").

[285] LATOUR, *supra* note 25, at 77; *see also* Latour, *supra* note 263, at 15 ("[T]he word network, like Deleuze and Guattari's term rhizome, clearly meant a series of transformations—translations, transductions—which could be not captured by any of the traditional terms of social theory.").

[286] *Cf.* LATOUR, *supra* note 25, at 50 ("In what world are these multitudes to be housed? Are we in the realm of biology, sociology, natural history, ethics, sociobiology?").

Second, and more profound, is the opportunity to use network analysis not as an apologia for current inequalities, but as a tool through which to understand and ameliorate power relations by understanding especially those who inhabit the margins of social networks. As Foucault reminds us:

> The state is superstructural in relation to a whole series of power networks that invest the body, sexuality, the family, kinship, knowledge, technology, and so forth. True, these networks stand in a conditioning-conditioned relationship to a kind of "metapower" structured essentially around a certain number of great prohibition functions; but this metapower with its prohibitions can only take and secure its footing where it is rooted in a whole series of multiple and indefinite power relations that supply the necessary basis for the great negative forms of power.[287]

Or, in Deleuze and Guattari's more abstract metaphor, a "rhizome ceaselessly establishes connections between semiotic chains, organizations of power, and circumstances relative to the arts, sciences, and social struggles."[288] In this sense, network theory can become a powerful tool that can not only map the "outsiders" of existing postmodern legal scholarship,[289] but more broadly focus reform efforts on achieving social justice.

### 2. *Participatory democracy*

The second example I propose to start the conversation centers more on praxis than on theory. It involves supplementing existing liberal democracy with participatory democracy offering more direct forms of citizen involvement. The idea is an outgrowth of the postmodern effort to question representation—this time, in the political context. Put simply, "rejecting modern representation leads to demands for more authentic representation or a call for more and better democracy to the point of each citizen 'representing' himself or herself."[290] Such a notion encourages movement toward "direct democracy as local autonomy where every citizen can participate in political discussions."[291] By nature, such a notion of democracy is a grassroots

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[287] Foucault, *supra* note 213, at 123; *see* Foucault, *supra* note 205, at 345 ("Power relations are rooted in the whole network of the social.").

[288] DELEUZE, *supra* note 257, at 30. *Cf.* Lee & Stenner, *supra* note 67, at 105 ("Without the majority world servicing its debt, there will be no circulation and our networks will collapse. Our wealth depends on their poverty.").

[289] *See supra* Part IV.A.

[290] ROSENAU, *supra* note 13, at 23; *see id.* at 100 ("Affirmative post-modernists deny that anyone can have a monopoly of truth, whereas modern versions of representative democracy assure a monopoly of truth to the electoral victor.").

[291] *Id.* at 100.

movement that emphasizes political "local narratives" over the meta-narrative of grand political theory.[292]

As with network theory, there is substantial theoretical support for participatory democracy. Canonical postmodernists question traditional political machinery in an era of polls, focus groups, and "spin doctors." Perhaps unsurprisingly, Baudrillard views the electoral process as a game, a simulation. He argues, for example, that "[t]he polls are located in a dimension beyond all social *production*. They refer only to a simulacrum of public opinion."[293] He even goes so far as to claim that "[a]t this point it makes no difference at all what the parties in power are expressing historically and socially. It is *necessary* even that they represent nothing: the fascination of the game, the polls, the formal and statistical compulsion of the game is all the greater."[294] Foucault is less cynical. He lionizes the student movement of the late 1960s—after all, an early form of grassroots political involvement—as for the first time uncovering a power game from which those at the margins of society were excluded:

> [t]he mechanics of power in themselves were never analyzed. This task could only begin after 1968, that is to say, on the basis of daily struggles at [the] grass-roots level, among those whose fight was located in the fine meshes of the web of power. This was where the concrete nature of power became visible, along with the prospect that these analyses of power would prove fruitful in accounting for all that had hitherto remained outside the field of political analysis. To put it very simply, psychiatric internment, the mental normalization of individuals, and penal institutions have no doubt a fairly limited importance if one is only looking for their economic significance. On the other hand, they are undoubtedly essential to the general functioning of the wheels of power. So long as the posing of the question of power was kept subordinate to the economic instance and the system of interests this served, there was a tendency to regard these problems as of small importance.[295]

Lyotard echoes Foucault's concerns about the importance of political involvement. Returning to the notion of story-telling, he argues that

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[292] *See, e.g.*, *id.* at 84 ("As substitutes for truth and theory . . . [postmodernists] also emphasize certain kinds of narratives, small narratives, community-based narratives, rather than grand narratives. They applaud traditional narratives that speak, for example, as folk wisdom, myth, popular 'stories,' legends, fragmented creative snippets of wisdom, and 'petite histoire' (little stories).").

[293] BAUDRILLARD, *supra* note 50, at 125-26.

[294] *Id.* at 132.

[295] FOUCAULT, *supra* note 213, at 117. *Cf.* Fraser, *supra* note 51, at 288 ("The idea of the public sphere enables us to study the ways in which culture is embedded in social structure and affected by social relations of domination."); ROSENAU, *supra* note 13, at 147 ("Post-modern political action is generally aimed at rousing aspirations, raising consciousness, exploring the politics of identity, and opening up opportunities for those who are marginal.").

> the people are only that which actualizes the narratives . . . they do this not only by recounting them, but also by listening to them and recounting themselves through them; in other words, by putting them into "play" in their institutions—*thus by assigning themselves the posts of narratee and diegesis as well as the post of narrator.*[296]

Thus, Foucault and Lyotard both emphasize the importance of grassroots activity in promulgating more localized narratives that question grand meta-narratives.

Participatory democracy not only has striking support in theory, but also in the practice of postmodern art and architecture. The breakdown between author and reader in postmodern fiction, for instance, "may be interpreted as encouraging critical citizenship in the sense of stressing that each individual has a valuable and viable opinion on a candidate's speech, a government policy on social security, a foreign policy decision (all text-events)."[297] As odd as it might seem as first, one might also look to performance art that diminishes the role of artist qua artist and emphasizes that of the spectator. As just one example,

> Joseph Beuys has attained the status of European guru of post-modern art. Shaman, seer, sculptor, maker of happenings, performance artist, he has achieved almost mythic proportions with his conviction that everyone is an artist . . . . This challenge flies in the face of the artist as an embodiment of the creative ideal, or as hero. The 'great artist', genius, innately born rather than trained, is bunk! *Beuys widens the definition of artist to the 'process of living' in a radically democratic gesture.*[298]

Beuys is not the only prominent postmodern artist who suggests parallels to participatory democracy. Consider participatory architecture, pioneered by Charles Moore,[299] and practiced masterfully by Frank Gehry whose

> *bricolage* and use of cheapskate materials stem from this LA [Los Angeles] background and also his desire to work closely with his clients, understanding their motivations. Like Erskine, Kroll and Moore, he actually feels empowered by constant interaction with those commissioning the building. In fact, Gehry would be unable to take the expressive risks he does without consultation. In this

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[296] LYOTARD, *supra* note 33, at 23 (emphasis added).

[297] ROSENAU, *supra* note 13, at 40-41; *see also id.* at 27 ("The death of the author in the humanities parallels the decline of the legislator in society.").

[298] WOODS, *supra* note 15, at 153 (emphasis added).

[299] *See, e.g.*, JENCKS, *supra* note 34, at 74-75 ("As well as slowing the indiscriminate destruction of the city, participatory design opened up architects to solutions they might otherwise not have imagined. This happened, on more than one occasion, with Charles Moore who collaborated with local communities and even audiences in a television studio.").

> sense one of the great lessons of participation is that, with certain architects, it can liberate not hamper creativity.[300]

More generally, postmodern creation is "often a bridging of conventional art boundaries: public and private, individual and communal, high style and vernacular."[301] Similarly, participatory democracy breaks down formal boundaries: politician versus citizen, public versus private.[302]

A particularly dramatic illustration would be ACT-UP, a group that worked to speed access to medications during the early years of the AIDS crisis. The movement—borrowing techniques from feminist, civil rights and antiwar campaigns[303]—"disdained relying primarily on legislative and electoral niceties"[304] and instead "effectively played the postmodern concatenation of outrageous confrontation with adroit media politics to help level the playing field."[305] The movement exhibited a Baudrillardean sensitivity to television and publicity:

> Rather than being fought *primarily* at the ballot box which in the eyes of most activists is stuffed by the de facto one-party system, the battle must be joined in the new public sphere: the visual images emanating from TV's 11 o'clock news of intransigent protesters conducting in-your-face politics, street actions that embarrass public officials through exposure, and other disruptions. Publicity is the movement's crucial strategic weapon, embarrassment its major tactic. ACT-UP's tacit strategy is to force on public officials, church, and business leaders their most horrific nightmare: exposure by means of actions that signify disrespect. By presenting itself as an "out-of-control" instransigent mélange of queers and misfits, it reveals a capacity to opt out of what is expected of a "responsible" civic organization: to play by the rules.[306]

Most dramatically, its activists "insisted that as 'laypersons' they have the right, and perhaps more to the point, the capacity to participate in making

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[300] *Id.* at 75.

[301] WOODS, *supra* note 15, at 149.

[302] As one commentator writes:

> It follows, then, that we need to take a harder, more critical look at the terms "private" and "public." These terms are not simply straightforward designations of preexisting societal spheres; rather, they are cultural classifications and rhetorical labels. In political discourse, they are frequently deployed to delegitimate some interests, views, and topics and to valorize others.

Fraser, *supra* note 51, at 294. For a critique of the public-private distinction, see Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 OHIO ST. L.J. 1041, 1119-22 (2003).

[303] *See* Stanley Aronowitz, *Against the Liberal State: ACT-UP and the Emergence of Postmodern Politics*, *in* SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS, *supra* note 48, at 357, 370, 378.

[304] *Id.* at 366.

[305] *Id.* at 365.

[306] *Id.* at 364-65.

crucial policy decisions."[307] In other words, ACT-UP was willing—much like "children and tourists" analyzing architecture[308]—to question the traditional representational paradigms of political and scientific discourse.

The point of the example, of course, is not to pass judgment on ACT-UP's specific goals or methods. Rather, it is simply to recognize that ACT-UP's success in part reflects the effectiveness of direct citizen participation in a world in which "majoritarian ideologies have lost some of their moral force because of the partial breakdown of the legitimacy of the liberal state (where 'liberal' connotes not so much the dominance of political parties of modern social welfarism but a system where 'representation' is considered an adequate measure of legitimate power)."[309]

In case my discussion of continental philosophy, Beuys, Gehry, and ACT-UP sounds too esoteric, consider Justice Stephen Breyer's latest book, *Active Liberty*. In it, he observes that "liberty means not only freedom from government coercion but also the freedom to participate in the government itself."[310] Breyer thus champions "meaningful citizen participation in government by preserving a more local decision-making process,"[311] noting that "[p]articipation is most forceful when it is direct, involving, for example, voting, town meetings, political party membership, or issue- or interest-related activities."[312] In a manner reminiscent of the concept of "moral dialogue" pioneered by Amitai Etzioni,[313] Breyer suggests that

> [i]deally, in America, the lawmaking process does not involve legislators, administrators, or judges imposing law from above. Rather, it involves changes that bubble up from below. Serious complex legal change is often made in the context of a national conversation involving among others, scientists, engineers, businessmen and women, the media, along with legislators, judges, and many ordinary citizens whose lives the new technology will affect [for example, in the context of privacy rights]. That conversation takes place through meetings, symposia, and discussions, through journal articles and media reports, through administrative and legislative hearings, and through court cases.[314]

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[307] *Id.* at 366-67.

[308] *See supra* note 229 and accompanying text.

[309] Aronowitz, *supra* note 303, at 360; *see also id.* at 377 (noting ACT-UP's "reliance on direct action as a strategic principle behind which lay a largely unarticulated critique of the liberal state and its model of subordination, accommodation, and incremental change").

[310] STEPHEN BREYER, ACTIVE LIBERTY 3 (2005).

[311] *Id.* at 57.

[312] *Id.* at 15.

[313] *See* AMITAI ETZIONI, NEXT 22 (2001) [hereinafter ETZIONI, NEXT]; *see also* AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 242 (1988) (emphasizing "moral education, peer culture, community values, and the mobilization of appropriate public opinion").

[314] BREYER, *supra* note 310, at 70-71.

Interestingly, neither Breyer nor Etzioni rely on the language of postmodern discourse. I venture, however, that their ideas are postmodern in the sense that they force us to rethink conventional paradigms of political representation which simply center on passive voting every few years.

It cannot be overemphasized, however, that participatory democracy is in no position to replace traditional liberal democracy; rather, it should supplement it. As I have argued elsewhere, the preconditions for participatory democracy remain largely unfulfilled.[315] The core of the problem is that there must be sufficient incentive for citizens to involve themselves in public life.[316] The unusual irony is that the postmodern individual is likely too self-absorbed to take advantage of the political possibilities a more nuanced representational account of postmodernism might offer. After all, while a representational conception of the postmodern points to a role for participatory democracy, "[i]f a public sphere is to survive and thrive, individuals will be given greater choice; they must accept greater responsibility, something the narcissistic post-modern individual avoids."[317] Thus, for better or worse, at least in the short term, attention needs to be devoted to improving incentives for direct participation,[318] while simultaneously improving representative democracy—for example, through campaign finance reform[319] or cumulative voting for local and regional governments.[320]

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[315] *See* Dibadj, *Weasel Numbers*, *supra* note 181, at 1380-82.

[316] The participants in ACT-UP, of course, had the greatest incentive: prolonging life for themselves or their loved ones. Lack of incentives is not the only problem. In addition, given that participatory democracy is typically a local grassroots effort, another problem "is spatial: how to develop a *national* political movement on the basis of a *city* strategy and politics." JAMESON, *supra* note 27, at 414.

[317] ROSENAU, *supra* note 13, at 104-05.

[318] *See, e.g.*, Dibadj, *supra* note 302, at 1122.

[319] *See, e.g.*, ETZIONI, *supra* note 313, at xi ("Can campaign financing be thoroughly reformed, not by our current method of merely closing one floodgate as money gushes over and around the dam and everywhere else, but in a way that will stop the drift toward a plutocracy of one *dollar*, one vote?").

[320] Postmodern ideas might apply here as well. For example, Gerald Frug suggests that

> One way postmodern subjectivity might be introduced into local government law is through a modification of the regional legislature . . . [which can be] imagined in terms of the representation of neighborhoods, with each neighborhood defined by residency. If, however, as argued above, people have multiple attachments to the metropolitan area, including attachments to places where they shop or work (like Tyson's Corner or King of Prussia), a different system of representation might be better. Consider a plan, for example, in which everyone gets five votes that they can cast in whatever local elections they feel affect their interest . . . . Under such an electoral system, mayors, city council members, and neighborhood representatives in the regional legislature would have a constituency made up not only of residents but of workers, shoppers, property owners in neighboring jurisdictions, the homeless, and so forth.

Frug, *supra* note 173, at 329.

Yet despite these obstacles, participatory democracy needs to be taken very seriously for one very simple reason: those unhappy with the status quo cannot rely solely on traditional liberal politics.[321] Let us not forget that many citizens do not even vote. This sad phenomenon, of course, may be partly explained by the fact that the postmodern individuals simply do not care about politics and cannot be bothered. But the problem runs deeper. The liberal ethos itself engenders apathy in repeatedly emphasizing the negative rights that individuals possess against the state rather than positive citizen involvement.[322] To make matters worse, the existing conception of representative democracy, despite the assurance of "one person, one vote," disproportionately favors monied interests.[323] Various lobbying efforts and jockeying among interest groups create a situation where "the numbers game, the staple of modern electoral politics, may no longer regulate policy struggles and their outcomes (if it ever did), except in terms of the 'bottom-line' issue of who may claim the right to rule."[324] These factors breed cynicism.

An additional unfortunate consequence of citizen disengagement and interest group lobbying is that traditional liberal politics has encouraged government to shed many of its welfare functions,[325] thereby exacerbating income inequality and economic insecurity:

> Indeed, at the near end of the twentieth century, particularly in the most affluent societies, the number of those denied equal benefit of law and income is indisputably growing in direct proportion to the widening gap between their real prospects and those of the most blessed. Modernity's answer to this dilemma has always been to refer those who suffer to hope. This is fine and good for the

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[321] *See, e.g.*, Nicholson & Seidman, *supra* note 201, at 9 ("The positive possibilities of postmodern theorizing can be matched, we believe, by constructive ideas about political action. Such ideas may seriously challenge and expand our ideas about how political change can take place.").

[322] *Cf.* Chantal Mouffe, *Feminism, Citizenship and Radical Democratic Politics*, *in* FEMINISTS THEORIZE THE POLITICAL, *supra* note 21, at 369, 377 ("Liberalism has . . . reduced citizenship to a merely legal status, indicating the rights that the individual holds against the state . . . . Notions of public-spiritedness, civic activity and political participation in a community of equals are alien to most liberal thinkers.").

[323] *See, e.g.*, Nicholson & Seidman, *supra* note 201, at 31 ("[L]iberal majoritarian politics is threatened by business interests which increasingly dictate public policy—demanding tax breaks or deferment of public investment—by its threat to relocate or significantly reduce their present investments."); Aronowitz, *supra* note 303, at 363 ("The power of capital resides, principally, in the public perception that, in the absence of an alternative economic discourse and plan, corporations . . . hold the economic strings. . . . Almost everybody who counts in political terms accepts the idea that no fiscal program can be *perceived* to hurt business.").

[324] Aronowitz, *supra* note 303, at 362.

[325] *See, e.g., id.* at 379.

> short-run moral sanity of the social body. But, through the cold eye of social analysis, hope is not what was originally promised.[326]

One alternative to modernist "hope" is instead to recognize the too frequent "indeterminacy of the relation between electoral outcomes and public policy"[327] and espouse additional, more direct, forms of representation. Hence, a postmodern turn toward participatory democracy.

## V. CONCLUSION

Postmodernists have made mistakes, notably in their pretentious jargon and irrepressibly critical stance that too often simply rails against the status quo rather than offering constructive suggestions for social change.[328] But, as the old saying goes, let's be careful not to throw out the baby with the bath water.[329] For all of its reassurance and progress, the modernist legacy has left us with deep problems. Like it or not, postmodernism "will continue to exist so long as the problems of modernization—economic, ecological, social, and cultural—are so pressing."[330] As these issues become exacerbated, the law can either resign itself or try to consider postmodernism seriously.

Happily, postmodernism can help. Its main contribution is to question facile representational paradigms. Postmodernists are acutely aware of the context in which messages appear. They want to illustrate that the signs and symbols we might otherwise passively accept are not pure, but rather mediated. They have made their points forcefully in the realm of art, architecture, and popular culture.

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[326] LEMERT, *supra* note 2, at 99.

[327] Aronowitz, *supra* note 303, at 362.

[328] *Cf.* Richard Rorty, *Is Derrida a Transcendental Philosopher?*, *in* DERRIDA: A CRITICAL READER 235, 237 (David Wood ed., 1992) ("On my view, the only thing that can displace an intellectual world is another intellectual world—a new alternative, rather than an argument against an old alternative.").

[329] As one commentator observes:

> Opponents of postmodernism, of which there are very many, seize upon the unexceptional stupidity of *some* things postmodern in order to mock the thing itself. This amounts to the same as judging the Russian people by the failures of the Soviet regime or, for that matter, judging the merits of sin by the unexceptional fact that preachers commit it in spite of their theories.

LEMERT, *supra* note 2, at x.

[330] JENCKS, *supra* note 34, at 7. *Cf.* JAMESON, *supra* note 27, at 418 ("I occasionally get just as tired of the slogan 'postmodern' as anyone else, but . . . I find myself pausing to wonder whether any other concept can dramatize the issues in quite so effective and economical a fashion."); ROSENAU, *supra* note 13, at ix (explaining that, with postmodernism, "[a]t stake are questions that pertain to the deepest dimensions of our being and humanity: how we know what we know, how we should think about individual endeavor and collective aspirations, whether progress is meaningful and how it should be sought").

These insights, I have suggested, have important implications for the law. Scattered strands of postmodern legal scholarship might regroup to question how law decontextualizes and mediates power relations and whether the assumptions legal doctrine makes are accurate or fair. Perhaps more fundamentally, scholars need to push forward thinking about new topologies within which to conceptualize the law. Our old tools—arid two-dimensional boxes into which we squeeze cases and statutes, and representational democracy, which too often devolves into a battle among interest-group influence and dollars—have left too many disenfranchised. We must do what we can to push forward the dialogue, rather than remaining enamored of our own formalisms that spit out reassuring banalities.[331] These structures are our impractical Miesian glass houses, our Mondrians, and our Pruitt-Igoes. Let us instead try to understand the messy, chaotic world in which the law operates—schlock, kitsch, and all.

[331] *Cf.* RORTY, *supra* note 37, at 377 (arguing that "the point of edifying philosophy is to keep the conversation going rather than to find objective truth").

# The Role and Content of the Character of the Governmental Action Factor in a Partial Regulatory Takings Analysis

Christopher T. Goodin*

## I. INTRODUCTION

"Partial" regulatory taking claims arise where a regulation does not deprive the takings claimant of all economically beneficial uses of his land.[1] However, where the claimant is left with no economically beneficial uses in his land, the U.S. Supreme Court employs a per se rule, holding that just compensation is then due.[2] When that happens, a "total" taking is said to have occurred.[3]

A partial regulatory takings analysis weighs the character of the government's action (the "Character Factor") and its effect on private property rights.[4] A partial taking is more likely to occur if the government's action can be characterized as a physical invasion of property than if the government merely regulates property.[5] In the former circumstance, the Character Factor clearly weighs in favor of a partial taking.[6] In contrast, the Character Factor's role in the latter circumstance is less than straightforward.[7] This is evident from the multitude of considerations that the U.S. Supreme Court has read into the Character Factor in its regulatory takings cases.[8] These considerations include, for example, purpose, effectiveness, nuisance, average reciprocity of

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[1] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[6] *See infra* note 32.

[7] *See* Louis R. Cohen, *Takings and Economic Hardship: "Regulatory Takings" and Historic Preservation*, SH026 ALI-ABA 673, 682 (2002) ("No one, as far as I can tell, understands exactly what [the Character Factor] means."); John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, SK081 ALI-ABA 143, 145 (2005) ("The so-called 'character' factor is the most confused and confusing feature of regulatory takings doctrine."); R.S. Radford, *Does Rent Control Fail to Substantially Advance Legitimate State Interests—And Why Does It Matter After* Lingle*?*, SL012 ALI-ABA 205, 222 (2005) (criticizing the *Penn Central* opinion more generally).

[8] *See* Echeverria, *supra* note 7, at 146-55.

advantage, retroactivity, compulsion, and the abrogation of the right to devise.[9] This doctrinal catch-all[10] has perhaps "been asked to do too much work."[11]

This Article seeks to clarify the role and content of the Character Factor in partial regulatory takings cases, proposing that the factor should assure that the government has fairly adjusted the burdens and benefits of economic life. Part II of this Article provides background on the Supreme Court's landmark partial takings case and distinguishes physical invasion cases from regulatory cases. In the latter, regulations can be characterized as having two functions: promoting the common good and adjusting the burdens and benefits of economic life. These functions thus provide potential lines of inquiry under the Character Factor. Part III argues that the promotion function should not be analyzed under the Character Factor, insofar as it considers the purpose and effectiveness of a regulation. Part IV contends that the proper role of the Character Factor is to evaluate how a regulation has adjusted the burdens and benefits of economic life. A fair adjustment is precisely what the Takings Clause guarantees. This approach is illustrated by how the Character Factor has been used to consider average reciprocity of advantage, compulsion, abrogation of the right to devise, nuisance, and rational retroactivity. All of these considerations, as well as the Character Factor itself, have their basis in the Court's landmark partial takings case.

## II. BACKGROUND

The "polestar"[12] of the U.S. Supreme Court's modern[13] regulatory takings jurisprudence is the 1978 case of *Penn Central Transportation Co. v. City of*

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[9] *Id.*

[10] *See* Henry A. Span, *Public Choice Theory and the Political Utility of the Takings Clause*, 40 IDAHO L. REV. 11, 89 (2003) (explaining that the Character Factor "seems to include everything that the Court might believe relates to the fairness and wisdom of the regulation in question but does not fit the categories of economic diminution or interference with investment-backed expectations, and perhaps even some things that do").

[11] Echeverria, *supra* note 7, at 155.

[12] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 n.23 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring)); *see also id.* at 331-32 (characterizing the *Penn Central* test as the "default rule").

[13] The Takings Clause was originally thought to only address physical appropriations by government. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). By the early 1900s, however, the states were increasingly regulating private property rights though land use controls. *See* Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 40 (1964). Consequently, the Supreme Court was called upon to bridle the police power in the 1922 case of *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). Writing for the Court, Justice Holmes held that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415.

*New York*.[14] That case involved the question of whether a landmark designation and regulation law effected a taking.[15] The owner of New York City's Grand Central Station challenged the law largely on the ground that it had been unfairly singled out to provide a public benefit to New York City at its own expense.[16]

Holding that the law did not effect a taking,[17] the Court began by reviewing the purpose of the Takings Clause.[18] Reciting the oft-quoted "*Armstrong* principle,"[19] the Court stated that the Takings Clause serves "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[20] Admitting that it was unable to develop a "set formula" for finding a taking,[21] the Court emphasized that the existence of a taking depends upon the "particular circumstances [of each] case."[22]

Consequently, the Court identified three factors "that have particular significance" in determining whether a taking has occurred.[23] Those factors were the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action."[24] Elaborating on the third factor, the Court observed that

> [a] "taking" may more readily be found when the interference with property can be characterized as a *physical invasion* by government, see, *e.g.*, *United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[25]

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[14] 438 U.S. 104 (1978).

[15] *Id.* at 107.

[16] *Id.* at 131.

[17] *Id.* at 138.

[18] *Id.* at 123.

[19] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

[20] *Penn Central*, 438 U.S. at 123 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[21] *Id.* at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

[22] *Id.* (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

[23] *Id.*

[24] *Id.*

[25] *Id.* (citation omitted) (emphases added); *see also id.* at 128 ("[G]overnment actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'").

### A. Physical Invasion and Occupation Cases

At its most basic level then, the Character Factor asks whether a regulation involves a physical invasion; if so, a taking is more likely to be found.[26] Only three years after deciding *Penn Central*, however, the Court elevated this formulation of the Character Factor to a per se rule.[27] This rule applies when the government goes beyond a mere *temporary* physical invasion and *permanently* occupies the property.[28] When that happens, a per se taking occurs, irrespective of the size of the occupation—even if it is no larger than a breadbox.[29] In permanent physical occupation cases, the Character Factor thus becomes determinative.[30]

What therefore remains of the *Penn Central* Court's distinction between physical and regulatory takings lies in those instances where the physical invasion is *temporary* in nature.[31] Although by no means a controlling consideration, the presence of a temporary physical invasion weighs in favor of finding a taking under the Character Factor.[32] The Court found such a temporary physical invasion in *United States v. Causby*,[33] for example, where the military flew planes over a chicken farm at low altitudes,[34] ruffling feathers to say the least.

In *Penn Central*, by contrast, the Court distinguished *Causby*, inasmuch as the landmark law did not cause a physical invasion.[35] There is thus no mystery to the Character Factor's function when it evaluates temporary physical invasions or permanent physical occupations.

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[26] *Id.*

[27] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[28] *See id.*

[29] *See id.* at 438.

[30] *Id.* at 426.

[31] *See* Echeverria, *supra* note 7, at 146-48, 158-59.

[32] *See* Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1301, 1334 (1989); Mark Mahaffey, Note, City of Monterey v. Del Monte Dunes at Monterey: *Drawing the Battle Lines Clearly*, 61 LA. L. REV. 259, 269 (2000); Echeverria, *supra* note 7, at 159 ("[T]he nature of a temporary physical occupation should weigh in favor of a taking."); Dwight H. Merriam, *What Is the Relevant Parcel in Takings Litigation?*, SC43 ALI-ABA 505, 517-18 (1998); *see also* Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002); Sallie Mae v. Riley, 907 F. Supp. 464, 470 (D.D.C. 1995).

[33] 328 U.S. 256 (1946).

[34] *Id.*

[35] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978).

### B. Regulatory Cases

Beyond the context of physical invasions and occupations, a regulation can be characterized as an "interference aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good."[36] The regulatory burden imposed can therefore be described as relating to two governmental functions. The first is to adjust the burdens and benefits of economic life (the "Adjustment Function"). The second is to promote the common good (the "Promotion Function"). The Character Factor analysis can assess either function.

The *Penn Central* Court's discussion indeed reflected an analysis of both functions. For example, the Court addressed whether the landmark law amounted to a fair adjustment of public burdens and benefits when it discussed average reciprocity of advantage.[37] The Court also contemplated how the law promoted New York City's interest in historic and aesthetic preservation.[38] The Character Factor scrutinized the two functions, at least in 1978. The question is therefore whether the evaluation of either function squares with the Court's current regulatory takings jurisprudence.

## III. THE PROMOTION FUNCTION: PROMOTING THE COMMON GOOD

The prevailing and most problematic approach to assessing the Promotion Function under the Character Factor is to evaluate the importance of the public interest that a regulation serves and the extent to which the regulation serves that interest (the "Promotion Approach").[39] To illustrate, under this approach, "[a] health and safety concern should carry more weight than an aesthetic-based control."[40] This is because "'not all police power values are equal.'"[41] The end result of this evaluation in turn dictates the strength of the government's interest in the *Penn Central* analysis. In that analysis, the government's interest is counterbalanced against the private property interests, which are measured in terms of the regulation's economic impact on the takings claimant and the extent to which the regulation interfered with the

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[36] *Id.* at 124.

[37] *Id.* at 134-35.

[38] *Id.* at 129.

[39] *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 10.6, at 434 (1998); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Rule*, 64 NOTRE DAME L. REV. 1, 26 (1989); Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 414 (1997); *see also* Bass Enters. Prod. Co. v. United States, 381 F.3d 1360, 1370 (Fed. Cir. 2004).

[40] JUERGENSMEYER & ROBERTS, *supra* note 39, § 10.6, at 435.

[41] *Id.* (quoting John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 499 (1983)).

claimant's investment-backed expectations.[42] As some of the cases in the following subpart demonstrate, the practical implication of the Promotion Approach is that a court is less likely to conclude that a partial taking has occurred where a regulation serves an important public interest and serves that interest very effectively.

### *A. Supreme Court Cases*

Following the Promotion Approach and citing a substantive due process case, the *Penn Central* Court observed that "a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[43] The Court illustrated that the landmark law clearly passed this test based on two of the railroad company's concessions. First, the company conceded that "preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal."[44] Hence, the landmark law was justified by a substantial public purpose. Second, the company conceded that "the restrictions imposed on its parcel are appropriate means of securing the purposes of the [landmark] law."[45] As such, the law was reasonably necessary. The Court then concluded that these concessions, among others, weighed against the company's takings claim.[46]

The Court reaffirmed this approach in 1980, in *Agins v. City of Tiburon*.[47] At issue was whether an open space ordinance, which severely restricted density, effected a taking.[48] The Court held that it did not.[49] Relying on the

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[42] *See id.*

[43] *Penn Central*, 438 U.S. at 127 (citing Nectow v. City of Cambridge, 277 U.S. 183 (1928)). For further discussion of this interpretation of the Character Factor, see Steven J. Eagle, *"Character" as "Worthiness": A New Meaning for Penn Central's Third Test?*, 27 No. 6 ZONING & PLAN. L. REP. *6 (2004) ("Just as the 'expectations' test examines the motivation and circumstances of the property owner, and not the property, the 'character' test in an era of 'fairness' would examine the motivation and circumstances of the regulator, and not merely the regulation's effect on the property."); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1647-48 (2003) ("But Justice Brennan chose a different approach, making federal law agnostic about the character of the government's action. He instructed that the character of the government action be deemed high whenever the challenged law 'is reasonably related to the promotion of the general welfare.'" (quoting *Penn Central*, 438 U.S. at 131)).

[44] *Penn Central*, 438 U.S. at 129.

[45] *Id.*

[46] *Id.* ("In appellants' view none of these factors derogate from their claim that New York City's law has effected a 'taking.'").

[47] 447 U.S. 255 (1980), *overruled by* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).

[48] *Id.* at 257.

[49] *Id.* at 263.

same substantive due process case cited in *Penn Central*, the Court stated that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[50] The Court explained that this rule was consistent with how the takings "question necessarily requires a weighing of private and public interests."[51] After concluding that the preservation of open space was a legitimate state interest, the Court ruled that the ordinance substantially advanced that interest by limiting density and deterring urbanization.[52] Thus, the Court concluded that a taking had not occurred.[53]

The Court expressly integrated the *Agins* substantially advances test into the Character Factor in the 1987 case of *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[54] There, a statute imposed liability on mining operators who engaged in mining activities that could have severe impacts on the surface above.[55] A bare majority held that the statute had not worked a taking of those mining rights.[56] Although the Court was divided on the contours of the nuisance defense to a takings claim, all of its members acknowledged the validity of the exception in some form or another.[57] The majority integrated and extended this nuisance exception into its takings framework by tying the *Agins* substantially advances test to the Character Factor.[58] The Court reasoned that the interest advanced was to "abate activity akin to a public nuisance."[59] As the dissent pointed out, the Court's use of the word "akin" extended the nuisance exception, which traditionally encompassed the abatement of actual public nuisances, not the regulation of mere nuisance-like activities.[60] On this basis, and consistent with the Promotion Approach, the Court concluded that "the character of the governmental action involved . . . lean[ed] heavily against finding a taking," inasmuch as the government "acted to arrest what it perceive[d] to be a significant threat to the common welfare."[61] In other words, because the public purpose served was "significant," the Court was less inclined to find a taking. The *Keystone* decision is clearly consistent with the notion that under the Promotion

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[50] *Id.* at 260 (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).

[51] *Id.* at 261.

[52] *Id.*

[53] *Id.* at 267.

[54] 480 U.S. 470, 485 (1987).

[55] *Id.* at 474; *see also* 52 PA. STAT. ANN. § 1406.1 *et seq.* (West 1986).

[56] *DeBenedictis*, 480 U.S. at 474.

[57] *Id.* at 488; *cf. id.* at 511-12 (Rehnquist, C.J., dissenting).

[58] *Id.* at 485 (majority opinion).

[59] *Id.* at 488.

[60] *Id.* at 511-12 (Rehnquist, C.J., dissenting).

[61] *Id.* at 485 (majority opinion).

Approach, health and safety considerations weigh more heavily against the finding of a taking than welfare considerations.[62]

In 2005, the Court "correct[ed] course" and overruled the *Agins* substantially advances test in *Lingle v. Chevron U.S.A., Inc.*[63] That case concerned a regulatory takings challenge to a gasoline rent control statute on the grounds that the statute failed to substantially advance the state's interest in curbing gas prices.[64] The Court held that the *Agins* test was not a takings test at all, but rather a substantive due process inquiry.[65] The test failed as a takings test because it did not accord the *Armstrong* principle, which ensures distributive fairness.[66] To illustrate, the Court observed that:

> The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as *singled out* and just as *burdened* as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not.[67]

In other words, measuring the extent to which a regulation achieves its goal does not reveal either the burdens imposed or benefits conferred by a regulation upon a takings claimant.

Although the *Agins* test was not a takings test, the Court did acknowledge that the test had "some logic in the context of a due process challenge."[68] A due process inquiry, the Court explained, "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."[69] Therefore, the Court concluded that inquiry into the effectiveness of a regulation is invalid in the context of takings challenges.

### *B. The Promotion Approach: Purpose and Effectiveness*

Just as the substantially advances test is not a valid takings test, the Promotion Approach to the Character Factor is likewise invalid for two reasons. The first is that it suffers from the same doctrinal infirmities as the

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[62] *See* JUERGENSMEYER & ROBERTS, *supra* note 39, § 10.6, at 435.

[63] 544 U.S. 528, 548 (2005).

[64] *Id.* at 532.

[65] *Id.* at 544.

[66] *See* Armstrong v. United States, 364 U.S. 40, 49 (1960).

[67] *Lingle*, 544 U.S. at 543 (second and third emphasis added).

[68] *Id.* at 542.

[69] *Id.* at 543. But the Court did not stop there. It also concluded that the substantially advances test even failed as a substantive due process inquiry because the test employed the phrase "substantially advance." *Id.* at 543-45. This phrase, the Court explained, is heightened scrutiny language, clearly inappropriate in a substantive due process inquiry. *Id.*

substantially advances test in *Agins*. Recall that that test failed because a regulation's effectiveness did not show when a takings claimant was being singled out or unfairly burdened.[70] Consideration of effectiveness is no more telling under the Promotion Approach to the Character Factor. Appraisal of the importance of the public purpose served by a regulation is likewise utterly uninformative on that score.

For example,[71] suppose that an ordinance severely restricts development on beach-front property in the interest of preserving open space, thus implicating public welfare interests. These restrictions are, on balance, barely severe enough to effect a taking under a *Penn Central* analysis, but suppose further that no inverse condemnation action is brought by the landowners. Years later, the local government discovers the beach also serves as a buffer to soften the impact of incoming storms on the inland community and that overdevelopment could potentially erode the beach to such an extent that it could no longer take the brunt of the storms effectively.[72] The local government also concludes that the current minor development permitted on the beach-front properties will not lead to erosion of that magnitude. Consequently, the ordinance is not amended because it is restrictive enough. Now the ordinance is supported by public safety concerns, not merely welfare. As such, the ordinance serves a more important public interest.

Under the Promotion Approach, a court would be less likely to find a taking after the safety findings were made by the local government because those findings elevated the government's interest. Recall that before the findings were made, the ordinance barely effected a taking. With safety now underpinning the ordinance, a court following the Promotion Approach would almost certainly find that no taking occurred. Yet the regulatory burden carried by the landowners did not change when the findings were made, insofar as the developmental restrictions imposed by the ordinance remained the same. Likewise, the landowners were no more or less singled out by the ordinance when the local government determined that it protected the public safety. Consequently, much like the *Agins* substantially advances test, the Promotion Approach to the Character Factor obviously leaves courts in the dark when it comes to distributive fairness. And as a practical matter, it is simply absurd to say that the landowners' takings claim evaporated by virtue

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[70] *Id.* at 542.

[71] The following fact pattern is loosely based on *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

[72] The local government's findings in *Lucas*, for example, provided that the use prohibition in the coastal area "protect[ed] life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." *Id.* at 1021 n.10.

of the local government findings. But that is precisely the conclusion that the Promotion Approach requires.

The second reason that the Promotion Approach should be rejected is that it forces courts to unfairly discriminate against regulatory takings claimants. This stems from the disparate impact that results when condemnees (eminent domain) are approached differently than inverse condemnees (regulatory takings).[73] As the names imply, such actions differ chiefly with respect to who files the action: the government files in condemnation actions and the takings claimant files in inverse condemnation actions.[74] In this connection, it is irrational to suggest in a condemnation case "that the government should be excused from its obligation to pay for a right of way for a road, or for a site for a school, on the ground that the road or the school served a vital public need."[75] In other words, the Takings Clause does not alter the government's obligation to pay compensation based on the nature of the proposed "public use."[76] It is equally irrational to posit "that the government's liability to pay compensation on account of its regulatory actions should vary with the importance of the objective served by the regulation,"[77] or the extent to which that objective is served. Although inverse condemnees are by no stretch a suspect class,[78] there is simply no rational basis for treating them differently than condemnees in this regard. Such treatment is patently unfair. Accordingly, the Promotion Approach to the Character Factor is invalid.[79]

## IV. THE ADJUSTMENT FUNCTION: ADJUSTING THE BURDENS AND BENEFITS OF ECONOMIC LIFE

Because the Promotion Approach is inappropriate, what remains for the Character Factor, in terms of the *Penn Central* opinion, is an evaluation of the regulation's Adjustment Function (the "Adjustment Approach"). This

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[73] *See* Echeverria, *supra* note 7, at 162.

[74] *Id.*

[75] *Id.*

[76] *See* U.S. CONST. amend. V.

[77] Echeverria, *supra* note 7, at 162.

[78] *See* Jonathan M. Block, Note, *Limiting the Use of Heightened Scrutiny to Land-use Exactions*, 71 N.Y.U. L. REV. 1021, 1039 (1996) ("[T]akings challenges implicate economic legislation, which generally involves no suspect class.").

[79] *See* Steven J. Eagle, *"Character of the Governmental Action" in Takings Law: Past, Present, and Future*, SJ052 ALI-ABA 459, 464 (2004) ("The fact that a regulation promotes the public interest . . . says nothing about whether it also constitutes a compensable taking."); Radford, *supra* note 7, at 222 n.100 ("It should be noted in passing that a straightforward inquiry into whether a land-use regulation in fact 'promotes the common good' would today either be barred from the takings inquiry altogether under *Lingle* . . . ."); John D. Echeverria, Lingle, *Etc.: The U.S. Supreme Court's 2005 Takings Trilogy*, 35 E.L.R. 10577, 10582 (2005).

approach examines whether a regulation has fairly adjusted the burdens and benefits of economic life. This is in fact the prevailing rationale for the Takings Clause. Indeed, where public burdens are unfairly distributed, the *Armstrong* principle dictates that those burdens "should be borne by the public as a whole."[80] As will be shown, the presence of distributive fairness, or the lack thereof, can be inferred from a variety of criteria, including average reciprocity of advantage, compulsion, the abrogation of the right to devise, nuisance, and rational retroactivity.

### *A. Average Reciprocity of Advantage*

A regulation that impairs a person's property rights normally imposes the same restrictions on similarly situated individuals. Where the restrictions on the similarly situated individuals benefit the person, the regulation is said to have secured an average reciprocity of advantage.[81] These reciprocal benefits serve as implicit compensation in-kind.[82] Although there must be some reciprocal benefits to secure an average reciprocity of advantage, the benefits need not be equal.[83] The existence of an average reciprocity of advantage thus suggests that the government has fairly adjusted the burdens and benefits of economic life.[84] Its absence, on the other hand, suggests that the individual has been unfairly singled out.[85]

Average reciprocity of advantage furnishes the basic justification behind zoning, for example.[86] A zoning ordinance generally restricts the uses of land, thus burdening the landowner's private property rights.[87] So long as the ordinance applies broadly to other people in the surrounding community, the

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[80] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[81] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by [the restrictions imposed by regulations], we, in turn, benefit greatly from the restrictions that are placed on others."); *id.* at 512 (Rehnquist, C.J., dissenting) ("[T]he Fifth Amendment does not prevent actions that secure a 'reciprocity of advantage' . . . .").

[82] *See* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1570 (Fed. Cir. 1994); Eagle, *supra* note 43, at *6-7 (citing Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 195-99 (1985)); *cf.* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (explaining that average reciprocity of advantage "has been recognized as a justification of various laws").

[83] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 134 (1978).

[84] *See* Echeverria, *supra* note 7, at 159-60.

[85] *Id.* at 160.

[86] *See Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting) (explaining that average reciprocity of advantage "is [the] reason that zoning does not constitute a 'taking'").

[87] *Id.* ("While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.")

landowner is also benefited by the restrictions that the ordinance places upon his neighbors.[88] This exchange of benefits is effectively a form of compensation.[89]

To illustrate, the *Penn Central* Court implicitly found such compensation quantitatively sufficient to secure an average reciprocity of advantage.[90] The Court concluded that the landmark law secured an average reciprocity of advantage for the railroad owner,[91] because the law effected the designation of over four-hundred landmarks, many of which were located nearby the terminal.[92] The Court further explained that the law benefited all of the city's people and structures "both economically and by improving the quality of life in the city as a whole."[93] Consequently, the Court rejected the notion that the claimant had been uniquely burdened and not benefited by the law.[94] *Penn Central* highlights how the benefits conferred by a regulation upon a takings claimant need not exceed or even be equal to the burden the regulation imposes in order for the regulation to secure an average reciprocity of advantage;[95] "[a]s long as some benefits accrued to the regulated party, reciprocity demands were met."[96]

This reading of the *Penn Central* opinion comports with how the Court in *Lucas v. South Carolina Coastal Council*[97] linked average reciprocity of advantage to the Character Factor. *Lucas* marked a shift in the Court's takings jurisprudence, to the extent that the Court held that where a regulation leaves a landowner with no economically beneficial uses of his land, a per se taking occurs.[98] The Court justified this rule by explaining that "in the extraordinary circumstance when no . . . economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures

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[88] *Id.*

[89] *See supra* note 82.

[90] *See Penn Central*, 438 U.S. at 134.

[91] *See* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 328-29 (1990); Span, *supra* note 10, at 89 n.343.

[92] *Penn Central*, 438 U.S. at 134.

[93] *Id.*

[94] *Id.*

[95] *Id.* at 135.

[96] Coletta, *supra* note 91, at 329.

[97] 505 U.S. 1003 (1992).

[98] *Id.* at 1018 ("We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."). Before *Lucas*, the per se rule only applied in the context of physical invasions and permanent occupations. *See supra* Part II.A.

an average reciprocity of advantage to everyone concerned."[99] In other words, in zoning cases, the Character Factor inquiry usually proceeds on the assumption that a regulation secures an average reciprocity of advantage. To secure such an advantage, a regulation must be general enough that its restrictions create benefits for similarly situated (regulated) individuals.[100] What the *Lucas* Court was saying, then, was that whatever benefits may accrue from a regulation, those benefits can never counterbalance a total taking in which the claimant is left with naked title.[101]

Outside of the context of total takings, average reciprocity of advantage is thus properly evaluated under the Character Factor, because it indicates whether an individual has been unfairly singled out to shoulder a disproportionate share of public burdens without corresponding benefits.[102] A four-member plurality concluded that the regulatory burden was indeed disproportionate on a former coal mining company, for example, in *Eastern Enterprises v. Apfel*.[103] The company provided statutorily mandated medical benefits for its employees while it remained in the coal mining industry.[104] After leaving the industry, a law was passed that required the company to pay additional medical benefits not previously required.[105] The issue was whether the law effected a taking.[106] In concluding that a taking had occurred and that the law was thus unenforceable, the plurality examined the Character Factor and observed that where the governmental action "*singles out certain employers to bear a burden that is substantial in amount*, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause."[107] Observing that the instant law was of such a character, the plurality concluded that the coal company could not "be forced to bear the

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[99] *Lucas*, 505 U.S. at 1017-18 (internal quotation marks omitted) (citations omitted).

[100] *See* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) (explaining that in a partial takings analysis, a court should consider whether "there are direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment").

[101] *Lucas*, 505 U.S. at 1017-18; *cf., e.g.*, Hodel v. Irving, 481 U.S. 704, 715-18 (1987) (finding that the average reciprocity of advantage secured by an escheat provision did not counterbalance how the provision could be characterized as effectively abrogating the right to devise).

[102] *See* Echeverria, *supra* note 7, at 159-60.

[103] 524 U.S. 498 (1998); *see also* Span, *supra* note 10, at 89 (observing that the *Eastern Enterprises* Court folded consideration of average reciprocity of advantage into the Character Factor).

[104] *E. Enters.*, 524 U.S. at 504-05 (plurality opinion).

[105] *Id.* at 512-14.

[106] *Id.* at 503-04.

[107] *Id.* at 537 (emphasis added).

expense of . . . benefits for miners based on its activities decades before those benefits were promised."[108]

Insofar as the *Eastern Enterprises* plurality concluded that the law singled out the coal company to pay the benefits, and that a taking had thus occurred, it follows that the law did not secure an average reciprocity of advantage. Indeed, the coal company pointed out in its opening brief that the law did not secure such an advantage, because it did not stand to gain any "legal or economic benefit in exchange for the considerable contribution that the [law] require[d] [it] to make."[109] In stark contrast to *Penn Central*, the *Eastern Enterprises* plurality opinion provides an extreme example of how the absence of reciprocal benefits to counterbalance substantial regulatory burdens can weigh in favor of a taking. In short, average reciprocity of advantage can cut both ways under the Character Factor, because it speaks to how the government has adjusted to the burdens and benefits of economic life. Where such an advantage is absent, implicit in-kind compensation is lacking and explicit monetary compensation is perhaps appropriate.

### *B. The Right to Devise*

Compensation is likewise appropriate when a regulation can be characterized as extinguishing an essential property right. So far, the Court has acknowledged three such rights: exclusive possession, use, and disposition.[110] The abrogation of the first two rights has led the Court to fashion two corresponding per se rules.[111] Although the total loss of the right to devise does not result in a per se taking, it strongly weighs in favor of a taking under the Character Factor in a partial takings analysis.[112] In terms of the Adjustment Function, the abrogation of an essential property right is just too onerous for any individual to bear.

This approach to the Character Factor was first utilized in *Hodel v. Irving*,[113] a 1987 decision. In that case, an Indian land consolidation statute's escheat

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[108] *Id.*

[109] Brief for Petitioner at 78, E. Enters v. Apfel, 524 U.S. 498 (1998) (No. 97-42).

[110] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" (quoting United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945))); *see also* Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!": Reconsidering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 49 (2005) ("[T]he rights to possess, use, and dispose of property seem to play a central role in the law of regulatory takings.").

[111] *See Loretto*, 458 U.S. at 434; *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[112] *See* Echeverria, *supra* note 7, at 159.

[113] 481 U.S. 704 (1987).

provision eliminated certain individuals' ability to devise their interests in land where each interest represented two percent or less of the total acreage and the property interest yielded less than one-hundred dollars in the year preceding the statute's enactment.[114] Consequently, three descendents were divested of their interests.[115] The Court held the escheat provision effected a taking, specifically concluding the Character Factor weighed heavily towards a taking, because "the character of the Government regulation . . . [was] extraordinary."[116] In assessing the Character Factor, the Court explained that much like the right to exclude, "the right to pass on a certain type of property . . .—to one's family in particular—has been part of the Anglo-American legal system since feudal times."[117] The statute, the Court observed, "effectively abolishe[d] both descent and devise of [the] property interests."[118] Hence, where a regulation can be characterized as abrogating a basic property right, such as the right to devise, the Character Factor weighs in favor of a taking.

### *C. Compulsion*

The absence of regulatory compulsion conversely counsels against compensation. Such compulsion under the Character Factor goes to the question of whether that burden was "force[d]," in *Armstrong*'s terms.[119] When a regulatory burden is voluntarily undertaken, it is fair to assume that the individual has weighed the burdens and benefits associated with the adjustment and concluded that he would be better off with the regulatory change.[120] Such voluntarily adjustments are more likely to yield a fair result, because the takings claimant would not have taken on the burden otherwise.[121] The choice to assume this burden can be either implicit or explicit. An implicit decision to assume the regulatory burden may be evidenced by the option to readily opt-out of the regulatory scheme.

An explicit choice was made to undertake a regulatory burden in *Bowen v. Gilliard*.[122] That case involved the question of whether child support payments were being taken by a welfare statute, which required applicants to assign those payments to the government, which in turn remitted the amount collected

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[114] *Id.* at 709.

[115] *Id.*

[116] *Id.* at 716.

[117] *Id.*

[118] *Id.*; *see also, e.g.*, Babbit v. Youpee, 519 U.S. 234 (1997) (reaffirming its conclusions respecting the character of escheat provision in *Hodel*, despite minor amendments to the provision).

[119] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[120] *See* Bowen v. Gilliard, 483 U.S. 587, 608-09 (1987).

[121] *See id.*

[122] 483 U.S. 587 (1987).

as part of the benefits applied for, in order to benefit all of the applicant's family.[123] The Court held that the statute did not effect a taking under the *Penn Central* test, concluding that the Character Factor weighed against a taking, because "a decision to include child support as part of the family income certainly does not implicate the type of concerns that the Takings Clause protects."[124] Quoting *Armstrong*, the Court explained that such concerns instead arise when "an enactment . . . *forces* 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[125] As such, the Court explained that "[t]he law does not *require* any custodial parent to apply for [the] benefits."[126] When such an application is submitted, the Court further explained, "it is reasonable to presume that a parent who does make such an application does so because she or he is convinced that the family as a whole—as well as each child committed to her or his custody—will be better off with the benefits than without."[127]

While the choice to assume the regulatory burden was explicitly made by the custodial parents in *Bowen*, the decision to permit a temporary physical occupation was implicitly made by the takings claimant in *Yee v. City of Escondido*.[128] In that case, the question was whether a mobile home rent control ordinance, on its face, amounted to a governmental physical occupation of property by limiting mobile home park owners' ability to evict tenants.[129] Under the ordinance, evictions were only allowed where the tenant failed to pay rent or the mobile home park owner sought to change the use of his land.[130] In holding that the ordinance did not effect a physical occupation, the Court explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."[131] Compensation is only due, the Court reasoned, "if the government authorizes a compelled physical invasion of property."[132] In line with this reasoning, the Court observed that the "tenants were invited by [the park owners], not forced upon them by the government."[133] It further observed that the park owners indeed "voluntarily rented their land to mobile home owners."[134] The Court also relied on the fact that the park owners still had the

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[123] *Id.* at 593-94.
[124] *Id.* at 608.
[125] *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) (emphasis added).
[126] *Id.* (emphasis added).
[127] *Id.* at 608-09.
[128] 503 U.S. 519 (1992).
[129] *Id.* at 523.
[130] *Id.* at 524.
[131] *Id.* at 527.
[132] *Id.*
[133] *Id.* at 528.
[134] *Id.* at 527.

option of evicting their tenants by changing the use of their land.[135] It would be a different case, the Court proposed, if the ordinance "compel[led] a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy."[136] Thus, in contrast to the parents' express decision in *Bowen*, the park owners in *Yee* implicitly accepted the restrictions imposed upon them by ordinance. By failing to seek a zoning change, it is fair to assume that the park owners assessed the economic benefits accruing from the current use of their land against the potential benefits that they might appreciate if they decided to change their zoning classification.[137] It is likewise fair to conclude that the regulatory adjustment was a fair one.

On the other hand, the owners of the property interests in land in *Hodel* had no way to avoid the escheat provision's effect of abrogating their rights to devise those interests.[138] To review, that case involved a statute that escheated certain Indian individuals' interests.[139] In concluding that the Character Factor counseled towards a taking, the Court observed that availability of *inter vivos* transfers did not furnish an adequate substitute for the right to devise.[140] Specifically, the Court stated that "[t]he fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex *inter vivos* transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property."[141] Put differently, the opportunity to convey a future interest while reserving a life estate, for instance, did not provide an adequate means to opt-out of the regulatory burden imposed by the escheat provision. This is because the right to devise would be lost whether the owners exercised this option or allowed their interests to escheat to the government; once it was lost, the right was gone forever. *Yee* thus presented a very different case, because the mobile home park owners there could have effectively recaptured their rights to exclude by applying for a zoning change.[142] The property owners in *Hodel* had no such option. In the absence of that option, it is improper to assume that a fair adjustment had taken place. The property interest owners in *Hodel* were compelled to relinquish their rights to devise. The mobile home park owners

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[135] Id. at 528.

[136] *Id.*

[137] *Cf.* Bowen v. Gilliard, 483 U.S. 587, 608-09 (1987).

[138] Echeverria, *supra* note 7, at 159 (explaining that the holding in *Hodel* could be justified in part because "no individual can take action to avoid the effect of [the type of law in that case]").

[139] Hodel v. Irving, 481 U.S. 704, 707 (1987).

[140] *Id.* at 716.

[141] *Id.*; *see also, e.g.*, Babbit v. Youpee, 519 U.S. 234, 245 (1997) (concluding again that the availability of an *inter vivos* transfer does not serve an adequate substitute for the right to devise).

[142] Yee v. City of Escondido, 503 U.S. 519, 527-28 (1992).

in *Yee* voluntarily gave up their right to exclude. Accordingly, the absence of regulatory compulsion, whether the regulatory burden is voluntarily assumed explicitly or implicitly, thus augurs against a taking under the Character Factor.

### *D. The Nuisance Exception*

The nuisance exception to a takings claim likewise militates clearly and conclusively against the claim. If the purpose of the government's action is to prevent an activity that a takings claimant did not have the right to engage in to begin with, then nothing has been taken.[143] One such activity is the creation of a nuisance.[144] This exception finds a proper home in the Adjustment Approach to the Character Factor since it reveals the absence of a regulatory burden. This is because, where the exception nuisance applies, there are simply no property rights to burden.

As a preliminary matter, note that much like the Promotion Approach, the nuisance exception does consider purpose. The exception is worlds apart from the Promotion Approach because it does not exalt one public purpose over another.[145] For example, under the nuisance exception, the prevention of a nuisance is no more important than the preservation of open space. The fact that a regulation seeks to abate a nuisance instead illustrates the absence of a regulatory burden. Thus, the nuisance exception does not fall under the Promotion Approach to the Character Factor.

The *Lucas* decision provides the basis for this view of the nuisance exception. That case was about a state law that prevented a landowner from building on his coastal lot in order to prevent erosion.[146] The law left the landowner without any economically beneficial use of his land.[147] The Court held that in such a case, in terms of the *Penn Central* opinion, the economic impact on the claimant becomes determinative, and a taking has occurred, per se.[148] However, the Court did provide an exception to this rule: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests *were not part of his title to begin with*."[149] The Court cited nuisance as an example of such a use interest that no landowner

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[143] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

[144] *Id.* at 1029-30.

[145] *See supra* Part III.

[146] *Lucas*, 505 U.S. at 1007-08.

[147] *Id.* at 1015.

[148] *Id.*

[149] *Id.* at 1027 (emphasis added).

possesses.[150] Indeed, although the *Keystone* Court did not rest its decision on this formulation of the nuisance exception, it nonetheless acknowledged it in passing.[151] This approach has likewise gained acceptance in the lower courts.[152] Accordingly, the nuisance exception is a proper consideration under the Character Factor.

### *E. Rational Retroactivity*

Whereas the nuisance exception speaks to the character of the burden, consideration of rational retroactive liability addresses the nature of benefits received by the burdened landowner. As mentioned earlier, the Court addressed the rationality of retroactive liability under the Character Factor in the *Eastern Enterprises* decision.[153] A four-member plurality interpreted the *Armstrong* principle as protecting an individual against severe retroactive legislation that imposed liability unrelated to the individual's past conduct.[154] To review, *Eastern Enterprises* involved a coal mining company that paid medical benefits, and after leaving the industry, a law was passed retroactively requiring the company to pay additional medical benefits not previously required.[155] In its analysis of the Character Factor, the plurality reasoned that the nature of the law was "quite unusual," because it imposed retroactive liability "*unrelated* to any commitment that the [coal company] made or to any injury [it] caused."[156]

The other five members of the Court, one concurring in the judgment and the other four dissenting, expressed the view that arbitrary retroactivity raised due process, not takings, concerns.[157] In his dissenting opinion, Justice Breyer explained that the question of whether retroactive liability is arbitrary "finds a natural home in the Due Process Clause, a Fifth Amendment neighbor."[158] This is because the Due Process Clause specifically "safeguards citizens from arbitrary or irrational legislation."[159] And, he explained, "a law that is

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[150] *Id.* at 1029.

[151] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987).

[152] *See* Creppel v. United States, 41 F.3d 627, 631 (Fed. Cir. 1994) (explaining that the Character Factor "examines the challenged restraint under the lens of state nuisance law"); *cf.* O'Connor v. Denver, 894 F.2d 1210, 1220 (10th Cir. 1990) (describing the Character Factor as considering nuisance).

[153] E. Enters. v. Apfel, 524 U.S. 498 (1998).

[154] *Id.* at 528-30 (plurality opinion).

[155] *Id.* at 504-14.

[156] *Id.* at 537 (emphasis added).

[157] *Id.* at 556 (Breyer, J., dissenting); *id.* at 547-50 (Kennedy, J., concurring in the judgment and dissenting in part).

[158] *Id.* at 556 (Breyer, J., dissenting).

[159] *Id.*

fundamentally unfair because of its retroactivity is a law which is basically arbitrary."[160] As *Lingle* teaches, evaluation of the legitimacy of legislation is indeed a due process inquiry, and such an inquiry is antecedent to a takings analysis.[161] This is because a takings analysis presupposes that the legislation is legitimate.[162] Therefore, consideration of whether legislation imposes retroactivity arbitrarily has no place in a takings analysis in general, and under the Character Factor in particular.[163]

Because *arbitrary* retroactivity is an invalid consideration under the Character Factor, the question then becomes whether *rational* retroactivity is a valid consideration. Recall that according to the four-Justice plurality, only severely retroactive legislation that imposes liability "*unrelated* to any commitment that the [individual] made or to any injury [he] caused,"[164] runs afoul of "fundamental principles of fairness underlying the Takings Clause,"[165] i.e., the *Armstrong* principle. Conversely, legitimate retroactive legislation imposes liability on an individual that is rationally related to promises that the individual made or injuries he caused. When that occurs, under the plurality's reasoning, there would be no violation of fundamental fairness. On the contrary, "fairness and justice"[166] would dictate that the individual, and not society, should pay for those old injuries and past promises.[167] The adjustment of the burdens and benefits of economic life in that case are no doubt fair, insofar as the burdens imposed are counterbalanced by the benefits already received.

This principle is akin to average reciprocity of advantage. To review, average reciprocity of advantage treats *current* benefits flowing to the takings claimant as implicit compensation.[168] Similarly, rational retroactive legislation should consider *past* benefits received by the claimant as implicit compensation. In both circumstances, the implicit compensation alleviates the government's obligation to pay explicit compensation. Accordingly, although arbitrary retroactive liability is not a valid takings consideration, rational retroactive liability is a proper consideration under the Character Factor,

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[160] *Id.* at 557.

[161] *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540-43 (2005).

[162] *Id.* at 543.

[163] *See* Echeverria, *supra* note 7, at 156.

[164] *E. Enters.*, 524 U.S. at 537 (plurality opinion) (emphasis added).

[165] *Id.*

[166] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[167] *Cf., e.g.*, Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 553 (6th Cir. 2001) (explaining that the retroactive character of environmental clean-up liability did not counsel towards finding a taking, because "Congress intended to spread the costs of present risks and liabilities, which were created in the past, to those who benefited from their creation").

[168] *See supra* Part IV.A.

because its rationality reveals the nature of the benefits received by the takings claimant. The presence of rational retroactive liability thus counsels against a taking.

## V. CONCLUSION

Understanding the role of the Character Factor is essential to a fair application of the *Penn Central* analysis. On one hand, the Character Factor should not ask whether a regulation promotes the common good in determining whether a taking has occurred. This approach fails to determine whether a takings claimant has been unfairly singled out or overburdened. It also discriminates against regulatory takings claimants, insofar as it treats them less favorably than condemnees for no apparent reason.

Rather, the role of the Character Factor should be to assess whether the government has fairly adjusted the burdens and benefits of economic life. In this role, the Character Factor is informed by at least five considerations. First, if regulation has secured an average reciprocity of advantage for a takings claimant, there is a greater likelihood that a fair adjustment has occurred. Conversely, the absence of such an advantage suggests the claimant has been unfairly singled out and overburdened. This is because average reciprocity of advantage measures the general public benefits currently received by the claimant relative to the scope of the regulation, insofar as the benefits received can only counterbalance the burdens imposed if the regulation is general enough to secure the advantage. Second, rationally imposed retroactive liability likewise suggests that a taking has not occurred. Where individuals have made promises or caused injuries, it seems only fair that they should be responsible for the compensation owing. In this way, a fair adjustment is evidenced by benefits in the past that correspond to the burden currently imposed. Third, the absence of regulatory compulsion likewise counsels against a taking. The rationale is that if a person has voluntarily taken on the burdens of a regulatory scheme, it is fair to assume that the person only did so because he would be better off in light of the benefits inherent in the regulation. Fourth, where the nuisance exception applies, the Character Factor becomes determinative, dictating that a taking has not occurred. No one can claim a property right to create a public nuisance. Consequently, there are no property rights for the regulation to burden. Finally, a regulation's abrogation of the right to devise suggests that a taking has occurred because such a regulation impinges on an essential property right.

In short, all of these considerations aid in determining whether a regulation has made a fair adjustment. Because such an adjustment is precisely what the Takings Clause seeks to guarantee, the Character Factor should evaluate only whether a regulation has fairly adjusted the burdens and benefits of economic life.

# *Hamdan v. Rumsfeld*: The Ongoing Debate of the Proper Use of International Norms in Federal Constitutional Decisions

"The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."[1]

## I. INTRODUCTION

In November 2001, Salim Ahmed Hamdan, a Yemeni national, was captured during hostilities between U.S. armed forces and the Taliban (then the governing force of Afghanistan) by militia forces and handed over to the U.S. military.[2] Hamdan was transported to an American prison in Guantanamo Bay, Cuba, in June 2002.[3] He was held for more than a year before President George W. Bush declared that he would be "[e]ligible for trial by military commission for then-unspecified crimes."[4] The commission procedures used to try Hamdan were the focus of the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*.

One of the Court's holdings in *Hamdan* is that regardless of whether or not the U.S. Government "[c]harged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed."[5] Because the Geneva Conventions require a trial by a "regularly

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[1] Hamdan v. Rumsfeld, ___ U.S. ___, ___, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part) [hereinafter *Hamdan III*], *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.) [hereinafter MCA of 2006].

While the intent of the MCA of 2006 may have been to supersede the Court's decision in *Hamdan III*, whether or not the MCA of 2006 actually supersedes the Court's decision is one the Court has yet to address. On February 20, 2007, the Court of Appeals for the District of Columbia held that *Hamdan III* was superseded by the MCA of 2006. *Boumediene v. Bush*, 476 F.3d 981, 986-87 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 2007 WL 957363 (Apr. 2, 2007). The Court denied certiorari on April 2, 2007, but did not "express[] . . . any opinion on the merits." *Boumediene*, ___ U.S. at ___, 2007 WL 957363, at *1 (Stevens and Kennedy, JJ., statement respecting the denial of certiorari) (citing Rasul v. Bush, 542 U.S. 466, 480-41 (2004); *id.* at 487 (Kennedy, J. concurring in judgment)).

This Note does not address the D.C. Circuit's holding in *Boumediene*; however, should the Court address the issues raised in *Boumediene*, the Court's decision will have great implications for the conclusions drawn in this paper.

[2] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2759.

[3] *Id.*

[4] *Id.*

[5] *Id.* at ___, 126 S. Ct. at 2786.

constituted court,"[6] a term which was not defined in the Conventions, the Court grappled with whether notions of "customary international law" could be used to determine the definition.[7] Among those agreeing with this holding, there were divergent views regarding the extent to which courts should use international law in rendering decisions. Justice Stevens argued that notions of customary international law might be used to inform an understanding of the definition of a "regularly constituted court."[8] On the other side of the discussion, Justice Kennedy noted in his separate opinion, in which he concurred in part, that "[t]here should be reluctance . . . to reach unnecessarily the question whether, as the plurality seems to conclude, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol."[9]

Part II of this Note provides an overview of the *Hamdan* case, its background, and the case history leading to the U.S. Supreme Court's 2006 decision.[10] Part III compares and contrasts Justice Kennedy and Justice Stevens's concurring and plurality opinions, respectively. This part also recounts the use of certain international agreements, including the Geneva Conventions and the attendant Protocols, in U.S. common law, and addresses the U.S. Supreme Court's decisions addressing the role of international law in deciding U.S. cases.[11] Part III contrasts Justice Stevens's suggestion that adopting "customary international law,"[12] as embodied by certain Protocols to the Geneva Conventions, is constitutionally acceptable to instruct a court's use of the term "regularly constituted court"[13] with Justice Kennedy's suggestion "[t]hat domestic statutes control this case."[14] This Note argues that Justice Kennedy is not completely correct when he stated that "domestic statutes control this case."[15] Instead, this Note suggests Justice Stevens's application of international law is correct and that certain "customary international law"[16] may in fact be controlling in certain cases, specifically this one.[17]

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[6] *Id.* at ___, 126 S. Ct. at 2796-97.

[7] *Id.*

[8] *Id.* at ___, 126 S. Ct. at 2797.

[9] *Id.* at 2809 (internal citations omitted) (Kennedy, J., concurring in part).

[10] *See infra* Part II.

[11] *Id.*

[12] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2797 (plurality opinion).

[13] *Id.*

[14] *Id.* at 2800 (Kennedy, J., concurring in part).

[15] *Id.*

[16] *Id.* at 2797 (plurality opinion).

[17] *Id.*

## II. *HAMDAN V. RUMSFELD* BACKGROUND AND CASES LEADING TO THE SUPREME COURT'S DECISION

### *A. Hamdan's Detention and Declaration as an "Enemy Combatant"*

On July 3, 2003, President Bush declared Hamdan and five other detainees at Guantanamo Bay subject to his November 13, 2001 order[18] related to the detention of non-citizens in the war against terrorism.[19] President Bush's determination subjected Hamdan and the five detainees to being "'tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including imprisonment or death.'"[20]

After military counsel was appointed for Hamdan, on February 23, 2004, the legal adviser to the Appointing Authority denied Hamdan any of the protections under Article 10[21] of the Uniform Code of Military Justice ("UCMJ").[22] Hamdan was not charged with an offense until after he filed suit in federal court[23] and more than a year after he was deemed eligible for trial by military commission.[24]

Hamdan, Osama bin Laden's alleged "body-guard and personal driver,"[25] was charged, *inter alia*, with arranging for transportation and transporting weapons for al Qaeda members, driving Osama bin Laden to various training camps where bin Laden encouraged attacks against the United States, and receiving weapons training at al Qaeda-sponsored camps.[26]

### *B. The District Court's Opinion*

On July 7, 2004, a Combatant Status Review Tribunal declared Hamdan an "enemy combatant."[27] On November 8, 2004, the United States District Court

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[18] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter November 13 Order and Order].

[19] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2760.

[20] *Id.* (quoting 66 Fed. Reg. at 57,834).

[21] 10 U.S.C. § 810 (2000).

[22] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2760.

[23] *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) [hereinafter *Hamdan I*], *rev'd*, 415 F.3d 33 (D.C. Cir. 2005) [hereinafter *Hamdan II*], *rev'd*, ___ U.S. ___, 126 S. Ct. 2749 (2006).

[24] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2760.

[25] *Id.* at ___, 126 S. Ct. at 2761.

[26] *Id.*

[27] *Id.* at ___ n.1, 126 S. Ct. at 2761 n.1 (defining an "enemy combatant" by military order as "an individual who was part of or supporting Taliban or al Quaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners" (internal

for the District of Columbia granted Hamdan's petition for habeas corpus and stayed the commission's proceedings.[28] The district court concluded that

> the President's authority to establish military commissions extends only to "offenders or offenses triable by military [commission] under the law of war," that the law of war includes the Geneva Convention (III) Relative to the Treatment of Prisoners of War . . .; that Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with that treaty, not to be a prisoner of war; and that whether or not Hamdan is properly classified as a prisoner of war, the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear.[29]

### *C. The Court of Appeals Decision*

The Court of Appeals for the District of Columbia Circuit reversed, rejecting the view "that Hamdan was entitled to relief under the Third Geneva Convention."[30] The court of appeals judges unanimously "agreed that the Geneva Conventions were not 'judicially enforceable,'"[31] while two judges on the three-judge panel "[t]hought that the Geneva Conventions did not in any event apply to Hamdan."[32] The court of appeals also concluded that "[the U.S. Supreme Court's] decision in *Quirin* foreclosed any separation-of-powers objection to the military commission's jurisdiction and further held that Hamdan's trial before the contemplated commission would violate neither the UCMJ nor U.S. Armed Forces regulations intended to implement the Geneva Conventions."[33]

### *D. The U.S. Supreme Court Decision*

On November 7, 2005, the U.S. Supreme Court granted certiorari "to decide whether the military commission convened to try Hamdan has authority to do so, and whether Hamdan may rely on the Geneva Conventions in these proceedings."[34] As to the question of the military commission's authority,[35]

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citation omitted)).

[28] *Id.* at ___, 126 S. Ct. at 2761.

[29] *Id.* at ___, 126 S. Ct. at 2761-62 (quoting *Hamdan I*, 344 F. Supp. 2d 152, 158-72 (D.D.C. 2004)) (other citations omitted).

[30] *Id.* at ___, 126 S. Ct. at 2762.

[31] *Id.* (quoting *Hamdan II*, 415 F.3d 33, 38 (D.C. Cir. 2005)).

[32] *Id.* (citing *Hamdan II*, 415 F.3d at 40-42).

[33] *Id.* (citing *Hamdan II*, 415 F.3d at 38, 42-43).

[34] *Id.*

[35] *Id.*

the Court began by examining whether Congress had properly authorized the President to hold such military commissions.[36] After considering both the Authorization for Use of Military Force[37] ("AUMF") and the Detainee Treatment Act of 2005 ("DTA"),[38] the Court held that "[n]either of these Congressional Acts, however, expands the President's authority to convene military commissions. . . . [T]here is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."[39] The Court went to say that "[l]ikewise, the DTA cannot be read to authorize this commission."[40]

The Court stated: "Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."[41] The Court eventually concluded that "[a]bsent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified."[42]

## III. JUSTICE KENNEDY'S AND JUSTICE STEVENS'S DIFFERING RATIONALES FOR THE COURT'S HOLDING THAT HAMDAN'S MILITARY COMMISSION WAS NOT AUTHORIZED

Justice Stevens, joined by a plurality of justices, reviewed the common law governing the use of military commissions and justified the outcome of the *Hamdan* decision, in part, on customary international law.[43] Justice Kennedy,

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[36] *Id.* at ___, 126 S. Ct. at 2774 n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").

[37] Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001).

[38] Detainee Treatment Act of 2005, Pub. L. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-44 (2005) (codified at 10 U.S.C.A. § 801 note (West 1998 & Supp. 2006) (Treatment of Detainees), 28 U.S.C.A. § 2241(e) (West 1994 and Supp. 2006), and 42 U.S.C.A. §§ 2000dd to dd-1 (West Supp. 2006)) [hereinafter DTA of 2005 or DTA].

[39] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2775. Article 21 of the Uniform Code of Military Justice ("UCMJ") states the following:

> The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2000).

[40] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2775.

[41] *Id.*

[42] *Id.*

[43] *Id.* at ___, 126 S. Ct. at 2777, 2784 (plurality opinion).

in a separate opinion concurring in part, disagreed with Justice Stevens's plurality opinion related to the conspiracy charge levied upon and the procedures used to try Hamdan. Justice Kennedy argued that the Court did not "[n]eed to address the validity of the conspiracy charge against Hamdan . . . ."[44] This Note suggests that Justice Stevens's plurality opinion, related to the conspiracy charge against Hamdan, is properly grounded in military commission common law and customary international law. This support in common law and customary international law buttresses Justice Stevens's ultimate conclusion that the then-established military commissions could not legally be used to prosecute the conspiracy charges against Hamdan.[45]

### *A. Justice Stevens's Plurality Opinion Suggested the Charges Raised Against and the Format Used to Try Hamdan Are Illegal*

Unlike Justice Kennedy, a plurality of the Court agreed that the charges against Hamdan and the commission used to try him are illegal.[46] Stevens's plurality opinion, citing to a treatise written by Colonel William Winthrop, known as the "'Blackstone of Military Law,'"[47] describes certain factors that must be met "[f]or [legitimate] exercise of jurisdiction by a tribunal of the type convened to try Hamdan."[48] First, "'[a] military commission . . . can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander.'"[49] Next, the offense, "'must have been committed within the period of the war.'"[50]

> Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare . . . in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of War."[51]

The plurality concluded that the documents that charge Hamdan did not fulfill these requirements.[52] Specifically, the plurality noted that Hamdan's actions did not take place in a theater of war or after the beginning of the conflict that

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[44] *Id.* at ___, 126 S. Ct. at 2809 (Kennedy, J., concurring in part).

[45] *See id.* at ___, 126 S. Ct. at 2779-80, 2785 (plurality opinion).

[46] *Id.* at ___, 126 S. Ct. at 2777.

[47] *Id.* (quoting Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)).

[48] *Id.*

[49] *Id.* (quoting W. WINTHROP, MILITARY LAW AND PRECEDENTS 837 (rev. 2d ed. 1920)).

[50] *Id.* (quoting WINTHROP, supra note 49, at 837).

[51] *Id.* (quoting WINTHROP, supra note 49, at 838).

[52] *Id.* at ___, 126 S. Ct. at 2778-80.

began on September 11, 2001.[53] Justice Stevens's plurality concluded on this point that "*[n]one of the overt acts* that Hamdan is alleged to have committed violates the law of war. These facts alone cast doubt on the legality of the charge and, hence, the commission,"[54] because the facts of Hamdan's case did not match the standard set forth by Colonel Winthrop and because conspiracy "is not triable by law-of-war military commission."[55]

Justice Stevens then pointed out that while the U.S. Constitution empowers Congress with the responsibility to "'define and punish . . . Offences against the Law of Nations,'"[56] here, Congress has not declared conspiracy to be an offense under the UCMJ.[57] Therefore, while not a fatal flaw in the Government's claim of authority, Justice Stevens stated: "the precedent [of conspiracy as an offense under the UCMJ] must be plain and unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution."[58] Justice Stevens's plurality opinion concluded that "the Government must make a substantial showing that a crime" is an "offense against the law of war" before using a military commission to try a defendant.[59] Justice Stevens found that the government failed to satisfy this burden[60] and, therefore, the commission used to try Hamdan and the charges against him were illegal.[61]

In support of Justice Stevens's conclusion that conspiracy is not a generally recognized offense against the law of war, the plurality noted that:

> The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.[62]

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[53] *Id.* at ___, 126 S. Ct. at 2778.

[54] *Id.* at ___, 126 S. Ct. at 2778-79 (emphasis added).

[55] *Id.* at 2779 (citing *In re* Yamashita, 327 U.S. 1, 13 (1946)). In a footnote, Justice Stevens addressed Justice Thomas's position that the charging document in this case "includes more than one charge: Conspiracy *and* several other ill-defined crimes . . . ." *Id.* at ___ n.32, 126 S. Ct. at 2779 n.32. Justice Stevens stated that Justice Thomas's position adds charges that were not in the original document to begin with. *Id.* In addition, according to Justice Stevens, Justice Thomas blurs the distinction between the "categories of 'offender' who may be tried by military commission . . . with the 'offenses' that may be so tried." *Id.*

[56] *Id.* at ___, 126 S. Ct. at 2779 (quoting U.S. CONST. art. I, § 8, cl. 10).

[57] *Id.*

[58] *Id.* at ___, 126 S. Ct. at 2780.

[59] *Id.*

[60] *Id.* at ___, 126 S. Ct. at 2780-81.

[61] *Id.* at ___, 126 S. Ct. at 2785-86.

[62] *Id.* at ___, 126 S. Ct. at 2780-2781 (footnotes omitted).

Justice Stevens ended his discussion of conspiracy as a war crime by stating that the requirements for a proper military tribunal, including the presence of an internationally-recognized war crime, which occurred during the time of or in a theater of war, were not present.[63] Therefore, the military commission used to try Hamdan was illegal because the circumstances ordinarily required for such a commission were not present.[64]

*1. Justice Stevens's application of international agreements to Hamdan's case*

Justice Stevens's plurality opinion asserted that there is a body of common law governing military commissions.[65] He began his argument by noting three situations in which military commissions have been used.[66]

First Justice Stevens explained that military commissions "have substituted for civilian courts at times and in places where martial law has been declared."[67] He noted that the use of military commissions in these situations "has raised constitutional questions,"[68] but the issue was settled in *Duncan v. Kahanamoku*[69] and *Ex parte Milligan*.[70] The issue raised in these two cases was whether military courts could serve as substitutes for civilian courts during a foreign invasion or civil war.[71] The situations, however, in *Duncan* and *Ex parte Milligan* are inapposite to Hamdan's situation because the military commission in Hamdan's case did not serve to substitute for civilian courts. The Court and the D.C. Circuit's review of Hamdan's military commission's decision prove that this commission is not outside of the purview of the civilian courts.[72]

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[63] *Id.* at ___, 126 S. Ct. at 2785.

[64] *Id.* at ___, 126 S. Ct. at 2785-86.

[65] *Id.* at ___, 126 S. Ct. at 2775.

[66] *Id.*

[67] *Id.*

[68] *Id.* (citing Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121-22 (1866)).

[69] 327 U.S. at 322-24 (holding that two persons charged with civil crimes that had nothing to do with military crimes were improperly tried by military tribunal because "'the military should always be kept in subjection to the laws of the country to which it belongs'" (quoting Dow v. Johnson, 100 U.S. 158, 169 (1880))).

[70] 71 U.S. at 127 (explaining that military commissions would be justified in certain circumstances: "in times of foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law," but only for limited duration).

[71] *Hamdan III*, ___ U.S. at ___ n.25, 126 S. Ct. at 2776 n.25 (plurality opinion) (citing *Milligan*, 71 U.S. at 127).

[72] *See, e.g.*, *Hamdan III*, ___ U.S. at ___ n.10, ___ n.15, 126 S. Ct. at 2766 n.10, 2769 n.15; *Hamdan II*, 415 F.3d at 36.

The second type of situation described by Justice Stevens was "commissions . . . established to try civilians 'as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.'"[73] The quintessential example cited by Justice Stevens was the commission established at the end of World War II in occupied Germany.[74] Again, these types of commissions do not apply to Hamdan's situation because Hamdan was tried by a military commission on U.S. territory in Guantanamo Bay, Cuba, not on enemy occupied territory.[75]

The third situation Justice Stevens mentions is relevant to this inquiry, namely, the commission that is "[c]onvened as an 'incident to the conduct of war' when there is a need 'to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'"[76]

### 2. *Justice Stevens relied upon* Ex parte Quirin, *which incorporated customary international law into federal common law*

Justice Stevens cited *Ex parte Quirin*,[77] a case that had been previously relied upon by the Court for its use of international law principles.[78] Justice Stevens further noted that in *Quirin* the Court held that "Congress, through Article 21 of the UCMJ, has 'incorporated by reference' the common law of war which may render triable by military commission certain offenses not defined by statute."[79] The *Quirin* Court explained that Congress took a positive action in the adoption of international norms by "adopting the system

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[73] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2776 (plurality opinion) (quoting *Duncan*, 327 U.S. at 314).

[74] *Id.* (citing Madsen v. Kinsella, 343 U.S. 341, 356 (1952)) ("The occupation courts in Germany are designed especially to meet the needs of law enforcement in that occupied territory in relation to civilians and to nonmilitary offenses. Those courts have been directed to apply the German Criminal Code largely as it was theretofore in force.").

[75] *Id.* at ___, 126 S. Ct. at 2760 (majority opinion).

[76] *Id.* at ___, 126 S. Ct. at 2776 (plurality opinion) (citation omitted).

[77] 317 U.S. 1 (1942).

[78] Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 367 n.45 (citing Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion)) ("Justice O'Connor cited *Ex parte Quirin* 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'").

[79] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2780 (plurality opinion) (quoting *Quirin*, 317 U.S. at 30).

of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts."[80]

Furthermore, *Quirin* stated that, "[b]y *universal agreement and practice*, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations . . . ."[81] Later the Supreme Court, in characterizing certain violations of the law of war stated:

> This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of law of war recognized by this Government by its enactment of the Fifteenth Article of War.[82]

As support for this proposition, the *Quirin* Court cited various international authorities on war, including a Great Britain Manual of Military Law and several international law documents.[83]

### *B. Justice Kennedy's Reasoning for Not Addressing the Definition of "Regularly Constituted Court" or the Conspiracy Charge Against Hamdan*

In the portion of Justice Kennedy's separate opinion dealing with the basic procedures that U.S. law sets for military commissions, he deferred to the restrictions that Congress placed on the President's use of military tribunals.[84] Justice Kennedy stated:

> Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.[85]

Justice Kennedy chose not to address the conspiracy charge, but instead asked that Congress provide more guidance on how military commissions could legitimately proceed, stating that Congress is "the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with

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[80] *Quirin*, 317 U.S. at 30.

[81] *Id.* (emphasis added) (footnote omitted).

[82] *Id.* at 35-36 (footnote omitted).

[83] *Id.* at 35 n.12, *see also*, *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2780 (plurality opinion) (examining *Quirin* as an example where the Court found that "historic and textual evidence constituted clear precedent" for proceeding with a military commission on a specific offense against the law of war).

[84] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2807-08 (Kennedy, J., concurring in part).

[85] *Id.* at ___, 126 S. Ct. at 2808.

the national interest or international justice.'"[86] Justice Kennedy proceeded to state: "I express no view on the merits of other limitations on military commissions described as elements of the common law of war."[87]

*1. Justice Kennedy's position is based on a view which assumes that international law must be first adopted by Congress to have legitimacy in federal courts*

Justice Kennedy's opinion attempted to ground understandings of "regularly constituted" tribunals not upon the Geneva Conventions, but rather through Congress's adoption of these international norms into U.S. law.[88] Justice Kennedy stated that the term "regularly constituted" found in the Geneva Conventions of 1949 "controls here, if for no other reason, because Congress requires the military commissions like the ones at issue conform to the 'law of war.'"[89] Justice Kennedy further stated that the definition of "regularly constituted," as interpreted by this Court, "[r]elies upon the importance of standards deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms. All of which returns us to the point of beginning—that *domestic statutes control this case*."[90]

*2. Justice Kennedy relied upon domestic statutes to invalidate the military commissions used to try Hamdan*

Justice Kennedy framed the argument as a matter of the Congress using its proper authority to decide military justice, providing and limiting the Executive in its exercise of military power, and specifically military justice, in the form of military commissions.[91] Justice Kennedy clearly telegraphed his intention to make Hamdan's detention an issue of domestic and not foreign law in his statement that "[t]rial by military commission raises separation-of-powers concerns of the highest order."[92] On Justice Kennedy's view, this case involves domestic law as it relates to the proper authority inherent in each branch of government. Justice Kennedy's reasoning makes sparse reference to international authority, outside of the following phrase: "the requirement

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[86] *Id.* at ___, 126 S. Ct. at 2809 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

[87] *Id.* (citation omitted).

[88] *Id.* at ___, 126 S. Ct. at 2799 (citing 10 U.S.C. § 821 (2000)).

[89] *Id.* (quoting 10 U.S.C. § 821 (2000)).

[90] *Id.* at ___, 126 S. Ct. at 2800 (emphasis added).

[91] *Id.* at ___, 126 S. Ct. at 2799.

[92] *Id.* at ___, 126 S. Ct. at 2800.

of the Geneva Conventions of 1949 that military tribunals be 'regularly constituted' . . . a requirement that controls here, if for no other reason, *because Congress* requires that military commissions like the ones at issue conform to the 'law of war.'"[93] This brief mention of international law and how it may be woven into domestic law assumes that Congress must first adopt international customary norms before they may become a part of the federal common law.

Instead of "incorporat[ing] at least the barest of those trial protections that have been recognized by customary international law,"[94] Justice Kennedy posited that where the Geneva Conventions of 1949 are unclear on the specific requirements encompassing a "regularly constituted" military tribunal, Congress is to decide.[95] Justice Kennedy ended this section by declaring that the use of military commissions is a domestic issue, arguing that Congress retains the authority to require certain procedures for these military commissions.[96]

Furthermore, Justice Kennedy detailed a process for Congress to use in determining what is required for a "regularly constituted" military tribunal, stating, "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so."[97] Justice Kennedy carefully constrained Congress's power by requiring that Congress take into consideration "[t]he Constitution and other laws."[98] Outside of this broad guidance, Justice Kennedy's concurring opinion is vague as to what exactly Congress could do in this area of law, e.g., could Congress ever preclude the federal courts from reviewing any military commission that Congress creates under the "power and prerogative"[99] that Justice Kennedy recognizes?

The Court in *Hamdan* concluded that Congress did not intend the DTA[100] to strip the federal courts of jurisdiction over military commissions convened before enactment of the Act.[101] The Court expressly declined to decide whether Congress should strip federal courts of jurisdiction over military commissions.[102]

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[93] *Id.* at ___, 126 S. Ct. at 2799 (quoting 10 U.S.C. § 821 (2000)) (emphasis added).

[94] *Id.* at ___, 126 S. Ct. at 2797 (plurality opinion).

[95] *Id.* at ___, 126 S. Ct. at 2799-2800 (Kennedy, J., concurring in part).

[96] *Id.* at ___, 126 S. Ct. at 2800.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] DTA § 1005(e)(1).

[101] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2769.

[102] *Id.* at ___ n.15, 126 S. Ct. at 2769 n.15 ("Because we conclude that [the Detainee Treatment Act of 2005] does not strip federal courts' jurisdiction over cases pending on the date of the DTA's enactment, we do not decide whether, if it were otherwise, this Court would

### *3. International treatment of "customary international law" and whether or not Article 75 of Protocol 1 to the 1977 Geneva Conventions can serve as binding in federal courts*

In support of Justice Kennedy's position, commentators have suggested that judicial reliance upon foreign law or authority outside of the federal courts "raises significant problems of constitutional text and structure."[103] The general response by this line of thought to a "customary international law" framework is that such reliance on external authorities "would subject the private conduct of American citizens, in a relatively unfiltered form, to the regulatory decisions of foreign or international courts."[104]

This response, however, fails to consider that federal courts have often relied upon such foreign norms in the development of the common law of the United States. As one federal district court judge noted: "We [federal judges] borrow from foreign law those concepts, those ideas, those alternatives which 'bubbled up' into American legal landscape, which fit our norms and our traditions."[105] Indeed, commentators have noted that, as a practical matter, federal judges and scholars, "having bequeathed our Constitution to other democracies and bequeathed our traditions, we now have been surpassed by them."[106] Therefore, the application of international law to domestic cases does not seem to violate constitutional norms and is in fact a function of interacting with other constitutional societies.[107]

## *C. The Court's Use of Customary International Law in Other Cases*

The Court in the past has adopted or referenced customary international law in deciding cases regarding detainees and prisoners of war. In a World War II case and a recent case involving the U.S. military operations in Afghanistan, the Court invoked customary international law and looked to international

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nonetheless retain jurisdiction to hear Hamdan's appeal. . . . Nor do we decide the manner in which the canon of constitutional avoidance should affect subsequent interpretation of the DTA." (internal citations omitted)).

[103] John Yoo, *Peeking Abroad?: The Supreme Court's Use of Foreign Precedents in Constitutional Cases*, 26 U. HAW. L. REV. 385, 389 (2004).

[104] *Id.*

[105] Nancy Gertner, *The Globalized District Court*, 26 U. HAW. L. REV. 351, 358 (2004).

[106] *Id.* at 359 (citing Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT'L L. 43, 48 (2004)).

[107] Harold Hongju Koh, *International Law As Part of Our Law*, 98 AM. J. INT'L L. 43, 43-44 (2004) ("Perhaps the Court was suggesting that, in an interdependent world, United States courts should not decide cases without paying 'a decent respect to the opinions of mankind,' in the memorable words of the Declaration of Independence.").

documents in deciding cases involving the validity of the detention of prisoners.[108]

*1. Use of customary international law in military commission cases*

A World War II case, *In re Yamashita*,[109] illustrates the Court's use of international law in deciding whether or not military commissions could take place after the end of hostilities.[110] Chief Justice Stone relied upon international norms and directly cited international authority when he said: "No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended."[111] Even more telling is Chief Justice Stone's citation to international treaties and commentaries to certain treaties, including the 1919 Treaty of Versailles, Treaty of St. Germain, and 1920 Treaty of Trianon.[112] Chief Justice Stone gave prominence to international sources by placing the discussion of international treaties and commentaries before his discussion of the historical use of military commissions in the U.S.[113]

The Court in *Yamashita* further relied upon international norms when it validated the war crimes charged against "[t]he Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands"[114] stating, "[i]t is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war."[115] Furthermore, the Court considered the "law of war" as presented in international documents, concluding that "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."[116] The Court then discussed several international conventions requiring an armed force to be commanded by a person responsible for his subordinates in order to be accorded the rights of a lawful belligerent, including the Annex to the Fourth Hague Convention of

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[108] *See Hamdan III*, ___ U.S. ___, ___, 126 S. Ct. 2749, 2788-90 (2006) (discussing procedures used to try General Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, near the end of World War II); *supra* text accompanying note 78.

[109] 327 U.S. 1 (1946).

[110] *Id.* at 12.

[111] *Id.*

[112] *Id.* at 12 n.1.

[113] *Id.* at 12-13.

[114] *Id.* at 5.

[115] *Id.* at 14 (citations omitted).

[116] *Id.* at 15.

1907, Article 19 of the Tenth Hague Convention, Article 26 of the Geneva Red Cross Convention of 1929, and Article 43 of the Fourth Hague Convention.[117]

The Court asserted that these international norms were properly used to judge the petitioner, "who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces . . . [and therefore bore] an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."[118] The Court noted that U.S. military tribunals also hold their commanding officers to similar international standards.[119] Finally, the Court recognized that similar principles of international law have been imposed and recognized by the United States, for example, "to impose liability on the United States in international arbitrations."[120]

*2. Use of customary international law in a recent detention case*

Commentators have noted that in several recent instances the Supreme Court has "utilized international law principles"[121] in cases related to the detention of individuals. For example, in *Hamdi v. Rumsfeld*,[122] Justice O'Connor "[r]elied 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."[123] Similarly, in a concurring opinion, "Justice Souter . . . observed that holding Hamdi incommunicado and without a hearing to determine his status 'appears to be a violation of the Geneva Convention.'"[124]

*3. The applicability of customary international law in the adjudication of Hamdan's case*

Justice Stevens's plurality opinion is bolstered by customary international law. As one commentator notes: "To become a 'custom,' a practice must have the widespread (but not necessarily universal) support of countries

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[117] *Id.* at 15-16.

[118] *Id.* at 16.

[119] *Id.* at 16 n.3 (providing two examples of officers being held to international standards).

[120] *Id.* at 16 (citing *Case of Jeannaud, in* 3 JOHN BASSETT MOORE, INTERNATIONAL ARBITRATIONS 3000 (1898); *Case of the Zafiro, in* 5 GREENE HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 707 (1943)).

[121] Van Dyke, *supra* note 78, at 367.

[122] 542 U.S. 507 (2004).

[123] Van Dyke, *supra* note 78, at 367 (quoting *Hamdi*, 542 U.S. at 520 (plurality opinion)).

[124] Van Dyke, *supra* note 78, at 367-68 (quoting *Hamdi*, 542 U.S. at 549-50 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment)).

concerned with the issue and must usually have continued for a period of time long enough to signify understanding and acquiescence."[125]

At the close of Part V of his plurality opinion, Justice Stevens concluded that the conspiracy charge against Hamdan was not supported or understood by international standards, stating that "*international sources* confirm that the crime charged here was not a recognized violation of the law of war."[126] Stevens cited to *Ex parte Quirin*, which stated:

> [T]here are acts regarded *in other countries*, or by some *writers on international law*, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury.[127]

Justice Stevens suggested that congruence existed in *Hamdan* between international law and domestic authorities regarding the crime of conspiracy: "the crime charged here is not a recognized violation of the law of war."[128] Justice Stevens proceeded to state that the crime of conspiracy charged against Hamdan had no support in either international or U.S. law.[129]

Justice Stevens concluded, therefore, that there was no customary international law specifying a crime of "conspiracy" against an enemy combatant in the law of war.[130] Under a commonly accepted definition of "custom," the fact that domestic sources "corroborated" the international ones suggested that there is support in the United States for a "customarily understood" set of crimes of war and that the United States has used the laws of war for a "period of time long enough to signify understanding and acquiescence."[131]

Professor Jon Van Dyke, a constitutional and international law scholar, also noted that "[s]ome principles of customary international law are so important they are called 'peremptory norms' or '*jus cogens*' principles of international law . . . that no nation is permitted" to act in contravention of.[132] Among these

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[125] *Id.* at 368-69 nn.51 & 52 (citing Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. 14, 98 para. 186 (June 27); The Scotia, 81 U.S. (14 Wall.) 170 (1871)).

[126] *Hamdan III*, ___ U.S. ___, ___ 126 S. Ct. 2749, 2784 (2006) (plurality opinion) (footnote omitted) (emphasis added).

[127] *Id.* at ___ n.38, 126 S. Ct. at 2784 n.38 (quoting *Ex parte* Quirin, 317 U.S. 1, 29 (1942) (emphasis added)).

[128] *Id.* at ___, 126 S. Ct. at 2784.

[129] *Id.* at ___ n.38, 126 S. Ct. at 2784 n.38.

[130] *Id.* at ___, 126 S. Ct. at 2784.

[131] Van Dyke, *supra* note 78, at 368-69 (footnote omitted).

[132] *Id.* at 369 (emphasis added).

'peremptory norms' are, "[g]enocide, crimes against humanity . . . *prolonged arbitrary detention*, torture, and racial discrimination."[133]

Therefore, Hamdan's detention would fit under the *jus cogens* prohibition against prolonged arbitrary detention because he was held for more than a year before being declared a person "eligible for trial by military commission for then-unspecified crimes."[134] Similarly, Justice Stevens is correct in his position that treaties adopted by the U.S. "[m]ust be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law."[135] Justice Stevens based this statement on the fact that the United States is signatory to other international instruments that include basic trial protections.[136] Justice Stevens's statement is correct as supported by a view of federal common law that federal courts may incorporate and adopt the law of nations.[137]

### *D. Federal Common Law: "Customary International Law" May Be Adopted As Federal Common Law*

Justice Stevens correctly concluded that the United States and its federal courts are bound to treaties to which the United States is a signatory, including those that guarantee certain basic rights for a detainee.[138] There is a strain of thought in certain federal decisions that argues that federal courts may not utilize principles of customary international law without express congressional authorization.[139] This position justifies this limitation on the judiciary by

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[133] *See* Yoo, *supra* note 103, at 389 (stating that the trend, in certain cases, in federal law is to rely upon foreign law and authority outside the federal government) (emphasis added).

[134] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2759.

[135] *Id.* at ___, 126 S. Ct. at 2797 (plurality opinion).

[136] *See, e.g., id.* ("Like the phrase 'regularly constituted court,' [procedures governing the tribunal] must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law. Many of these are described in Article 75 of Protocol I to the Geneva Conventions of 1949, adopted in 1977 (Protocol I). Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed it appears that the Government 'regards the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'" (quoting William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003))); *see also id.* at ___ n.66, 126 S. Ct. at 2797 n.66 ("Other international instruments to which the United States is a signatory include the same basic protections set forth in Article 75." (citing International Covenant on Civil and Political Rights, Art. 14, P3(d), Mar. 23, 1976, 999 U.N.T.S. 171)).

[137] Van Dyke, *supra* note 78, at 374 ("'[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations.'" (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004))).

[138] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2775-77 (plurality opinion).

[139] Van Dyke, *supra* note 78, at 374 (quoting 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,

claiming that without proper authorization, the judiciary may not usurp or "[i]nterfere[] with the conduct of foreign affairs delegated to the political branches of government."[140] In a similar vein, others have argued that *Erie R.R. Co. v. Tompkins*[141] precludes federal courts from engaging in using international law to deal with federal cases because *Erie* held that there is no federal common law,[142] and therefore federal courts must be bound by the substantive decisions of state courts.[143] Advocates of this position also argue, in the case of international law, state common law should not be followed because "[i]t is inappropriate for states to provide the lead, because foreign policy is a federal domain."[144] Supporters of this view ultimately conclude that "[a]fter *Erie*, then, a federal court can no longer apply [customary international law] in the absence of some domestic authorization to do so, as it could under the regime of general common law."[145]

Commentators, however, have stated that *Erie* does not necessarily preclude principles of international law from being used by federal courts,[146] and therefore, Justice Stevens correctly incorporates concepts of customary international law into his plurality opinion. Most notably, in 2004, the U.S. Supreme Court in *Sosa v. Alvarez-Machain*[147] suggested that federal courts may identify certain torts under the Alien Tort Claims Act "[w]hen the requisite international consensus emerges."[148] In *Sosa*, the Court articulated that while the *Erie* rule may deny general federal common law, federal courts

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1147-48 (D.C. Cir. 2003) (Randolph, J., concurring)).

[140] *Id.* at 373 (citations omitted).

[141] 304 U.S. 64 (1938).

[142] *Id.* at 79.

[143] Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 336-41 (1997), *cited in* Van Dyke, *supra* note 78, at 373 n.84.

[144] Van Dyke, *supra* note 78, at 373; *see also id.* at 373 n.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." (citing Louis Henkin, *International Law As Law in the United States*, 82 MICH L. REV. 1555, 1559 (1984))).

[145] 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). *But see* Van Dyke, *supra* note 78, at 373-74 n.86 ("[Certain commentators have characterized] the Bradley/Goldsmith thesis as 'utterly mistaken' and 'incoherent.'" (citing Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827, 1838 (1998))).

[146] Van Dyke, *supra* note 78, at 373-74, n.82 (citing Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939)).

[147] 542 U.S. 692 (2004).

[148] Van Dyke, *supra* note 78, at 375; *see also Sosa*, 542 U.S. at 724 ("The jurisdictional grant is best read as having been enacted 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.").

have a competency "to make judicial rules of decisions of particular importance to foreign relations,"[149] with a cautious eye to "[l]egislative guidance before exercising innovative authority over substantive law."[150]

## IV. CONCLUSION

*Hamdan* leaves more questions than it purports to answer. It falls in line with the Court's decision in *Hamdi v. Rumsfeld*,[151] upholding the President's inherent authority to detain individuals in the prosecution of the Global War on Terror. Stevens's plurality opinion has a sound basis in customary international law to grant certain customary international legal rights to unlawful alien enemy combatants.

On the other hand, Justice Kennedy's deference to Congress in his treatment of this matter may be warranted. As he observed, this is a situation best dealt with by the political branches of government.[152] Justice Kennedy, however, is too quick to dismiss the use of customary international law in a case replete with international consequences.

A majority of the justices in *Hamdan* concluded that broad grants of authority from the Congress in the forms of the AUMF and the DTA of 2005 are not sufficient to expand the President's authority to convene military commissions. Similarly, most agreed that the AUMF and the DTA of 2005 authorize the President to convene military commissions under specific situations as supported by the Constitution and laws of the United States as well as the law of war.

Justice Stevens's plurality opinion correctly relied upon customary international law as well as the federal courts' own common law on the issue of military detainees. Justice Kennedy was reluctant to adopt Justice Stevens's reasoning in order to preserve the constitutional powers granted to the legislative and the executive branches. Justice Kennedy may be avoiding a question that needs to be addressed, however: what the U.S. policy should be with regard to detainees in Hamdan's position. While there may be wisdom in waiting for the legislative and executive branches to provide better policies and reasons for the United States detention of foreign nationals, this may hurt the U.S.'s ability to tout democracy as the answer to the problems in Iraq and Afghanistan.

In the final analysis, *Hamdan* leaves open many questions, including whether unlawful alien enemy combatants enjoy the benefits of Common

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[149] Van Dyke, *supra* note 78, at 375 (quoting *Sosa*, 542 U.S. at 726).

[150] *Sosa*, 542 U.S. at 726.

[151] 542 U.S. 507 (2004).

[152] *Hamdan III*, ___ U.S. ___, ___, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part).

Article 3 of the Geneva Conventions. Furthermore, a new question has presented itself: whether the Military Commissions Act of 2006 ("MCA of 2006") resolve the issues raised in *Hamdan*. On September 29, 2006, the Congress approved the MCA of 2006 and President George W. Bush enacted P.L. 109-366 on October 17, 2006.[153] The MCA of 2006 generally sets forth provisions regarding the President's authority to establish military commissions and the procedures and laws governing such commissions.[154]

As Justice Kennedy clearly stated in *Hamdan*, "domestic statutes control this case."[155] Should the U.S. Supreme Court review certain sections of the MCA of 2006, Justice Kennedy's broad declaration in *Hamdan* that "Congress, after due consideration, [may] deem[] it appropriate to change the controlling statutes, in conformance with the Constitution and other laws," because, "it has the power and prerogative to do so,"[156] will be put to the test. Justice Kennedy based his hesitance on the fact that Hamdan's evidentiary proceeding had yet to start "and it remains to be seen whether he will suffer any prejudicial exclusion."[157]

A case challenging the MCA of 2006 would force the Court to clarify and crystallize its jurisprudence in this area of law and force Justice Kennedy to come to terms with his counsel in *Hamdan* that "[t]he Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."[158]

Allan M.Q. Alicuben[159]

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[153] *See* discussion *supra* note 1.

[154] *See generally* MCA of 2006, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. 2600, 2601-2630 (2006) (to be codified at 10 U.S.C. §§ 948a-950w).

[155] *Hamdan III*, ___ U.S. at ___, 126 S. Ct. at 2800 (Kennedy, J., concurring in part).

[156] *Id.* at ___, 126 S. Ct. at 2800.

[157] *Id.* at ___, 126 S. Ct. at 2809.

[158] *Id.* at ___, 126 S. Ct. at 2799.

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# Restricting Student Speech that Invades Others' Rights: A Novel Interpretation of Student Speech Jurisprudence in *Harper v. Poway Unified School District*

## I. INTRODUCTION

The First Amendment rights of students in schools are not identical to that of adults outside of the school context.[1] This does not mean, however, that students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2]

In the 2006 case of *Harper v. Poway Unified School District* ("*Harper II*"),[3] the Ninth Circuit opened a new chapter in First Amendment interpretation as applied to public school students. The court declined to apply the typical "substantial disruption" standard,[4] as the district court had done ("*Harper I*"),[5] to a student wearing a t-shirt condemning homosexuality.[6] Instead, the court held that school authorities could regulate the student's wearing of the t-shirt solely because the t-shirt's message was an invasion into the rights of homosexual students.[7]

Both the "substantial disruption" test and the "invasion of others' rights" test were introduced by the Supreme Court in the landmark case of *Tinker v.*

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[1] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

[2] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[3] 445 F.3d 1166 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.) [hereinafter *Harper II*].

[4] *See Tinker*, 393 U.S. at 514 (holding that there was no evidence "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities"). Thus the test from *Tinker* for limiting school speech that does not fall into any specific speech category is the following:

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

*Id.* at 513.

[5] Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1101 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.) [hereinafter *Harper I*].

[6] *Harper II*, 445 F.3d at 1184.

[7] *Id.* at 1178 (quoting *Tinker*, 393 U.S. at 508) (explaining that the message on the t-shirt "'colli[des] with the rights of other students' in the most fundamental way").

*Des Moines Independent Community School District*.[8] Though these are two separate tests, the courts have seldom, if ever, applied the test of invasion of others' rights in student First Amendment cases.[9] Furthermore, it is unclear what this test actually means. The Supreme Court introduced this test in what is arguably dicta, never elaborating on its meaning within the *Tinker* case, nor in any case that followed.[10] In choosing to base its holding completely on this enigmatic second test from *Tinker*, the Ninth Circuit's decision in *Harper II* is vulnerable to criticism because it employs a novel interpretation of Supreme Court precedent and because it limits student speech rights more than previous decisions have been willing to do.

Instead of affirming the result of the district court's decision on a completely untried invasion of others' rights test, the Ninth Circuit should have affirmed the district court's ruling using the grounds the district court employed, basing its decision on the typical substantial disruption test from *Tinker*. In applying only the invasion of others' rights test, the *Harper II* court effectively held that any student speech expressing opposition to homosexuality is open to constitutionally permissible regulation by school officials. Thus, the court's decision reaches far beyond the facts in *Harper II* and affects anti-homosexual speech in any school setting. Had the court affirmed the district court ruling based on the substantial disruption test, such a holding would be consistent with the *Tinker* line of cases, allowing regulation of student speech in limited circumstances.

Part II of this Note examines the history of First Amendment interpretation within the school context, explains the categories of student speech and the framework for each, and reviews the tests developed by the Supreme Court in *Tinker* and the application and use of these tests by other courts. Part III details the facts and opinions from both the district court and the Ninth Circuit in *Harper I* and *Harper II*. Part IV criticizes the Ninth Circuit's reasoning in *Harper II* and explores the potential impact of the Ninth Circuit's decision on students' First Amendment rights. The postscript explains this Note's continuing relevance despite the Supreme Court's vacatur of *Harper II*.

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[8] 393 U.S. at 513.

[9] For a general coverage of *Tinker*'s progeny and cases applying "substantial disruption," see Mitchell J. Waldman, Annotation, *What Oral Statement of Student Is Sufficiently Disruptive So As to Fall Beyond Protection of First Amendment*, 76 A.L.R. FED. 599 (2006), which discusses *Harper I*—the district court decision—as one of the Ninth Circuit decisions applying "substantial disruption."

[10] In *Tinker*, the Supreme Court based its decision on the fact that students wearing black armbands were not likely to cause a material disruption. 393 U.S. at 514. The Court never explained what would be required to show that a student's speech intruded on the rights of others, a test which is arguably dicta given that the Court never applied it.

## II. HISTORICAL REVIEW

In three landmark cases, the Supreme Court developed three standards applicable to regulations of student speech.[11] Two of the cases govern more specific types of student speech, while one case is the general benchmark for all other student speech cases.[12]

### *A.* Tinker v. Des Moines Independent School District

In the 1969 case of *Tinker v. Des Moines Independent Community School District*, the Supreme Court established the standard by which most student free speech cases would be judged.[13] In *Tinker*, the Court resolved the question of whether students could wear black armbands to school to protest the United States' involvement in the Vietnam War.[14] School administrators, anticipating this form of protest, had implemented a ban on students wearing armbands.[15] Despite the ban, several students wore the armbands and were suspended and sent home by school officials.[16]

The Court held that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."[17] Further, a school's constitutionally valid reason for regulating speech would be limited to certain circumstances: a school could regulate speech only when that speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[18] The Court subsequently concluded that wearing black armbands

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[11] *See Tinker*, 393 U.S. 503 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[12] *See* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992). The Ninth Circuit established the distinction between each category of student speech and which case would govern each category:

> We have discerned three distinct areas of student speech from the Supreme Court's school precedents: (1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of these categories. We conclude, as discussed below, that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*.

*Id.* (citations omitted).

[13] 393 U.S. at 512-13.

[14] *Id.* at 504.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 511.

[18] *Id.* at 513.

"neither interrupted school activities nor sought to intrude in the school affairs or the lives of others."[19]

The *Tinker* Court did not intend for its decision to cover all types of speech cases in the school context.[20] The Court limited its holding to cases "involv[ing] direct, primary First Amendment rights akin to 'pure speech.'"[21] The Court further impliedly defined pure speech as the "silent, passive expression of opinion, unaccompanied by any disorder or disturbance."[22] Thus for this type of pure speech, the Court established a stringent standard that school administrators must meet in order to constitutionally regulate the speech of their students:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.[23]

The Court's rationale for this standard was based on the principle that the Constitution demanded protection of the freedom of expression as much as possible, even in school settings.[24]

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[19] *Id.* at 514.

[20] *Id.* at 507-08 ("The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment.").

[21] *Id.* at 508.

[22] *Id.*

[23] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)).

[24] *See id.* at 508-09. The Court emphasized that difference of opinion and the ability to express ideas, even if unpopular, are essential pieces of a successful democracy and a successful educational system. *Id.* The Court reasoned:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

*Id.* at 509 (citations omitted).

### *B.* Bethel School District No. 403 v. Fraser

Seventeen years after the Supreme Court's decision in *Tinker*, the Court made another important decision in *Fraser* with regards to the First Amendment rights of public school students.[25] In *Fraser*, a student gave a speech at an assembly in which he used "an elaborate, graphic, and explicit sexual metaphor" to nominate another student for an elected office.[26] The following day, the student was suspended for three days and notified that he would be removed from the list of potential commencement ceremony speakers.[27]

The Court held the *Tinker* standard inapplicable by distinguishing lewd, vulgar speech from the political statements of wearing black armbands.[28] The Court found a "marked distinction" between a political expression and blatant, sexual innuendos.[29] Thus, the Court was not bound by *Tinker* and held that it was constitutional for the school to regulate "offensively lewd and indecent speech."[30] The *Fraser* Court upheld *Tinker* as it applied to students' speech regarding political viewpoints, but held that school administrators possessed the right to regulate illicit, sexual speech in a school setting:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.[31]

In holding that school administrators could regulate speech with sexual content, the Supreme Court did not weaken the standard set by *Tinker*. Instead, the Court merely created another category of speech with its own framework. Unlike the pure speech governed by *Tinker*, *Fraser* established a much lower constitutional threshold for school administrators regulating vulgar and plainly offensive speech.

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[25] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

[26] *Id.* at 678. The Court further noted that there were approximately 600 students in attendance at the assembly, which was a school sponsored activity. *Id.* at 677.

[27] *Id.* at 678.

[28] *Id.* at 680.

[29] *Id.* at 678.

[30] *Id.* at 685.

[31] *Id.* at 685-86.

The courts since *Fraser* have varied in their understanding of what kind of speech the *Fraser* standard should apply to.[32] Ninth Circuit cases have generally held that *Fraser* only governs "vulgar, lewd, obscene, and plainly offensive speech."[33] Cases interpreting *Fraser* as applying to offensive speech alone are likely misinterpreting the Court's language. One article has observed:

> It is critical to note that the phrase "vulgar or plainly offensive" never appeared in *Fraser*. The standard articulated in *Fraser* four times, "vulgar and offensive" clearly requires that the speech be both vulgar and offensive in order to be regulated; the test does not give courts the ability to pick one standard or the other.[34]

Thus a careful reading of *Fraser* limits its application specifically to speech that is both vulgar and offensive. Furthermore, the scope of the *Fraser* holding is likely limited to cases with similar factual circumstances such as school sponsored assemblies and other events.[35]

### C. Hazelwood School District v. Kuhlmeier

The third case in "the Supreme Court trilogy on student speech"[36] presented the Court with the question of whether school officials could regulate content, including censoring articles, within a school newspaper.[37] In *Hazelwood*, the principal of the school withheld two stories from a school newspaper.[38] One

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[32] *See, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465 (6th Cir. 2000) (applying *Fraser*, the court found the school justified in disciplining a student after wearing an anti-religious Marilyn Manson t-shirt); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214, 216-17 (3d Cir. 2001) (holding that *Fraser* only governs "lewd, vulgar, or profane language" and thus, applying *Tinker*, held that a school policy against any anti-homosexual speech was too broad and included speech that would not rise to the level of substantial disruption).

[33] Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992); *see also* Frederick v. Morse, 439 F.3d 1114, 1121 (9th Cir.), *cert. granted*, ___ U.S. ___, 127 S. Ct. 722 (2006).

[34] Cindy Lavorato & John Saunders, *Public High School Students, T-shirts and Free Speech: Untangling the Knots*, 209 ED. LAW REP. 1, 6 (2006).

[35] *Harper II*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.) ("Perhaps *Fraser* is best read as dealing with the situation where the school sponsors the activity in question and invites or encourages students to attend. . . . So read, *Fraser* . . . has no application at all to speech that has no school sponsorship at all—like talk in the corridors or messages on t-shirts worn by students.").

[36] Lavorato & Saunders, *supra* note 34, at 5.

[37] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[38] *Id.* at 264.

story was about student pregnancy while the other story was about the effect of divorce on students.[39]

The Court now faced the issue of what standard to apply to this type of student speech. The Court held that regulation of a school newspaper "concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[40] The Court emphasized that "[t]hese activities may fairly be characterized as part of the school curriculum,"[41] and thus the school should be allowed deference in forwarding its educational goals while regulating student speech in these situations.[42]

In its reasoning, the Court held that the *Tinker* standard was inapplicable to speech in school-sponsored activities.[43] The Court ruled that the school had the constitutional right to regulate student expression when it was the school itself that was being represented through the expression.[44] Distinguishing *Tinker*, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[45] This holding was consistent with the limitations the *Tinker* Court placed on itself.[46]

### *D. The Categories of Student Speech*

Since the Supreme Court's holdings in *Tinker*, *Fraser*, and *Hazelwood*, the task of the lower courts has been determining just how many categories of speech these cases create. Furthermore, if there is more than one category of speech, the courts must decide when each of the three cases governs student speech.

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[39] *Id.* at 263.

[40] *Id.* at 271.

[41] *Id.*

[42] *Id.* at 271-72.

[43] *Id.* at 272-73.

[44] *Id.*

[45] *Id.* at 273.

[46] The *Tinker* Court allowed for schools to have the freedom to regulate speech in situations like *Hazelwood*. In *Tinker*, the Court stated that the standard "does not concern speech or action that intrudes upon the work of the schools." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

*1. The two category classification*

In *Hazelwood*, the majority opinion characterized two categories of student speech: (1) "a student's personal expression that happens to occur on the school premises" and (2) "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[47] Under this classification, both *Hazelwood* and *Fraser* would govern cases within the second category.[48] The higher standard of *Tinker* would govern cases of pure speech in the first category.

Proponents of this categorization focus on the facts of *Fraser* to point out that both *Fraser* and *Hazelwood* govern the same type of student speech.[49] The issue lies in how much of the *Fraser* decision was influenced by the fact that the speech occurred at a mandatory school-sponsored assembly.[50] In Justice Brennan's concurrence in *Fraser*, he noted that the setting of a school-sponsored assembly was likely dispositive of the Court's ruling in favor of the school: "Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."[51] Adopting this interpretation, *Fraser* would therefore only govern vulgar and offensive speech within the context of school-sponsored activities.

*2. The three category classification*

The Ninth Circuit has adopted a slightly different classification model, ruling that *Tinker*, *Fraser*, and *Hazelwood* regulate three distinct categories of student speech.[52] Under this interpretation, *Fraser* governs all "vulgar, lewd, obscene, and plainly offensive speech"[53] regardless of whether they occur in a school-sponsored activity or not. *Hazelwood* then governs other "school-sponsored speech"[54] and *Tinker* covers "speech that falls into neither of [the first two] categories."[55]

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[47] *Hazelwood*, 484 U.S. at 271.

[48] The student in *Fraser* gave his speech at a school-sponsored assembly.

[49] *See* Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 532 (9th Cir. 1992) (Goodwin, J., concurring).

[50] At least one judge opined that "the Court [in *Fraser*] held that a student delivering a vulgar, lewd and plainly offensive speech *at an official school assembly* could be punished by school authorities without violating his First Amendment rights." *Id.* at 532.

[51] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 689 (1986) (Brennan, J., concurring).

[52] *Chandler*, 978 F.2d at 529.

[53] *Id.*

[54] *Id.*

[55] *Id.*

Under either of these categorical interpretations, the circumstances where *Tinker* is the applicable standard do not change. In fact, *Tinker* is the standard applied in most student speech cases because it covers the broadest amount of speech and the most common types of student speech.

## III. THE DECISION IN *HARPER V. POWAY UNIFIED SCHOOL DISTRICT*

### *A. Summary of the Facts*

In *Harper II*, a sophomore at Poway High School was not allowed to attend classes because he wore a t-shirt depicting his anti-homosexual views.[56] The school had allowed a group called the Gay-Straight Alliance to hold a "Day of Silence"[57] two years in a row in an effort to promote tolerance for people of differing sexual orientation.[58] In 2004, on the day of the second "Day of Silence," the student, Tyler Chase Harper, wore a t-shirt that read on the front, "'I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED,'" and on the back, "'HOMOSEXUALITY IS SHAMEFUL "Romans 1:27."'"[59] These messages were handwritten on the t-shirt.[60]

The following day, the student again wore a t-shirt with an almost identical message written on it.[61] The front of the t-shirt read, "'BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED,'" and the back again read, "'HOMOSEXUALITY IS SHAMEFUL "Romans 1:27."'"[62] On this day, school officials noticed the t-shirt and asked the student to remove it.[63] After refusing to remove the t-shirt, the student was eventually not

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[56] *Harper II*, 445 F.3d 1166, 1170-72 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.).

[57] *Id.* at 1171.

[58] As part of the "Day of Silence":

> [P]articipating students wore duct tape over their mouths to symbolize the silencing effect of intolerance upon gays and lesbians; these students would not speak in class except through a designated representative. Some students wore black T-shirts that said 'National Day of Silence' and contained a purple square with a yellow equal sign in the middle. The Gay-Straight Alliance, with the permission of the School, also put up several posters promoting awareness of harassment on the basis of sexual orientation.

*Id.* at 1171 n.3.

[59] *Id.* at 1171.

[60] *Id.*

[61] *Id.*

[62] *Id.* For photographs of Harper's t-shirt posted online, see Press Release, Alliance Defense Fund, School Administrator to Student: "Leave Your Faith in the Car" (June 2, 2004), *available at* http://www.alliancedefensefund.org/news/story.aspx?cid=2746#top.

[63] *Harper II*, 445 F.3d at 1171-72. Apparently no school official noticed Harper's t-shirt the first day that he wore it.

allowed to attend classes, and was forced to spend the remainder of the day studying in a conference room.[64]

School officials claimed that their concern over the t-shirt's message stemmed from altercations that had occurred during the previous year's "Day of Silence" when some students had made anti-homosexual comments.[65] In response to the "Day of Silence" the year before, "a group of heterosexual students informally organized a 'Straight-Pride Day,' during which they wore T-shirts which displayed derogatory remarks about homosexuals."[66] There were altercations between students and some students were suspended.[67] Fearing similar disruptions, the school felt it necessary to prevent Harper from wearing his t-shirt.[68]

### *B. District Court Opinion*

Nearly two months after this incident, the student filed a lawsuit against the Poway Unified School District.[69] The student based his claim on five federal causes of action: "[1] violations of his right to free speech, [2] his right to free exercise of religion, [3] the Establishment Clause, [4] the Equal Protection Clause, and [5] the Due Process Clause."[70] The Defendant school district filed a motion to dismiss all of the Plaintiff student's claims.[71] The Plaintiff student filed a motion requesting a preliminary injunction.[72]

Initially, the district court granted the school district's motion to dismiss Harper's equal protection, due process, and state law claims.[73] As to Plaintiff's First Amendment claim, the court denied the motion to dismiss, holding that the school district had failed to show that Harper's claim was without merit when all factual inferences were in Harper's favor.[74]

Faced with Harper's motion of a preliminary injunction, the district court denied the motion, applying the traditional substantial disruption test from

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[64] *Id.* at 1172.

[65] *Id.* at 1171-72.

[66] *Id.* at 1171.

[67] *Id.*

[68] *Id.* at 1171-1172.

[69] *See Harper I*, 345 F. Supp. 2d 1096, 1101 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.).

[70] *Harper II*, 445 F.3d at 1173. The student also had one state law claim under California Civil Code § 52.1, "which creates a private cause of action for the violation of individual federal and state constitutional rights." *Id.*

[71] *Harper I*, 345 F. Supp. 2d at 1099.

[72] *Id.*

[73] *Id.* at 1122-23.

[74] *Id.* at 1105-07.

*Tinker*.[75] The court ruled that the history of altercations at Poway High School during the previous year's "Day of Silence" could "reasonably lead school officials to forecast substantial disruption" when Harper wore his t-shirt.[76]

Basing its decision on the substantial disruption test, the district court disregarded the invasion of others' rights test as a part of the *Tinker* analysis.[77] Furthermore, the court found that there were "no facts indicating any other persons' rights were violated by the speech [on Harper's t-shirt]."[78]

### *C. Ninth Circuit Opinion*

The Ninth Circuit affirmed the district court's decision but declined to apply the district court's legal standard.[79] The majority chose to completely disregard the substantial disruption test of *Tinker* and instead relied solely on the invasion of others' rights test.[80]

Both the majority and dissenting opinions correctly distinguished *Fraser* from the circumstances of the case. Because *Fraser* requires speech that is both vulgar and offensive,[81] *Fraser* does not apply to the language of Harper's t-shirt. Harper's message, though arguably offensive, was clearly not vulgar or lewd. Furthermore, *Fraser* may only apply in cases of active speech, not passive speech, or at least in cases like *Hazelwood*, where the speech in question occurs at a school sponsored event.[82] The Ninth Circuit was even

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[75] *Id.* at 1120-22.

[76] *Id.* at 1120 (quoting LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)).

[77] *Id.*

[78] *Id.* at 1106.

[79] *Harper II*, 445 F.3d 1166, 1175 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.).

[80] *Id.* The court held that "[a]lthough we, like the district court, rely on *Tinker*, we rely on a different provision—that schools may prohibit speech that 'intrudes upon . . . the rights of other students.'" *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

[81] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("It is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."); *id.* at 684 ("We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language."). Not all courts have agreed that *Fraser* only applies to speech that is both vulgar and offensive. *See, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469-71 (6th Cir. 2000) (stating that *Fraser* is used for "reviewing the suppression of vulgar *or* plainly offensive speech" and affirming a district court decision that "school[s] may prohibit a student from wearing a T-shirt that is offensive, but not obscene" (emphasis added)).

[82] *See Harper II*, 445 F.3d at 1193 n.1 (Kozinski, J., dissenting). The dissent in *Harper II* argued that *Fraser* only applies where the school has involved itself at a significant level in the activity where the disputed speech takes place:

more reluctant to apply *Fraser* because of another decision within the circuit only three months earlier in *Frederick v. Morse*,[83] limiting the application of *Fraser* only to vulgar speech.[84]

The majority opinion, written by Judge Reinhardt, ruled that "Harper's shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting."[85] The majority held, however, that students should be protected from "verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation."[86] Because Harper's t-shirt was directed towards homosexuals, this type of speech violated the invasion of others' rights test.[87]

Ironically, the majority noted that "'the precise scope of *Tinker*'s "interference with the rights of others" language is unclear.'"[88] Yet despite this recognition, the majority opinion applied the test in holding that the t-shirt's message was one form of "psychological attack[] that cause[s] young people to question their self-worth and their rightful place in society."[89] Concluding that homosexual students are included as "members of minority groups that have historically been oppressed,"[90] the majority held that "the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn."[91] Thus by implication, the Ninth Circuit opinion generally held that all anti-homosexual speech in a school setting is impermissible under *Tinker*'s invasion of others' rights analysis.[92]

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> Perhaps *Fraser* is best read as dealing with the situation where the school sponsors the activity in question and invites or encourages students to attend. By giving its imprimatur to the activity, the school is, in effect, assuring potential attendees that they will not be subjected to anything plainly offensive. So read, *Fraser* is merely a precursor to *Hazelwood*, and has no application at all to speech that has no school sponsorship at all—like talk in the corridors or messages on t-shirts worn by students.

*Id.*

[83] 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, ___ U.S. ___, 127 S. Ct. 722 (2006).

[84] *Id.* at 1122 n.44 ("*Fraser* only enables schools to prevent the sort of vulgar, obscene, lewd, or sexual speech that, especially with adolescents, readily promotes disruption and diversion from the *educational curriculum*.").

[85] *Harper II*, 445 F.3d at 1176.

[86] *Id.* at 1178.

[87] *Id.* at 1178-79.

[88] *Id.* at 1178 (quoting Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001)).

[89] *Id.*

[90] *Id.* at 1178-1179. The Court noted that "[t]he demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development." *Id.*

[91] *Id.* at 1180.

[92] *Id.* at 1184.

Judge Kozinski's dissenting opinion agreed that *Tinker* is the applicable standard in the case.[93] Kozinski, however, looked to the substantial disruption test as the appropriate standard, and argued that "[t]he school authorities here have shown precious little to support an inference that Harper's t-shirt would 'materially disrupt[] classwork.'"[94]

More importantly, the dissent pointed out the impropriety of the majority's application of the invasion of others' rights test.[95] The dissent argued that the only reading of the invasion of others' rights consistent with *Tinker* is that these rights "refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established."[96] Any other interpretation of the invasion of others' rights would "give state legislatures the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech."[97]

The dissent argued most strongly against the special protection for homosexual students emphasized by the majority opinion:

> As I understand the opinion, my colleagues are saying that messages such as Harper's are so offensive and demeaning that they interfere with the ability of homosexual students to partake of the educational environment. This is not a position briefed or argued by any of the parties, and no one introduced any evidence in support of, or opposition to, this proposition.[98]

The dissent argued that creating a special protection for homosexual students in schools was a blatant example of "sua sponte lawmaking" with "no support in the record."[99]

Though speech such as Harper's could affect the educational experience of homosexual students, the evidence cited by the majority was not conclusive or authoritative.[100] Furthermore, the dissent concluded, even if the majority's

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[93] *Id.* at 1193 (Kozinski, J., dissenting).

[94] *Id.* It is arguable whether Harper's t-shirt created a substantial disruption. The district court, however, found that indeed a substantial disruption was created. *Harper I*, 345 F. Supp. 2d 1096, 1120 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.).

[95] *Harper II*, 445 F.3d at 1198 (Kozinski, J., dissenting).

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.* at 1198-99. The dissent was troubled by the type of evidence the majority used to buttress its main arguments:

> What my colleagues say could be true, but the only support they provide are a few law review articles, a couple of press releases by advocacy groups and some pop psychology. Aside from the fact that published articles are hardly an adequate substitute for record evidence, the cited materials are just not specific enough to be particularly helpful.

*Id.*

goal was noble, the fundamental problem with the majority's opinion is that it "has no anchor anywhere in the record or in the law."[101] The dissent argued that the opinion could not be reconciled with precedent and was further "likely to cause innumerable problems in the future."[102]

## IV. ANALYSIS

The majority's opinion is an effort to protect students of certain groups from suffering unwarranted serious psychological harm.[103] In basing its decision on *Tinker*'s invasion of others' rights dicta, however, the Ninth Circuit has created a policymaking decision with no legal backing, and in the process has made the courtroom a place for analysis of human psychological health.[104]

### *A. The Ninth Circuit Incorrectly Applied the "Invasion of Others' Rights" Test from* Tinker

Though the invasion of others' rights was first mentioned in *Tinker*, this test was never applied by that Court.[105] In fact, the *Tinker* Court specifically held that "this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."[106] Thus the invasion of others' rights test was not applicable in the *Tinker* decision. To the contrary, this test was nothing more than dicta by the *Tinker* Court.[107]

Very few cases since *Tinker* have attempted to elaborate on the meaning of invasion of others' rights.[108] One recent court decision noted that there is "no

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[101] *Id.* at 1201.

[102] *Id.*

[103] *Id.* at 1179 (majority opinion) ("In short, it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.").

[104] *See* Brian Pickard, New Development, *Tinkering with the Rights of Others:* Harper v. Poway Unified School District, 8 RUTGERS J. OF L. & RELIG. 1, 8 (2006), *available at* http://org.law.rutgers.edu/publications/law-religion/new_devs/harper.pdf ("The problem with the majority's argument is that its chain to the 'right to be let alone' anchor is constructed of observations concerning the human psyche which are sufficiently outside the bounds of a court's psychological expertise to warrant an ample level of judicial restraint.").

[105] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

[106] *Id.*

[107] *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

[108] Lavorato & Saunders, *supra* note 34, at 3 ("The second part of the test, 'interfering with the rights of others' was also not further elucidated [by the *Tinker* Court], and since that time has been analyzed very little.").

authority interpreting what 'invasion on the rights of others' really entails. In fact, the [Ohio District] Court is not aware of a single decision that has focused on that language in *Tinker* as the sole basis for upholding a school's regulation of student speech."[109] Thus the Ninth Circuit became the first court in the thirty-seven years since *Tinker* to base its decision solely on the invasion of others' rights test without applying the substantial disruption test.[110]

The Ninth Circuit's decision to depart from a substantial disruption analysis is particularly significant given that previous Ninth Circuit cases followed the *Tinker* progeny, applying only the substantial disruption test.[111] In its opinion, the district court in *Harper I* concluded that "the doctrine of *stare decisis* requires this Court to follow Ninth Circuit precedent [and apply substantial disruption]."[112] Yet ironically on appeal, the Ninth Circuit declined to follow its own precedent, and in so doing became the first court to apply the invasion of others' rights test independently. In this way, the Ninth Circuit's sole reliance on the second test "is entirely a judicial creation, hatched to deal with the situation," and affords schools the power to limit most anti-homosexual speech, a protection not allotted for under a traditional *Tinker* analysis.[113]

Though the Ninth Circuit affirmed the district court's result, in basing its decision on the invasion of others' rights, the Ninth Circuit effectively rejected the legal analysis of both the district court and Ninth Circuit precedent.[114] In holding that the message on Harper's t-shirt could have

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[109] Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005).

[110] The cases since *Tinker* focus almost entirely on the substantial disruption test and pay little to no attention to the invasion of others' rights test. *See id.* ("[T]he *Tinker* line of cases focus on whether or not material disruptions have occurred or whether or not they are reasonably likely to occur.").

[111] *See, e.g.*, Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992) (quoting *Tinker*, 393 U.S. at 514) (failing to even mention the invasion of others' rights test in holding that "[t]o suppress speech in this category [speech governed by *Tinker*], school officials must justify their decision by showing 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities'").

[112] *Harper I*, 345 F. Supp. 2d 1096, 1104-05 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.).

[113] *Harper II*, 445 F.3d 1166, 1201 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.). The majority opinion specifically stated that the scope of its holding should include "instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation." *Id.* at 1183 (majority opinion).

[114] The majority opinion did not explicitly reject the future use of the substantial disruption test in student speech cases. The opinion simply explained that "[i]n light of our conclusion regarding the application of the 'rights of others' prong of *Tinker*, we have no cause to decide whether the evidence would be sufficient to warrant denial of a preliminary injunction under the 'substantial disruption' prong as well." *Id.* at 1184.

reasonably caused a substantial disruption because of the history of problems at the school, the district court applied a standard consistent with *Tinker* and its progeny. The standard articulated by all cases since *Tinker* can be summarized generally by the following:

> Acceptable regulation of the content of student speech occurs when, for example, a student wears a T-shirt to school with a Confederate flag on it AND the school has recently suffered from racial tension that impedes the work of the school. If administrators cannot demonstrate *both* a reasonable fear of disruption to the school, and that the past incidents are tied to the speech being expressed by the student in question, then the T-shirt should not be regulated.[115]

By completely ignoring this standard and instead creating a "novel doctrine,"[116] the Ninth Circuit did not even adhere to its own purported standard of review.[117] Of course the Ninth Circuit did not technically reverse the district court's decision, but because the substantial disruption test was not an erroneous legal standard, the Ninth Circuit should not have completely disregarded the district court's analysis.

### *B. The Application of the Second* Tinker *Prong Avoided Direct Inconsistencies with Similar Cases*

The Ninth Circuit may have invoked the invasion of others' rights test in order to steer clear of a circuit split. Had the Ninth Circuit applied the substantial disruption test, yet still found that the school district could regulate the anti-homosexual speech on Harper's t-shirt, such a holding would at first appear in direct contradiction to the Third Circuit's holding in *Saxe v. State College Area School District*[118] and several district court opinions with similar factual situations.[119] In employing only the invasion of others' rights test,

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[115] Lavorato & Saunders, *supra* note 34, at 14 (emphasis added).

[116] *Harper II*, 445 F.3d at 1200 (Kozinski, J., dissenting).

[117] The Ninth Circuit stated that "[t]he district court's interpretation of the underlying legal principles is subject to de novo review." The court further explained, however, that "[w]e will reverse 'only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact.'" *Id.* at 1174 (majority opinion) (quoting El Pollo Loco, Inc. v. Hashim, 316 F.3d 1032, 1038 (9th Cir. 2003)).

[118] 240 F.3d 200 (3d Cir. 2001).

[119] *See, e.g.*, Nixon v. N. Local Sch. Dist. Bd. Of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005); Chambers v. Babbitt, 145 F. Supp. 2d 1068 (D. Minn. 2001). In *Nixon*, the district court considered whether a school could prevent a student from wearing a t-shirt that said on the front "INTOLERANT Jesus said . . . I am the way, the truth and the life. John 14:6" and on the back said "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" 383 F. Supp. 2d at 967. The court applied *Tinker* and held that the t-shirt had not caused any disruption at the school and that the t-shirt was insufficient to be a material disruption of school activities. *Id.* at 973. The court concluded that "[i]f the mere fact that other

however, the Ninth Circuit's decision is actually more susceptible to criticism because this standard is completely untested. Instead, the Ninth Circuit could have based its decision on substantial disruption and still avoided a circuit split. Even the Third Circuit would likely have agreed that Harper's speech could be regulated because of the history of disruption at Poway High School on sexual orientation issues, evidence showing that school administrators held "a well-founded expectation of disruption."[120]

In *Saxe*, the Third Circuit was asked to rule on whether a school policy banning any type of verbal or physical conduct directed towards students' sexual orientation was constitutional.[121] The Third Circuit applied the substantial disruption analysis and held that the policy was too broad and thus unconstitutional because it included speech that would not necessarily be a substantial disruption to the schools.[122] The Third Circuit noted that "[t]he Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."[123] Therefore, under *Tinker*, the only way that a school may regulate speech is "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech."[124]

Under the Third Circuit's substantial disruption standard in *Saxe*, a circuit split would not have occurred had the Ninth Circuit simply affirmed the district court's holding that found a substantial disruption in Harper's t-shirt.[125] Because "Poway High School . . . has had a history of conflict among

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students will likely find a message offensive justified a school's regulation of expression, then a student's right to freely express himself would be greatly diminished." *Id.* at 973 n.11. In *Chambers*, the district court considered whether the principal of the school could prevent a student from wearing a sweatshirt bearing the message "Straight Pride." 145 F. Supp. 2d at 1069. The court applied the typical *Tinker* substantial disruption test, but held that given the facts of the case, "the Court cannot make a finding that the requisite threshold was met." *Id.* at 1073. The district court held, however, that there could be circumstances where a school could have enough evidence of disruption so that a school ban on the sweatshirt would be constitutional. *Id.* at 1074 ("The Court declines to declare that there is no set of circumstances where the 'Straight Pride' shirt can be prohibited, albeit temporarily until the circumstances change, without resulting in the violation of the First Amendment.").

[120] *See Saxe*, 240 F.3d at 212.

[121] *Id.* at 202-03. The policy was not limited to speech condemning sexual orientation. The policy specifically included speech condemning "race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics." *Id.* at 202.

[122] *Id.* at 217.

[123] *Id.* at 215.

[124] *Id.* at 212.

[125] *See id.* at 217.

its students over issues of sexual orientation,"[126] it is reasonable to hold that the school had a well-founded fear of disruption and could constitutionally regulate Harper's speech, whereas, in *Saxe*, no history of altercation existed and the speech could thus not be regulated.[127]

In applying the invasion of others' rights test, however, the Ninth Circuit's holding actually contradicts the Third Circuit's holding regarding that test: "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear .... In any case, it is certainly not enough that the speech is merely offensive to some listener."[128] Though the Ninth Circuit quoted the second half of the above language and claimed to agree with the holding in *Saxe*,[129] the court further stated that speech should be regulated when it "serves to injure and intimidate" the students it is directed at.[130] Therefore, the Ninth Circuit was simply using linguistics in an attempt to show agreement with *Saxe*, while ultimately holding contrary to the *Saxe* interpretation of the invasion of others' rights test.

By applying an untested standard, the Ninth Circuit blurred the once clear standard on limitations of student speech. After *Harper II*, the Supreme Court needs to clarify the scope of *Tinker* and what parts of the test are applicable to student speech, instead of leaving the last word to the Ninth Circuit as to how *Tinker* can be applied. Unless the Supreme Court reinstates substantial disruption as the only applicable student speech standard drawn from *Tinker*, future courts will have a choice in applying either substantial disruption or invasion of others' rights when *Tinker* governed cases arise.

To avoid a circuit split yet still get the result it desired, the Ninth Circuit would have done better to employ the substantial disruption test and simply distinguish *Saxe*, *Nixon*, and *Chambers* on the facts of the *Harper II* case. The Ninth Circuit should have emphasized the history of problems at Poway High

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[126] *Harper II*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated*, No. 06-595, ___ U.S. ___, 2007 WL 632768 (Mar. 5, 2007) (mem.).

[127] *Saxe*, 240 F.3d at 203. *Saxe* and *Harper II* are further distinguishable because they involved different constitutional challenges. *Saxe* involved a facial challenge to the school policy itself and did not involve any actual incidents of regulation of speech. *Id.* In *Harper II*, however, the challenge was only with regards to the incidents surrounding Harper's t-shirt, not a challenge to the school policy itself. *Harper II*, 445 F.3d at 1170-73.

[128] *Saxe*, 240 F.3d at 217. The *Saxe* court also noted that "at least one court has opined that [the invasion of others' rights language] covers only independently tortious speech like libel, slander or intentional infliction of emotional distress." *Id.* (citing Slotterback v. Interboro Sch. Dist., 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991)).

[129] *Harper II*, 445 F.3d at 1180 n.21 (quoting *Saxe*, 240 F.3d at 217) ("We agree, however, with *Saxe*'s conclusion that 'it is certainly not enough that the speech is merely offensive to some listener.'").

[130] *Id.* at 1178.

School regarding sexual orientation issues and how these differed from circumstances in other cases.[131]

### *C. Practical and Legal Implications of Ninth Circuit Rationale*

By refusing to apply the traditional substantial disruption analysis, the Ninth Circuit created a completely new legal framework in *Harper II*. The dissenters for the Ninth Circuit's denial of a rehearing en banc argued that under the new standard articulated by the panel majority, "if displaying a distasteful opinion on a T-shirt qualifies as a psychological or verbal assault, school administrators have virtually unfettered discretion to ban any student speech they deem offensive or intolerant."[132] Therefore, the Ninth Circuit has essentially created a blank check for schools to regulate student speech, at least when that speech is anti-homosexual.

This holding thus directly contradicts *Tinker*'s explicit limitations placed on school regulation of speech.[133] Under the new standard articulated by the Ninth Circuit, a court in a student speech case may essentially choose a test to either uphold or strike down a school's regulation of student speech, according to the court's preference. In most cases, applying substantial disruption would likely lead to striking down a limitation on student speech. In contrast, applying invasion of others' rights would usually allow the court to uphold restrictions on speech, especially where the speech is directed at a specific group or individual. Thus, the Ninth Circuit effectively executed an end run around all of the requirements of *Tinker*, making the future applicability of *Tinker* uncertain.

The Ninth Circuit may not have knowingly acted to blur the established standards for student speech cases, but the decision in *Harper II* creates new interpretational avenues for future speech cases in both school and non-school contexts. In opening a new jurisprudential door where none otherwise existed, the Ninth Circuit's decision reaches further than it should be allowed to, and leaves the Supreme Court no choice but to condemn or concede to the viability of the invasion of others' rights test as an independent doctrine.[134]

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[131] *Id.* at 1171 (noting a "series of incidents and altercations [that] occurred on the school campus as a result of anti-homosexual comments that were made by students" prior to the incident involving Harper's t-shirt).

[132] Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1054 (9th Cir. 2006) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[133] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (holding that restrictions on student speech are unconstitutional when "school officials ban[] and s[eek] to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners").

[134] The dissent in *Harper II* suggested that *Tinker* could be modified, but that modification should come from the Supreme Court first: "Perhaps the narrow exceptions of *Tinker* should

## V. CONCLUSION

The majority's decision in *Harper* was correct in its result, but its legal rationale is inconsistent with precedent. Given the history of altercations at Poway High School regarding both pro and anti-homosexual speech, the message on Harper's t-shirt rose to the level of substantial disruption that a typical *Tinker* analysis requires, and thus the Ninth Circuit's determination was correct that Harper's speech could be regulated. In its legal analysis, however, the Ninth Circuit relied solely on the fact that the message itself was an invasion of the rights of homosexual students. Few courts have ever embarked on this analysis, perhaps because it is more dicta than a separate test. Furthermore, the facts in *Harper II* made it more difficult to argue that there was any invasion of the rights of other students, because there was no actual spoken speech, only writing on a t-shirt. In order to find an invasion of student's rights, the court performed a sua sponte analysis of homosexual students' psychological health.[135] The court found that messages like the one on Harper's t-shirt were detrimental to the point of invading those students' rights.[136]

By basing its decision solely on the second *Tinker* test, the Ninth Circuit blurred how *Tinker* is to be interpreted by future courts. The Supreme Court and the lower courts have continually applied *Tinker* to limit student speech only when absolutely necessary. After *Harper II*, however, most anti-homosexual speech in schools is subject to regulation because of its harmful psychological impact on any homosexual student attending the school. Student speech that inflicts similar psychological harm on any other individual or specific group is also potentially subject to regulation under *Harper II*'s application of the invasion of others' rights test.

The Ninth Circuit should have affirmed the district court's decision based on the substantial disruption test of *Tinker*. The Ninth Circuit could thus have deferred to the district court's findings that a fear of substantial disruption was justified. This finding would permit the school to regulate student speech in limited circumstances, yet still recognize students' rights of free speech.

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be broadened and multiplied. Perhaps *Tinker* should be overruled. But that is a job for the Supreme Court, not for us." *Harper II*, 445 F.3d at 1207 (Kozinski, J., dissenting).

[135] *See id.* at 1178-79 (majority opinion); *see also id.* at 1198-99 (Kozinski, J., dissenting).

[136] *Id.* at 1180 (majority opinion).

## VI. POSTSCRIPT

Shortly before this Note went to press, the Supreme Court granted certiorari on March 5, 2007, only to vacate the Ninth Circuit's decision.[137] The Court stated that vacatur of the case was appropriate because petitioner Harper's claims were moot.[138] Harper's claims had been ruled moot by the district court in the case on January 22, 2007 because Harper graduated and was no longer a student in the Poway School District.[139] The Supreme Court recognized the district court's mootness ruling, vacated the Ninth Circuit's decision, and remanded the case to the Ninth Circuit with instructions to dismiss the petitioner's appeal.[140] The Court's vacatur of the Ninth Circuit's decision raises a question as to the continuing validity of this Note.

The issues discussed in this Note remain relevant for two reasons. First, because the Court vacated the Ninth Circuit's decision, there remains no Supreme Court clarification regarding the applicability in student speech cases, if any, of the invasion of others' rights prong from *Tinker*. Though the Ninth Circuit's decision in *Harper II* is no longer good law, courts are still free to interpret *Tinker* using the same analysis as the Ninth Circuit, upholding limitations on speech solely to prevent the invasion of others' rights.[141] Thus in vacating the decision, the Supreme Court has only delayed what it must eventually do: set the record straight as to how *Tinker* is to be applied and whether speech can be limited only because of its harmful effect on a vulnerable individual or group.

Second, the Supreme Court has not likely heard the last from the Harper family and the Ninth Circuit. As part of its vacatur of the Ninth Circuit's decision, the Court denied a motion to allow Tyler Chase Harper's younger sister Kelsie to intervene in the case.[142] Kelsie is currently a student at Poway High School and thus her claim is not moot that the school's policy is

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[137] Harper v. Poway Unified Sch. Dist., No. 06-595, ___ U.S. ___, 2007 WL 632768, at *1 (Mar. 5, 2007) (mem.), *vacating as moot* 445 F.3d 1166 (9th Cir. 2006) [hereinafter *Harper III*].

[138] *Id.*

[139] Harper v. Poway Unified Sch. Dist., No. 04CV1103, slip op. at 4-5 (S.D. Cal. Jan. 22, 2007), *available at* http://www.nctimes.com/pdf/harpervpusd.pdf.

[140] *Harper III*, ___ U.S. at ___, 2007 WL 632768, at *1.

[141] Even in non-student speech cases, the Ninth Circuit's analysis is still viable in showing the harmful effects on homosexual students caused by demeaning and discriminatory behavior. At least one case has employed the arguments used by the Ninth Circuit to limit other First Amendment rights. *See, e.g.*, Parker v. Hurley, No. 06-10751, 2007 WL 543017, at *14 (D. Mass. Feb. 23, 2007) (citing *Harper II* and holding that educational requirements that students be exposed to curriculum encouraging respect for homosexuals and homosexual couples was not a violation of the parents' free exercise rights).

[142] *Harper III*, ___ U.S. at ___, 2007 WL 632768, at *1.

unconstitutional.[143] Though she was not allowed to intervene in the Supreme Court's decision, the district court has already ruled that Kelsie's claims are "still viable."[144] Thus, in a decision prior to the Supreme Court's vacatur but after the Ninth Circuit's decision, the district court granted motions for summary judgment on Kelsie's constitutional claims in favor of Poway School District.[145] The district court based its holding on the Ninth Circuit's decision in *Harper II*.[146] As it currently stands, the district court's decision is again likely to be appealed to the Ninth Circuit, especially because of the Supreme Court's vacatur of the previous Ninth Circuit decision, a decision used as a basis for the district court ruling.

Thus the Ninth Circuit will again be asked to interpret *Tinker* in determining whether Poway School District's policies constitutionally limit free speech. There is no way to know whether the Ninth Circuit will again look only to the invasion of others' rights standard from *Tinker* or if the court will instead incorporate a more traditional view of student speech regulation. Either way, the Supreme Court must ultimately approve an invasion of others' rights analysis as a viable standard of student speech regulation or the Court must invalidate the standard as mere dicta, not to be applied as a separate test to limit speech. The potential problems and benefits of employing the invasion of others' rights test as an independent standard are illustrated within this Note.

Douglas D. Frederick[147]

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[143] Harper v. Poway Unified Sch. Dist., No. 04CV1103, slip op. at 5 (S.D. Cal. Jan. 22, 2007), *available at* http://www.nctimes.com/pdf/harpervpusd.pdf.

[144] *Id.* at 15.

[145] *Id.* at 30.

[146] *Id.* at 8. The district court held that the Ninth Circuit's decision in *Harper II* "addressed some of the issues sought by the parties to be adjudicated by this Court on summary judgment. Specifically, the Ninth Circuit addressed plaintiff's [Kelsie's] First Amendment claims based on free speech, free exercise of religion and the Establishment Clause." *Id.* (citing *Harper II*, 445 F.3d 1166, 1191-92 (9th Cir. 2006)). The district court thus based its ruling on the Ninth Circuit's decision in *Harper II*, stating that "[t]he Ninth Circuit's ruling on these issues now become law of the case and, thus, are binding on this Court." *Id.* Since the Supreme Court has now vacated the Ninth Circuit's decision, the district court's rationale can be questioned, and the plaintiff Kelsie Harper is almost certain to appeal to the Ninth Circuit.

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# *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu*: Demonstrating the Need to Abandon the Field Preemption Doctrine

## I. INTRODUCTION

Since this country's inception, the balance of power between federal and state governments has been a source of tension.[1] This jurisprudential debate was brought home with significant results in the 2006 Ninth Circuit decision *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu*.[2] In this case, the City and County of Honolulu fought to preserve a local ordinance that prohibited signs and banners towed aloft by aircraft over the island of Oahu.[3] Challenging the ordinance was the Center for Bio-Ethical Reform, an anti-abortion organization that sought to spread its message by flying 30-by-100 foot banners depicting aborted fetuses across the famous Waikiki skyline.[4] The Federal Aviation Administration granted the organization permission to fly, but the Honolulu ordinance barred its banners.[5] The outcome of the case turned on whether federal aviation law preempted the field of banner towing, or whether Honolulu retained the right to regulate its airspace.[6] The Ninth Circuit analyzed three preemption doctrines: field preemption, which exists when preemption may be implied based on pervasive federal regulation in the field; conflict preemption, which exists when a state law directly conflicts with a federal law; and express preemption, which exists when a federal statute or regulation explicitly supersedes state regulations.[7] The court concluded that federal law did not preempt the Honolulu ordinance under any of these doctrines.[8]

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[1] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively . . . ."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("[A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that federal law prevails in shipping waterways because of the need for uniform, consistent regulations).

[2] 455 F.3d 910 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

[3] *See* discussion *infra* Part III.

[4] *Center*, 455 F.3d at 915-16.

[5] *See* discussion *infra* Part III.

[6] *Center*, 455 F.3d at 917-19 (analyzing the preemption question prior to addressing the free speech and equal protection claims).

[7] *Id.* at 917; *see* discussion *infra* Parts II.A, III.

[8] *Center*, 455 F.3d at 918.

In *Center*, the Ninth Circuit correctly held that federal law did not preempt the Honolulu ordinance.[9] Nevertheless, *Center* illustrates the need for reform of the preemption doctrine. This Casenote contends that the doctrine of field preemption should be abandoned in favor of express and conflict preemption. Whereas field preemption is impractical in application and undermines federalism principles, express and conflict preemption are workable doctrines that provide the appropriate distribution of state and federal power.

Part II of this Casenote provides an overview of the preemption and federalism doctrines. Part III provides the context for the Ninth Circuit's decision in *Center*. Part IV analyzes the failings of the field preemption doctrine as exemplified in *Center*, and compares *Center* to two cases[10] with contrary holdings. Part IV further asserts that *Center* reveals field preemption to be inconsistent with federalism principles. This Casenote concludes that the difficulty the *Center* court and Hawai'i lawmakers had in determining whether Honolulu's ordinance was preempted is best resolved by abandoning the field preemption doctrine entirely.

## II. Overview of the Preemption and Federalism Doctrines

### A. *Preemption Doctrine*

Federal law is the "supreme Law of the Land."[11] This guiding precept is grounded in the Supremacy Clause of the United States Constitution.[12] It is from this principle that the United States Supreme Court has recognized the derivative doctrine of preemption.[13] Under this doctrine, once the federal

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[9] *See id.*

[10] Banner Adver., Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994) (en banc); State v. Santoriello, 702 N.Y.S.2d 539 (Crim. Ct. 1999).

[11] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . .").

[12] *Id.*; *see also* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (observing that the Supremacy Clause gives the federal government "a decided advantage in [the] delicate balance" the Constitution strikes between state and federal power, but assuming that Congress does not exercise the power lightly).

[13] CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 676 (1993) (holding that, based on the Supremacy Clause, regulation of train speed was preempted by the Federal Railway Safety Act); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 530 (1992) (acknowledging that preemption is derived from the Supremacy Clause and that the Public Health Cigarette Smoking Act of 1969 preempted some common law tort damages claims); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) (holding that state regulation of safety was preempted by the federal Occupational Safety and Health Act); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that national uniformity in waterway regulations requires uniform federal regulation). *But see* Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 768-69 (1994) (arguing that the preemption doctrine is not completely based on the Supremacy Clause).

government has preempted an area of law, "any state law . . . which interferes with or is contrary to federal law, must yield."[14] Federal agency regulations have the power to preempt state and local laws just as federal statutes do.[15] The doctrine of preemption, therefore, is a powerful tool for the federal government to supersede a state's sovereign police powers.

Ultimately, federal preemption of a state law or regulation revolves around the finding of congressional intent.[16] Preemption analysis begins with the assumption that federal law may not encroach upon the police powers of the states "unless that [is] the clear and manifest purpose of Congress."[17] An initial presumption is made by the courts that the state law is valid.[18] This presumption holds unless the state has regulated an area historically within the province of the federal government.[19]

There are three generally recognized categories of preemption: express, conflict, and field.[20] These categories can be amorphous and overlapping, and there is no set test for determining whether a federal law preempts a state law.[21] Express preemption exists when a federal statute or regulation contains

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[14] *Gade*, 505 U.S. at 108 (quoting Felder v. Casey, 487 U.S. 131, 138 (1988)).

[15] *E.g.*, Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) ("We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes."); United States v. Locke, 529 U.S. 89, 109-10 (2000) (holding that Coast Guard regulations preempted state law). For a general discussion on aviation law and preemption, see Ann Thornton Field & Frances K. Davis, *Can the Legal Eagles Use the Ageless Preemption Doctrine to Keep American Aviators Soaring Above the Clouds and into the Twenty-First Century?*, 62 J. AIR L. & COM. 315 (1996).

[16] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001) ("Congressional purpose is the 'ultimate touchstone' of our inquiry." (quoting *Cipollone*, 505 U.S. at 516)); *Gade*, 505 U.S. at 96 ("'The question [of] whether a certain state action is pre-empted by federal law is one of congressional intent.'" (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985))). The Supreme Court has explained that:

> Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. Also relevant, however, is the "structure and purpose of the statute as a whole," as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (internal citations omitted).

[17] *Cipollone*, 505 U.S. at 516 (alteration in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[18] *See* New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (holding there was insufficient evidence to assume that the Social Security Act preempted state employment statute).

[19] United States v. Locke, 529 U.S. 89, 108 (2000). One such example of the federal government's domain is the regulation of alien naturalization. *See* Hines v. Davidowitz, 312 U.S. 52, 66 (1941).

[20] *Gade*, 505 U.S. at 98; English v. Gen. Elec. Co., 496 U.S. 72, 78-79 & n.5 (1990).

[21] *Hines*, 312 U.S. at 67.

preemptive language that explicitly displaces state authority in a given area.[22] Conflict preemption exists when either compliance with both the state and federal rule is a "physical impossibility,"[23] or the state law, though not directly incompatible, "stands as an obstacle" to the achievement of the federal objectives.[24] If a federal law "contemplates coexistence" between federal and state regulatory schemes, then, providing that the state law does not interfere with the "underlying federal purpose," there is no conflict preemption.[25]

Field preemption occurs when the federal interest in the field is "so dominant that the federal system will be *assumed* to preclude enforcement of state laws on the same subject."[26] As a result, even without explicit preemptive language or direct conflict, field preemption may be found by a court if congressional intent to supersede state law is "implicit" from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[27] Thus, preemption is an extreme exercise of supremacy, because it may obliterate a state's ability to supplement federal law.[28]

### *B. Federalism Doctrine*

The term "federalism" refers to the balance of power between the federal and state governments. The federal government is granted a limited,[29] although superior,[30] scope of authority by the Constitution. Those powers not

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[22] *English*, 496 U.S. at 78-79. For example, the Employee Retirement Income Security Act of 1974 ("ERISA") states that it "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (1999 & Supp. 2006). The Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1997 & Supp. 2006), provides: "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

[23] Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963).

[24] *Hines*, 312 U.S. at 67.

[25] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1117, 1118 n.5 (9th Cir. 2002) (holding that federal regulations contemplated coexistence with state regulations of aerial banner towing and therefore did not preempt local laws).

[26] Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) (emphasis added).

[27] *Id.* at 203-04.

[28] *See* Gardbaum, *supra* note 13, at 771 (suggesting that federal preemption doctrine presents a much greater threat to the principles of state sovereignty and federalism than does the Supremacy Clause).

[29] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *see also* discussion *supra* Part II.A.

[30] U.S. CONST. art. VI, cl. 2; *see also* discussion *supra* Part II.A.

granted to the federal government are reserved to the states by the Constitution.[31] This explicit guarantee of power to the states manifests the importance of states' rights as the bedrock of the nation.

Under the federalism doctrine, states are recognized as "independent sovereigns in [the] federal system."[32] As such, courts are generally hesitant to divest states of their police powers.[33] The Supreme Court has observed that "'[t]he exercise of federal supremacy is not lightly to be presumed," and therefore Congress "should manifest its intention [to preempt state and local laws] clearly."[34]

## III. *CENTER* FACTS AND PROCEDURAL HISTORY

The Center for Bio-Ethical Reform ("CBR") is a California-based organization that engages in national anti-abortion campaigns.[35] Its advocacy arsenal includes flying 100-foot long aerial banners with images of aborted fetuses over densely populated areas.[36] Desiring to fly one such banner over Waikiki beach, CBR applied for and received a "Certificate of Authorization"

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[31] U.S. CONST. amend. X; *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985), *superseded by statute*, Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150 §§ 2-3, 99 Stat. 787, 787-90 (codified as amended at 29 U.S.C. § 207(o)-(p) (1998)) ("The States unquestionably do '[retain] a significant measure of sovereign authority.' They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." (alteration in original) (internal citation omitted)).

[32] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

[33] *See, e.g.*, City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 389 (1991) ("'In a dual system of government in which, under the Constitution, the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.'" (quoting Parker v. Brown, 317 U.S. 341, 351 (1943))).

[34] New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03 (1952)); *see also Medtronic*, 518 U.S. at 485.

[35] *See* Center for Bio-Ethical Reform, http://abortionno.org (last visited Feb. 23, 2007).

Center for Bio-Ethical Reform ("CBR") terms its program the "Reproductive Choice Campaign." CBR/Abortion Trucks, http://abortionno.org/RCC.html (last visited Mar. 17, 2007). CBR "operates on the principle that abortion represents an evil so inexpressible that words fail us when attempting to describe its horror." Center for Bio-Ethical Reform, http://www.abortionno.org/about_us.html (last visited Mar. 17, 2007).

[36] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 915-16 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

See CBR/Anti-Abortion Planes, http://www.abortionno.org/RCC/planes/plane_photos.html (last visited Mar. 17, 2007), for photographs of CBR's aerial banners. CBR has flown its aerial banners in California, Florida, Georgia, Indiana, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and Wisconsin. Appellant's Petition for Writ of Certiorari at 3, *Center*, 455 F.3d at 915-16 (No. 06-479).

from the Federal Aviation Administration ("FAA").[37] This waiver was necessary because federal law provided that "[n]o pilot of a civil aircraft may tow anything with that aircraft . . . except in accordance with the terms of a certificate of waiver issued by the [FAA]."[38] The certificate expressly permitted CBR to engage in "aerial advertisement banner towing" in Hawai'i.[39] Significantly, CBR's certificate of waiver contained a "note" stating that it "[did] not constitute a waiver of any State law or local ordinance."[40]

The local ordinance standing between CBR and Hawai'i's friendly skies was Revised Ordinances of Honolulu section 40-6.1, which prohibited the use of aircraft to display "any sign or advertising device" for "any purpose whatsoever."[41] On April 4, 2003, CBR filed suit against the City and County of Honolulu, seeking declaratory and injunctive relief to prevent enforcement of the ordinance.[42]

CBR challenged the constitutionality of Honolulu's ordinance. CBR contended that the ordinance was preempted by federal law and the FAA's certificate of waiver, and that it violated CBR's rights under the First and Fourteenth Amendments to the United States Constitution.[43] CBR's motion for preliminary injunction was denied by the United States District Court for the District of Hawai'i, and the Court of Appeals for the Ninth Circuit affirmed the district court's ruling.[44] Honolulu and CBR then filed cross-motions for summary judgment, and on November 9, 2004, the district court granted summary judgment in favor of Honolulu and held that the ordinance was not

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[37] *Center*, 455 F.3d at 916.

[38] 14 C.F.R. § 91.311 (2006).

[39] *Center*, 455 F.3d at 916. CBR's certificate authorized it to fly banners in "the contiguous United States of America, Alaska, Hawaii, and Puerto Rico." *Id.*

[40] *Id.*

[41] Revised Ordinances of Honolulu section 40-6.1 (1996) provides in relevant part:

> Except as allowed under subsection (b), no person shall use any type of aircraft or other self-propelled or buoyant airborne object to display in any manner or for any purpose whatsoever any sign or advertising device. For the purpose of this section, a "sign or advertising device" includes, but is not limited to, a poster, banner, writing, picture, painting, light, model, display, emblem, notice, illustration, insignia, symbol or any other form of advertising sign or device.

HONOLULU, HAW., REV. ORDINANCES § 40-6.1(a) (1996), *available at* http://www.honolulu.gov/refs/roh/40.htm.

[42] *Center*, 455 F.3d at 916; Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 345 F. Supp. 2d 1123, 1126 (D. Haw. 2004), *aff'd*, Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 448 F.3d 1101 (9th Cir. 2006), *amended & superseded by*, *Center*, 455 F.3d 910.

[43] *Center*, 455 F.3d at 916.

[44] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 84 Fed. Appx. 779, 779 (9th Cir. 2003) (mem.).

preempted and was not unconstitutional.[45] On July 6, 2006, the Ninth Circuit affirmed with an amended opinion.[46] On December 4, 2006, CBR's petition for certiorari was denied by the Supreme Court.[47]

When the Ninth Circuit, in an opinion written by Judge McKeown, upheld Honolulu's ordinance, the court concluded that the FAA had not exerted its authority to fully field preempt banner towing regulations.[48] The court ultimately readopted[49] the reasoning it articulated in *Skysign International, Inc. v. City & County of Honolulu*,[50] a controlling case involving a nearly identical preemption challenge to the same aerial advertising ordinance.[51] In *Skysign*, the court quickly dispelled the plaintiff's argument that Honolulu's ordinance was either conflict preempted or expressly preempted.[52] The preemption issue turned on whether the FAA had regulated banner tow operations to an extent that the court could infer intent to preempt state law.

To determine whether the FAA had field preempted banner tow operations, the *Skysign* court considered evidence from a range of sources.[53] The court evaluated opinion letters written by the FAA to Hawai'i lawmakers in favor of preemption, an amicus brief submitted by the United States opposing preemption, and language from the FAA Handbook and certificate of waiver, all in light of Supreme Court precedent.[54] The *Skysign* court held that Congress, through the FAA, did not exclusively occupy the entire field of banner tow regulation.[55] When making its decision, the *Skysign* court gave little deference to the FAA opinion letters and instead relied heavily on the

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[45] *Ctr. for Bio-Ethical Reform, Inc.*, 345 F. Supp. 2d at 1139. The district court held that the FAA had not preempted local regulations on aerial banners and that the ordinance did not violate the First or Fourteenth Amendments. *Id.*

[46] *Center*, 455 F.3d at 915, 925. The Ninth Circuit denied CBR's request for a rehearing. *Id.* at 914-15.

[47] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, ___ U.S. ___, 127 S. Ct. 730 (2006).

[48] *Center*, 455 F.3d at 917-18; *see* discussion *infra* Part IV.A.2.

[49] *Center*, 455 F.3d at 917-18.

[50] 276 F.3d 1109 (9th Cir. 2002).

[51] *Center*, 455 F.3d at 918 ("[W]e are bound by *Skysign*'s no preemption conclusion."). In *Skysign*, plaintiff aerial advertising company Skysign International was cited for violating Revised Ordinances of Honolulu section 21-3.90-2, subsections (b), (c), and (e), which prohibited, *inter alia*, portable signs, flashing signs, and signs not located on the property for which they were advertising. 276 F.3d at 1113. Skysign International claimed that both sections 21-3.90-2 and 40-6.1 were preempted by federal law. *Id.* at 1115-16.

[52] *Skysign*, 276 F.3d at 1116-17 (holding that there was no express preemption because the FAA and Congress had never declared banner towing preempted, and finding no conflict preemption because the certificate contemplated coexistence of federal and state laws).

[53] *See* discussion *infra* Part IV.A.2.

[54] *Skysign*, 276 F.3d at 1113, 1116-18.

[55] *Id.* at 1116.

United States' amicus brief and the FAA Handbook and certificate of waiver.[56] The language of the Handbook and certificate, and prior Supreme Court case law preempting only certain facets of airspace, indicated that "the FAA ha[d] not exerted its statutory authority to a degree that warrant[ed] a holding that it ha[d] preempted the entire field."[57] Despite the *Skysign* court's firm conclusion against preemption, however, the evidence available to the court to make this judgment was by no means clear. When the issue resurfaced in *Center*, the Ninth Circuit did not depart from its reasoning in *Skysign*, but the court did note that "[t]he FAA's position on banner towing is difficult to divine."[58]

## IV. *CENTER* DEMONSTRATES THAT THE FIELD PREEMPTION DOCTRINE SHOULD BE ABANDONED

### *A. The Field Preemption Doctrine Is Impractical in Application*

The field preemption doctrine does not provide practical guidance to judges and state and local lawmakers attempting to determine the balance of federal and state authority. This problem is demonstrated in *Center* by the amount of guesswork required to ascertain if federal law preempted Honolulu's aerial banner ordinance. A survey of other aviation cases illustrates that field preemption has facilitated the proliferation of inconsistent preemption holdings and has compromised the uniformity of airspace regulation.

#### *1. Field preemption is a poorly-defined doctrine*

The confusion surrounding field preemption is rooted in the doctrine itself. At a fundamental level, field preemption is vague and imprecise. Field preemption exists when there is a dominant federal presence, or when there is a pervasive scheme of federal regulation that precludes state laws on the same subject.[59] But, what does "dominant" mean? What does "pervasive" mean? What is the "same subject"?

Criteria developed by the courts for finding preemption are little more than general guideposts, and the Supreme Court has recognized that there is no "infallible constitutional test" or "distinctly marked formula"[60] for finding field

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[56] *Id.* at 1118 n.6 (contrasting the Colorado Supreme Court's heavy reliance on a FAA opinion letter in Banner Adver., Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994)).

[57] *Id.* at 1116; *see* discussion *infra* Part IV.A.2.

[58] Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 918 n.2 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

[59] *E.g.*, Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983).

[60] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

preemption. Historically, criteria that have been determinative for field preemption include: whether the federal government has traditionally played a unique or prominent role in the area,[61] whether allowing local regulations would interfere with necessary comprehensive national regulation,[62] and whether there is an important or traditional state interest in the regulation.[63] Over time, even these general principles have become more flexible as judges increasingly infer legislative intent on a case-by-case basis rather than determine the need for national uniformity.[64]

Even when a court has determined that Congress has selectively regulated one aspect of a field, it is difficult to divine how far the federal government reaches into related areas.[65] This is exemplified in the unpredictable collection of case holdings dealing with preemption in federal aviation law. Courts have found certain facets of local airspace regulation to be preempted by the FAA, including: airplane noise regulations,[66] parachute jumping regulations,[67] curfews and limitations on landing patterns,[68] certain load-lifting regulations,[69]

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[61] *E.g.*, *id.* at 66 (noting that regulation of aliens is preempted because the federal government has exclusive authority over international relations).

[62] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[63] For example, regulation and zoning restrictions on advertising have traditionally been within the states' domains. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 551-52 (2001); Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1115 (9th Cir. 2002) (stating that "advertising is an area traditionally subject to regulation under the states' police power" (citation omitted)).

Courts have also found that aesthetics are an important state interest. *E.g.*, Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); One World One Family Now v. City & County of Honolulu, 76 F.3d 1009, 1013 (9th Cir. 1996) (holding that "[c]ities have a substantial interest in protecting the aesthetic appearance of their communities").

[64] Field & Davis, *supra* note 15, at 324-25.

[65] *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947). It is a "perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed." *Id.* (citations omitted).

[66] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (holding that federal law preempted the field of airplane noise but not finding that it preempted airspace generally); Minnesota Pub. Lobby v. Metro. Airports Comm'n, 520 N.W.2d 388 (Minn. 1994) (finding preemption of state agency's maximum noise levels); *see also* Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918 (2000 & Supp. 2006); Luis G. Zambrano, Comment, *Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle over Noise*, 66 J. AIR L. & COM. 445, 463-64 (2000).

[67] Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 694 (N.D.N.Y. 1989) (holding that local ordinance regulating parachute jumping was preempted, and deferring to the FAA's own interpretation that its authority was pervasive as evidenced in 14 C.F.R. § 105.1).

[68] Pirolo v. City of Clearwater, 711 F.2d 1006, 1009 (11th Cir. 1983) (preempting air traffic pattern ordinance); Harrison v. Schwartz, 572 A.2d 528, 535 (Md. 1990) (holding that local zoning restrictions were preempted by the FAA's occupation of the field because they impinged

regulation of radio broadcast towers,[70] airline fares and fees,[71] and airplane safety generally.[72] Courts have stopped short of declaring all airspace regulation preempted.[73]

Courts have found other facets of airspace to be within a state's power to regulate, including the decision to build an airport,[74] aerial advertising,[75] certain facets of airline safety,[76] plane landing sites,[77] land or water use zoning,[78] and

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on aircraft operation); Gary Leasing, Inc. v. Town Bd. of Pendleton, 485 N.Y.S.2d 693, 694-95 (Sup. Ct. 1985) (preempting curfews and restrictions on the number of planes that could be used at an airport because they were attempts to control air navigation, an area under the exclusive authority of the FAA).

[69] Command Helicopters, Inc. v. City of Chicago, 691 F. Supp. 1148, 1151 (N.D. Ill. 1988) (finding field and conflict preemption of a local ordinance because it more stringently regulated helicopter load-lifting operations than did the FAA's regulations).

[70] Big Stone Broad., Inc. v. Lindbloom, 161 F. Supp. 2d 1009, 1019-20 (D.S.D. 2001) (relying in part on an FAA amicus brief when holding that the Federal Aviation Act preempted states' authority to veto an FAA "no hazard" determination in connection with radio broadcast towers).

[71] Morales v. Trans World Airlines Inc., 504 U.S. 374, 384 (1992) (holding that federal statute explicitly preempted any state law related to rates, routes or services of any air carrier).

[72] Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999) (holding that "federal law establishes the applicable standards of care in the field of air safety").

[73] *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633-34, 638 (1973) (holding that airplane noise regulations were preempted, but noting that "each case turns on the peculiarities and special features of the federal regulatory scheme in question"); Monroe v. Cessna Aircraft Co., 417 F. Supp. 2d 824, 829, 836 (E.D. Tex. 2006) (concluding that the Federal Aviation Act and the FAA's broadly written regulations do not evidence an intent by Congress to preempt either the field of aviation safety or state defective design schemes).

[74] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 197 (D.C. Cir. 1991) (relying on an FAA statement that "[i]n the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator"); Wright v. County of Winnebago, 391 N.E.2d 772, 777-78 (Ill. App. Ct. 1979) (holding that FAA does not preempt local zoning authority from determining whether or not to have an airport); Lucas v. People's Counsel for Baltimore County, 807 A.2d 1176, 1199-1200 (Md. Ct. Spec. App. 2002) (refraining from preempting land use regulations).

[75] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1116-18 (9th Cir. 2002).

[76] *See Monroe*, 417 F. Supp. 2d at 829, 836 (holding that there was insufficient evidence of congressional intent to preempt entire field of aviation safety).

[77] Gustafson v. City of Lake Angelus, 76 F.3d 778, 788-90 (6th Cir. 1996) (holding that FAA designation of plane landing sites is not pervasively regulated by federal law, and instead is a matter for local control because different states have different needs).

[78] Blue Sky Entm't, Inc. v. Town of Gardiner, 711 F. Supp. 678, 683 (N.D.N.Y. 1989) (relying on FAA statement that "[t]o the extent the ordinance regulates land use in the Town of Gardiner, it is not preempted by federal regulation of aviation"); *In re* Commercial Airfield, 752 A.2d 13, 15 (Vt. 2000) (explaining that the federal government "has not preempted land use issues").

breach of contract claims.[79]

Thus, there is no clear rule articulated by the collection of airspace case holdings. Many courts that found preemption for one facet of airspace relied on an explicit statute or regulation; some courts held that because the FAA clearly preempted one area, the whole field was preempted, while others declined to extend preemption until a similarly clear action was taken by the agency; some courts have noted the differing needs of states to restrict preemption, while others have cited the need for national uniformity.[80] By this piecemeal approach, the field preemption doctrine renders preemption untenable to judges and lawmakers.

### 2. Center *exemplifies the failings of field preemption*

As demonstrated by *Center* and the collection of airspace case law, it is difficult for judges and state and local lawmakers to determine if, when, and to what extent a state or city is free to regulate a certain facet of airspace. To determine if there is a pervasive scheme of federal regulation in the field of banner towing, the court may look to the FAA's own regulations in order to infer whether the agency intends to allow concurrent state and local regulation. But, even this has proven to be unreliable.

Internal agency confusion abounds in *Center*. As early as 1987, more than sixteen years prior to the district court's 2004 decision for Honolulu in *Center*, the City and County of Honolulu had inquired whether the FAA believed that Honolulu's proposed amendments to its aerial banner regulations would be preempted by federal law.[81] Even this direct inquiry to the FAA did not provide a reliable answer. In a 1987 opinion letter (which was repeated by a similar letter in 1996), regional counsel for the FAA indicated that "any local attempt to restrict the way in which aircraft operate within that airspace would be preempted."[82] The FAA's counsel justified this opinion based on the agency's "statutory grant of exclusive control of navigable airspace" and the "comprehensive and pervasive scheme of federal regulation."[83] Additionally,

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[79] *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228-29 (1995) (finding that a claim for breach of contract was not preempted because the action was based on the airline's own promises and not duties imposed by the state government).

[80] *See supra* notes 66-78 and accompanying text.

[81] Appellants' Excerpts of Record at 81-82, Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910 (9th Cir. 2006) (No. 04-17496) [hereinafter Appellants' Excerpts R.] (letter from DeWitte T. Lawson, Regional Counsel, U.S. Dep't of Transp., to Dennis O'Connor, Chair, Honolulu City Council (June 29, 1987)).

[82] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1113 (9th Cir. 2002). In 1996, the FAA reiterated the 1987 opinion in a letter to a member of the Honolulu City Council. *Id.*

[83] Appellants' Excerpts R. *supra* note 81, at 82.

he warned that "an effort to preserve the aesthetic appearance and 'atmosphere beauty' of [Honolulu], through an aerial advertising ordinance would likely not withstand a constitutional court challenge."[84]

When the ordinance came under legal attack for the first time in *Skysign*, rather than endorsing the FAA opinion letters, the United States government submitted an amicus brief controverting the FAA's conclusions.[85] The Government wrote in favor of upholding the Honolulu ordinance, and its brief contained statements that "appear[ed] to contemplate permissible, non-preempted state regulation of banner tow operations."[86] The Government explained that one reason to preserve Honolulu's ordinance was the "unique and isolated geographic setting involved, where similar laws of other jurisdictions are unlikely to apply to the activity at issue."[87] Thus, the court and the City and County of Honolulu received FAA opinion letters indicating that the FAA preempted Honolulu's ordinance and a brief submitted by the United States stating that the FAA did not preempt Honolulu's ordinance.[88] Both used Hawai'i's geographic isolation and the city's aesthetic interests to support their contrary positions.[89]

Four years later, the Ninth Circuit revisited the preemption issue in *Center*. Thoroughly confusing the matter was a 2003 letter from FAA Deputy Chief Counsel James Whitlow to United States Senator Daniel Inouye that contained internally conflicting statements about preemption.[90] When Senator Inouye inquired whether proposed regulatory changes would preempt Honolulu's ordinance, the FAA's response indicated that the agency itself was confused.[91] Whitlow's letter began with a seemingly unequivocal conclusion that, "[t]he FAA does not interpret these changes . . . to preempt [Honolulu's

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

[85] *Skysign*, 276 F.3d at 1117.

[86] *Id. See generally* Brief for the United States as *Amicus Curiae* Supporting Affirmance, Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109 (9th Cir. 2002) (No. 99-15974) [hereinafter United States as *Amicus Curiae*].

The *Skysign* Amicus Brief was later used to support the City and County of Honolulu's argument in *Center*. Defendants-Appellees' Supplemental Excerpts of Records at 119-68, *Center*, 455 F.3d 910 (No. 04-17496) [hereinafter Appellees' Supplemental Excerpts R.].

[87] United States as *Amicus Curiae*, *supra* note 86, at 154.

[88] *See supra* notes 83-87 and accompanying text.

[89] *See* discussion *supra* notes 81-87 and accompanying text. On balance, the *Skysign* court chose to give greater weight to the amicus brief and upheld Honolulu's ordinance. 276 F.3d at 1117. The Ninth Circuit concluded that the FAA opinion letters were merely "a tentative conclusion on a proposed ordinance." *Id.*

[90] *See Center*, 455 F.3d at 918 n.2.

[91] Senator Inouye's letter referred to Notice N 8700.16, which proposed to delete the portions of the FAA Handbook that disclaimed preemption of state and local regulations. Appellants' Excerpts R., *supra* note 81, at 17-19. The Notice expired by its own terms on October 7, 2003 and was not considered by the Ninth Circuit. *Center*, 455 F.3d at 918.

ordinance],"[92] because Honolulu's ordinance did not "dictate[] or interfere[] with . . . the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace."[93] Curiously, two paragraphs later, Whitlow belies his initial assertion, maintaining that "[s]tate or local regulations that have the effect of totally banning . . . banner towing would also be preempted since such regulations have the practical effect of barring aircraft operations that have been authorized . . . by the FAA."[94] Since Honolulu's ordinance completely proscribed aerial banner towing, the FAA's stance on the preemption question is unascertainable.

Further, analysis of the FAA Handbook and certificate of waiver language does not reveal congressional or agency intent because there is contradictory wording within both documents. Chapter 45, section 91.311 of the FAA's General Aviation Operations Inspector's Handbook pertains to the issuance of certificates of waiver for banner towing.[95] The stated objective of these regulations is to "determine if an applicant is eligible for issuance of a [waiver] for banner tow operations."[96] The default FAA rule regarding aerial banners is that they are not allowed.[97]

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[92] Letter from James Whitlow, Deputy Chief Counsel, U.S. Dep't of Trans., to Senator Daniel Inouye, U.S. Senate (July 31, 2003), *in* Appellees' Supplemental Excerpts R., *supra* note 86, at 117. Whitlow's letter continues in relevant part:

> We realize that [Honolulu] is attempting to address advertising, a traditional area of local regulation, rather than regulate the navigable airspace. One important factor is that Honolulu has enacted comprehensive land use regulations, directed to many forms of signage and advertising. For example, in addition to [the Ordinance], Honolulu regulates signage generally under sec. 21-7.30 and prohibits vehicular advertising under sec. 41-14.2. We would have a concern if a State or local government singled out aerial advertising for prohibition while permitting similar ground-based advertising since this could be interpreted as an attempt to control the navigable airspace.
>
> [The Ordinance] would not be considered to be preempted because it would not constitute a State or local law that dictates or interferes with aircraft equipment, or impacts in any other way the FAA's plenary authority and responsibility to ensure the safe and efficient use of the nation's airspace.

*Id.*

[93] *Id.*

[94] *Id.* at 118.

[95] The revised FAA Handbook can be found in its entirety on the FAA website. Federal Aviation Administration, General Aviation Operations Inspector's Handbook, Order 8700.1, http://www.faa.gov/library/manuals/examiners_inspectors/8700/ (follow "Table of Contents by Chapter" hyperlink; then follow "Chapter 45" hyperlink) (last visited Jan. 21, 2007). Chapter 45 is available in the document filed with the court of appeals. Appellants' Excerpts R., *supra* note 81, at 250-65.

[96] Appellants' Excerpts R., *supra* note 81, at 250.

[97] "No pilot of a civil aircraft may tow anything with that aircraft . . . except in accordance with the terms of a certificate of waiver issued by the Administrator." Special Flight Operations, 14 C.F.R. § 91.311 (2006). To issue a waiver, the FAA need only find "that the

In *Skysign*, Skysign International's FAA certificate of waiver contained a clause indicating: "The operator, by exercising the privilege of this waiver, understands all local laws and ordinances relating to aerial signs, and accepts responsibility for all actions and consequences associated with such operations."[98] CBR's certificate contained a similar note stating that it "does not constitute a waiver of any State law or local ordinance."[99] Furthermore, a provision in the Handbook provided that the operator was responsible for "acquiring knowledge of State and local ordinances that may prohibit or restrict banner tow operations."[100]

In 2004, however, the FAA amended the Handbook. The updated section 5(B)(2)(c) states that the "note" language is "boilerplate," has "no legal effect," "should be disregarded by inspectors," and is simply a "disclaimer of responsibility by the FAA for the enforcement of State or local ordinances."[101] This addition might be interpreted to relieve CBR of complying with Honolulu's ordinance. Other language, however, conveys an intention to preserve Honolulu's regulatory authority. The Handbook retains a section 5(B)(2) provision that requires operators to acquire knowledge of local laws "that may prohibit or restrict banner tow operations."[102] Read together, the revised Handbook is another example of the FAA's unascertainable position on banner tow operations. As with the letter to Senator Inouye, the FAA fails to consistently indicate its preemption position.

The incongruence within the FAA shows that basing preemption on assumed intent is fallacious. In actuality, the FAA was unsure of, or poorly articulated, its own position on the preemption question. Even though a court may look to an administrative agency's interpretation of regulations for

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proposed operation can be safely conducted under the terms of that certificate of waiver." Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 345 F. Supp. 2d 1123, 1128 (D. Haw. 2004) (citation omitted).

[98] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1113 (9th Cir. 2002).

[99] Ctr. for Bio-Ethical Reform v. City & County of Honolulu, 455 F.3d 910, 918 (9th Cir.), *cert. denied*, ___ U.S. ___, 127 S. Ct. 730 (2006).

[100] Federal Aviation Administration, General Aviation Operations Inspector's Handbook, Order 8700.1, at 45-3, http://www.faa.gov/library/manuals/examiners_inspectors/8700/ (follow "Table of Contents by Chapter" hyperlink; then follow "Chapter 45" hyperlink) (last visited Jan. 21, 2007). *See also Skysign*, 276 F.3d at 1118.

[101] Appellants' Excerpts R., *supra* note 81, at 252. Additionally, section 5(B)(2)(b) directs an inspector to not insert any language relating to the application of state or local law into the "Special Provisions" section of the certificate. *Id.*

[102] *Id.*

guidance,[103] a judge will find no help if the agency has never contemplated whether or not its regulations preempt state law.

The conflicting FAA statements, the United States amicus brief, and the confusing Handbook language were not the manifest clear intention the Supreme Court was contemplating for field preemption.[104] Therefore, the *Skysign* and *Center* courts correctly determined that there was no field preemption. But, not all courts have reached this conclusion.

*3. Case comparison: field preemption yields inconsistent holdings*

The result in *Center* is contrary to that of two state cases, which further demonstrates the unreliability of the field preemption doctrine. In *Banner Advertising, Inc. v. City of Boulder*,[105] the Supreme Court of Colorado held that the City of Boulder's aerial banner law was preempted by federal law.[106] In that case, Banner Advertising was charged with violating a municipal code that prohibited commercial signs towed by aircraft.[107] Similar to the situation in *Center*, Banner Advertising obtained a FAA certificate of waiver to tow banners, and a clause stated that the certificate did not waive state or local ordinances "'not otherwise preempted by the United States Constitution or Federal Statute or Regulation.'"[108]

Banner Advertising submitted an opinion letter written by the FAA's chief counsel stating that the Boulder ordinance "'represent[ed] an impermissible attempt to regulate in an area preempted by the Federal Government.'"[109] Despite acknowledging that the FAA letter was not binding, the Colorado court gave the agency's opinion more deference than did either the *Skysign* or *Center* courts.[110] Furthermore, the Colorado court was not persuaded that the

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[103] *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 217 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway." (citing Auer v. Robbins, 519 U.S. 452, 461 (1997))); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (stating that determination of the scope of an agency's own authority is entitled to great deference by the courts). *But see Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

[104] *See* New York State Dep't. of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973).

[105] 868 P.2d 1077 (Colo. 1994).

[106] *Id.* at 1079 (finding that Banner Advertising violated Boulder Revised Code Section 10-11-3).

[107] *Id.* at 1078.

[108] *Id.* at 1079 (citation omitted in original).

[109] *Id.* (citation omitted in original).

[110] *Id.* at 1083 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). The *Skysign* court distinguished its holding from *Banner* in an off-hand manner, and disregarded the *Banner* court's decision to place greater weight on the opinion letters. 267 F.3d 1109, 1117 n.6 (9th Cir. 2002).

"local ordinance" clause left room for a state ban on aerial banners, and instead interpreted this language to merely state the "fundamental principle of the doctrine of federalism" that the federal government could not exempt an individual from a "proper state or local law."[111] Contrary to the Ninth Circuit's conclusion in both *Skysign* and *Center*, the Colorado court concluded that the federal government had occupied the entire field of navigable airspace regulation because of its "pervasive" role in airspace management.[112]

In *People v. Santoriello*,[113] a boat operator was charged with violating a municipal law that prohibited towing banners from an aircraft,[114] despite operating under the authority of a FAA certificate of waiver that expressly allowing the proscribed activity.[115] The New York City Criminal Court held that the ordinance was unconstitutional, because it "entirely prohibit[ed], not regulat[ed], what the Federal government has authorized."[116] The court relied on Supreme Court precedent for the proposition that, since it was a physical impossibility to comply simultaneously with both the FAA certificate and the city code, the code was preempted.[117]

Collectively, *Center*, *Skysign*, *Banner*, and *Santoriello* underscore the capriciousness of field preemption as a doctrine. All three courts analyzed the same federal regulations and similar fact patterns, but resolved the cases differently. This is troublesome because a finding of field preemption should, in theory, apply equally across the country. The inconsistent conclusions illustrate a fundamental deficiency with the field preemption doctrine itself.

### *B. Field Preemption Undermines Federalism Principles*

Not only has the field preemption doctrine proven to be unworkable, but its expansive reach over state government interests undermines federalism. First, the doctrine grants the federal government overbroad powers. As long as field preemption is a viable doctrine, a state may lose its rights to exercise police powers entirely, even when it is possible for a person to abide by both state and federal laws concurrently.[118] This can lead to over-inclusive findings of preemption and the reduction of states' authority in areas never actually

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[111] *Banner*, 868 P.2d at 1082 (citation omitted).

[112] *Id.* at 1081 (citing Nw. Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944)); *see* discussion *supra* Part III.

[113] 702 N.Y.S.2d 539 (Crim. Ct. 1999). At issue in *Santoriello* was the 1985 Administrative Code of the City of New York Section 10-126(d)(1). *Id.* at 540.

[114] *Id.* at 540.

[115] *Id.* at 541.

[116] *Id.* at 544.

[117] *Id.* at 542 (citing Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963)); Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941).

[118] *See* discussion *supra* Part II.A.

envisioned by Congress to be preempted.[119] This does not sit comfortably with federalism principles.

The Supreme Court has expressed concern about the doctrinal inconsistencies between field preemption and modern federalism principles. The Court cautioned that courts should be reluctant to infer field preemption merely because there is a strong federal agency presence in the subject area:

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.[120]

Second, the doctrine grants too much discretionary power to the courts. The very idea that judges may make an *inference of preemption* does not comport with federalism. The "doctrine of field preemption is inconsistent with modern federalism and its presumption that states retain concurrent powers."[121]

Broad statutory language may be appropriate in some instances, but it is not appropriate when the states' very rights to exercise their police powers are at risk. A judge's analysis is impeded by the unavoidable reality that the decision may come down to interpretation of clumsily written, unofficial, ad hoc opinion letters by federal agencies. The markedly different holdings of *Banner*, *Santoriello*, and *Center* are not inconceivable considering the vagueness of the field preemption doctrine. *Banner* and *Santoriello* are examples of the collateral damage that can occur to peripheral areas of law: courts extending the scope of state law preempted further than had ever been intended by Congress or the FAA.

Finally, state and local legislative bodies are put in the precarious positions of questioning their lawmaking authority in fields merely tangentially regulated by the federal government. Such uncertainty stifles short- and long-term city planning. Accordingly, state legislators are left with preemption outcomes with the predictability of tarot cards.

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[119] *See* City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 644 (1973) (Rehnquist, J., dissenting) (arguing that Congress, in enacting legislation, had not been concerned with preempting air traffic noise regulations).

[120] Hillsborough County v. Automated Med. Labs. Inc., 471 U.S. 707, 717 (1985) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[121] Gardbaum, *supra* note 13, at 812 (relying on Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947)).

### C. Field Preemption Can Be Abandoned Without Undermining the Preemption Doctrine

Once the field preemption doctrine is eliminated, the remaining doctrines of express preemption and conflict preemption will adequately maintain the balance of power between the federal and state governments. In other words, field preemption is a superfluous complication to the analysis. Express and conflict preemption have the capacity to stand alone.

Express preemption eliminates most of the problems stemming from the uncertainty of field preemption. Under express preemption, state legislators can be assured that if there is no explicit congressional statement, no judge will "infer" congressional intent to deprive the state of its authority.[122] If the federal government wishes to flex its preemptive muscles, then why not trump state laws outright? Such a transparent display of intention will put states on notice, and if the federal government is truly acting within its constitutional authority to preempt states laws in a certain field, then it will not be accountable to the states.[123] If it is determined that the federal government did not have the authority to preempt states' rights outright, then the federalism doctrine will be upheld, and states' rights preserved, when a court finds that the federal government has overstepped the constitutional limitations on its power.

Requiring Congress and federal agencies to affirmatively determine preemption each time a law is passed may seem too burdensome. This is not so. Performing this task encourages Congress to seriously contemplate the significant repercussions of its actions before depriving the states of their sovereign and independent powers.[124] Indeed, in *Center*, a finding of preemption would have been dispositive to the question of whether Honolulu could regulate its own airspace.

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[122] It is important to note that an express preemption clause does not, by itself, foreclose an implied conflict preemption analysis for areas of law peripheral to the field that has been explicitly preempted. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

[123] Congress has already demonstrated its ability to explicitly preempt state power in FAA matters. *E.g.*, Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1997 & Supp. 2006).

[124] Invariably, even when preemptive intent is clear, judicial interpretation is necessary to ascertain how broadly or narrowly to construe the goal of the federal statute. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-41 (2001). In these instances, a court may examine the surrounding "statutory framework," including legislative history and other matters, to ascertain the operative preemptive scope of a given statute. Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996) (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring in judgment and concurring in part)).

Although peripheral issues may still be litigated, express preemption does not detract from the great advantage to be had from the otherwise definitiveness of an explicit statement by Congress pinpointing which particular aspect of a field is preempted.

Conflict preemption will resolve any problems arising from vague federal statutes and regulations. In the event that Congress makes no explicit determination, the doctrine of conflict preemption settles the state-federal tension in favor of the state government unless coexistence of the laws is a physical impossibility. Conflict preemption is preferable to field preemption because the reach of the doctrine is more limited and state legislators can be assured that their laws will be valid unless they actually conflict with federal laws.

## V. CONCLUSION

When the *Center* court held there was no field preemption of Honolulu's aerial banner ordinance, the judicial system struck the appropriate balance between state and federal authority. In doing so, the court allowed the City and County of Honolulu to exercise control over its own airspace and determine whether Hawai'i residents and Waikiki visitors should have to endure enormous banners pulled across their view of the sunset. Although in theory field preemption would preempt a state law only when congressional and agency intent is clear, *Center* and the other aviation cases[125] show that, in practice, judges, state legislators, and city officials are left to make their best guess. Courts are forced to navigate through convoluted, disparate clues towards intent. Judges cannot clairvoyantly divine the intent of federal lawmakers. The result—however noble the inquiry—is necessarily a finding of perceived, rather than actual, congressional intent.

Express and conflict preemption do justice to the federalism doctrine embodied in our Constitution. Field preemption, and its tolerance for inferences of intent, does away with state power too carelessly. It is this doctrine, not states' rights, that should be abandoned.

Kimberly K. Asano & Kamaile A. Nichols[126]

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[125] Skysign Int'l, Inc. v. City & County of Honolulu, 276 F.3d 1109, 1113 (9th Cir. 2002); Banner Adver., Inc. v. City of Boulder, 868 P.2d 1077 (Colo. 1994); State v. Santoriello, 702 N.Y.S.2d 539 (Crim. Ct. 1999).

[126] J.D. Candidates 2008, William S. Richardson School of Law, University of Hawai'i at Manoa. We would like to express our gratitude to Professor Jon M. Van Dyke for his generous assistance. We would also like to thank our families for their continued encouragement.

# More than a Line in the Sand: Defining the Shoreline in Hawai'i After *Diamond v. State*

## I. INTRODUCTION

Where is the shoreline? In Hawai'i, this deceivingly simple question has a complex answer with implications for a host of legal issues. The location of the shoreline can influence property boundary disputes[1] and a variety of land use,[2] tort,[3] criminal,[4] beach access,[5] and jurisdictional issues.[6] The location of the shoreline can also play a role in issues that do not reach judicial or administrative hands.[7]

In its simplest form, Hawai'i's definition of the shoreline is the upper reach of the wash of the waves.[8] This definition was enunciated in a series of landmark Hawai'i Supreme Court cases during the 1960s and 1970s, namely

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[1] *E.g.*, *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968).

[2] *E.g.*, Hawai'i Coastal Zone Management Act, HAW. REV. STAT. §§ 205A-1 to -71 (2001 & Supp. 2006) (regulating the development of coastal lands). The Coastal Zone Management Act ("CZMA") defines the "[c]oastal zone management area" as lands "seaward from the shoreline". *Id.* § 205A-1.

[3] *E.g.*, Lansdell v. County of Kauai, 110 Hawai'i 189, 130 P.3d 1054, 1060, 1065-66 (2006) (finding no State liability under HAW. REV. STAT. § 520 [1993 & Supp. 2005] for land that was not part of a public beach park). For beachfront property, these questions of ownership may be determined by the location of the shoreline. *See* Farrior v. Payton, 57 Haw. 620, 636, 562 P.2d 779, 789 (1977) (citing *Ashford*, 50 Haw. 314, 440 P.2d 76 and finding that "no competent evidence of [the shoreline] boundary" or "vegetation line" was established in a tort case arising from an injury suffered on coastal property).

[4] *E.g.*, State v. Kelly, Nos. 25198, 25199, 2003 WL 22534428 (Haw. App. Nov. 7, 2003) (mem.) (finding a beachfront camper's argument that he did not trespass, because waves sometimes washed over his campsite, unpersuasive).

[5] *E.g.*, HAW. REV. STAT. § 115-2 (1993) ("Absence of public access to Hawai'i's shorelines . . . constitutes an infringement upon the fundamental right of free movement in public space and access to and use of coastal and inland recreational areas."); Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982) (finding a private right of action to enforce public access to beaches based on non-statutory rights).

[6] *Cf.* Coulter v. Bronster, 57 F. Supp. 2d 1028, 1037-38 (D. Haw. 1999) (citing Hawaiian Navigable Waters Pres. Soc'y v. Hawai'i, 823 F. Supp. 766 (D. Haw. 1993)) (analyzing state jurisdiction to regulate a canal).

[7] For example, property owners wary of potential tort liability may change the rules of beach access and use near their properties based on their own interpretation of the shoreline, rather than an official interpretation. *See, e.g.*, Tim Ruel, *Fishing for Beach Access*, HONOLULU STAR-BULL., Oct. 6, 2002, *available at* http://starbulletin.com/2002/10/06/business/story1.html (describing how fishing access was curtailed by one resort's fear of liability).

[8] *See, e.g.*, Diamond v. State, 112 Hawai'i 161, 168, 145 P.3d 704, 711 (2006) (citing *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) and HAW. REV. STAT. § 205A-1 (2001)).

*In re Ashford*,[9] *County of Hawai'i v. Sotomura*,[10] and *In re Sanborn*.[11] Grounded in Hawaiian tradition, custom, and usage,[12] these decisions differ markedly from other common law jurisdictions.[13]

Due to a number of possible factors,[14] litigation squarely concerning the interpretation of Hawai'i's shoreline definition did not reach the appellate level again for nearly thirty years following these seminal decisions.[15] The issue reemerged in June 2006, when a settlement[16] between environmental groups and the Hawai'i Department of Land and Natural Resources ("DLNR") ultimately led to the harmonization of shoreline definitions found in Hawai'i statutes, case law, and administrative rules.[17] On the heels of this change the

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[9] 50 Haw. 314, 440 P.2d 76 (1968).

[10] 55 Haw. 176, 517 P.2d 57 (1973).

[11] 57 Haw. 585, 562 P.2d 771 (1977).

[12] *See, e.g.*, *Ashford*, 50 Haw. at 315-17, 440 P.2d at 77-78.

[13] Common law jurisdictions predominantly rely on tides to define a shoreline reference plane. *See generally* Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 200-02 (1974).

[14] One factor may be a lull in large-scale coastal development since *Sanborn*, particularly on Oahu. Interview with David L. Callies, Benjamin A. Kudo Professor of Law, William S. Richardson Sch. of Law, Univ. of Haw. at Manoa, in Honolulu, Haw. (Oct. 13, 2006). There is also a general culture in Hawai'i of an unspoken desire to "work it out" rather than risk being labeled an uncooperative developer. *Id.* Factors that may have spurred re-emerging shoreline location litigation include increasing population, rapidly increasing coastal property values, eroding beaches, and eroding neighborliness.

[15] Although subsequent cases addressed issues involving the shoreline, such cases did not focus on interpreting the definition to locate the shoreline. *See, e.g.*, Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) (addressing legal consequences of natural changes to the shoreline boundary due to erosion); Sotomura v. County of Hawai'i, 460 F. Supp. 473 (D. Haw. 1978) (finding that the Hawai'i Supreme Court's interpretation of the shoreline in *Sotomura* deprived property owners of due process and constituted a taking without just compensation); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992) (addressing legal consequences of natural changes to the shoreline boundary due to accretion); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (addressing legal consequences of natural changes to the shoreline boundary due to lava flow).

[16] *See, e.g.*, Jan TenBruggencate, *Expect More Beach from State Shoreline Pact*, HONOLULU ADVERTISER, Dec. 13, 2005, at B5 (discussing the terms of settlement).

[17] *See* HAW. REV. STAT. § 205A-1 (1993) ("'Shoreline' means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves."); *In re* Sanborn, 57 Haw. 585, 588, 562 P.2d 771, 773 (1977) ("The law of general application in Hawai'i is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves." (citing County of Hawai'i v. Sotomura, 55 Haw. 176, 181-82, 517 P.2d 57, 61-62 (1973))); *see also* HAW. ADMIN. R. § 13-222-2 (2006) ("'Shoreline' means the upper reaches of the wash of the waves, other than storm or seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.").

Hawai'i Supreme Court decided *Diamond v. State*,[18] addressing the use of vegetation in locating the shoreline.[19] While these recent developments have settled some issues related to the definition of the shoreline, the matter is hardly closed. Broad questions related to the "who?, why?, when?, where?, and how?" of shoreline location remain.

In Part II, this Note traces the history of today's shoreline definition to provide a framework for analysis of the definition and its application. Part III provides an overview of shoreline certifications and seaward boundary determinations, and distinguishes the two. Part IV examines *Diamond* and its implications for future shoreline determinations. Part V presents several questions left unanswered by the *Diamond* decision and addresses some of the inevitable conflicts that will arise from the application of Hawai'i's shoreline definition. In conclusion, Part VI suggests these problems can best be mitigated by clear statutory command, diligent administrative implementation, and more fundamentally, a shift in the way all parties, public and private, view shoreline property.

## II. BACKGROUND

An examination of Hawai'i's current shoreline definition first requires a survey of its legal evolution (judicial and statutory) and recent re-emergence in litigation. It is important to recognize that the definition, and its evolution and re-emergence, are premised on a unique historical and cultural platform. Indeed, a juxtaposition of collective and individual property rights, and modern and ancient surveying methods, along with a special appreciation for the role of the shore in Hawaiian life, all flow directly into the definition.[20]

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[18] 112 Hawai'i 161, 145 P.3d 704 (2006).

[19] *See id.* at 172-75, 145 P.3d at 715-18.

[20] *See generally* Statute Laws of Kamehameha III, 1847, vol. II, 81-87 (Rep. Haw.) (reciting the principles of the Board of Commissioners to Quiet Land Titles and discussing some challenges associated with applying allodial land title concepts to traditional collective property rights); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982) (addressing the juxtaposition of pre-Mahele collective property rights and modern private property rights); State v. Zimring, 58 Haw. 106, 109-15, 566 P.2d 725, 729-31 (1977) (providing a detailed history of Hawaiian land titles and boundaries); *In re* Boundaries of Pulehunui, 4 Haw. 239 (1879) (describing the use of natural features to define ancient Hawaiian land boundaries); Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850, 1-26 (June 1956) (unpublished M.A. thesis, University of Hawai'i) (on file with author) (describing in detail ancient Hawaiian land divisions and their relation to "the character and conditions of the immediate environment").

### A. Hawai'i Supreme Court Precedent

The current Hawai'i shoreline definition, grounded in Hawaiian tradition and usage, was established in a series of cases issued by the Hawai'i Supreme Court in the 1960s and 1970s.[21] These cases have been labeled at times as "historic and visionary,"[22] and at others as suspect "judicial activism."[23]

The shoreline was defined as the "upper reach of the wash of waves" in the 1968 landmark case *In re Ashford*.[24] The dispute in *Ashford* concerned the location of the *makai* (seaward)[25] boundaries of two parcels of private land sought to be registered in land court.[26] Both properties were described in royal land patents[27] as running *ma ke kai* (along the sea).[28] The State contended that *ma ke kai* described "the high water mark that is along the edge of vegetation or the line of debris left by the wash of the wave during ordinary high tide."[29] The property owners contended that the phrase described the boundaries at the mean high water ("MHW") mark, calculated from published tide heights.[30]

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[21] *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968); *Sotomura*, 55 Haw. 176, 517 P.2d 57; *Sanborn*, 57 Haw. 585, 562 P.2d 771.

[22] HAW. DEP'T OF LAND AND NATURAL RES., REPORT TO THE TWENTY-THIRD LEGISLATURE, REGULAR SESSION OF 2006, REQUESTING A REVIEW AND ANALYSIS OF THE ISSUES SURROUNDING THE SHORELINE CERTIFICATION PROCESS FOR THE PURPOSE OF ESTABLISHING SHORELINE SETBACKS 3 (2005), *available at* http://www.state.hi.us/dlnr/reports/OCCL06-Shoreline-Certification.pdf [hereinafter SHORELINE REPORT]. The report's authors added: "These decisions afforded broad recognition and protection of shoreline areas and public beach access and still stand as the most distinguished legacies of the [Hawai'i Supreme] Court to the law and people of Hawaii." *Id.*

[23] Paul M. Sullivan, *Customary Revolutions: The Law of Custom and Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 132 (1998); *see also* County of Hawai'i v. Sotomura, 55 Haw. 176, 189, 517 P.2d 57, 65 (1973) (Marumoto, J., dissenting) ("[I]n my opinion, the holding is plain judicial law-making.").

[24] 50 Haw. 314, 316, 440 P.2d 76, 77 (1968).

[25] Under an island-centric coordinate system commonly used in Hawai'i, *mauka* refers to inland, or toward the mountains, and *makai* refers to ocean, or toward the sea. *See, e.g.*, Fong v. Hashimoto, 92 Hawai'i 637, 640 nn.1-2, 994 P.2d 569, 572 nn.1-2 (App. 1998) (citing MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (6th ed. 1986)), *vacated*, 92 Hawai'i 568, 994 P.2d 500 (2000).

[26] *Ashford*, 50 Haw. at 314, 440 P.2d at 77.

[27] For a description of the role of royal land patents in Hawaiian property law, see generally *State v. Zimring*, 58 Haw. 106, 109-15, 566 P.2d 725, 729-31 (1977).

[28] *Ashford*, 50 Haw. at 314, 440 P.2d at 77.

[29] *Id.* at 315, 440 P.2d at 77.

[30] *Id.* at 314-15, 440 P.2d at 77. Shorelines defined by mean high water ("MHW") exist at the intersection between the shore and a reference plane fixed by a nineteen year average of high tides. *See generally* Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935); Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 224-25 (1974). Compare MHW to ordinary high water ("OHW"), which is a plane defined by the highest regularly recurring high

The difference in the two interpretations was significant; the State argued that the shoreline was twenty to thirty feet *mauka* (inland) of the line claimed by the property owners.[31] Relying on *kama'aina* testimony[32] and reportedly keeping in harmony with ancient Hawaiian land boundaries,[33] the court ruled that the phrase *ma ke kai* in royal land patents established the boundary of the shoreline "along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves."[34]

The rule pronounced in *Ashford* was further developed five years later in *County of Hawai'i v. Sotomura*.[35] At issue in *Sotomura* was the location of the seaward boundary of property subject to eminent domain initiated by the County of Hawai'i.[36] Unlike *Ashford*, however, the location of the seaward boundary had been previously established by registration of the property in land court.[37] The court held that the precise location of the high water mark on registered oceanfront property, like unregistered land, is subject to change and may always be altered by erosion.[38] Furthermore, the court held "as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further *mauka*, the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth."[39]

In addition to its holding, *Sotomura* announced that *Ashford* was "a judicial recognition of longstanding public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right."[40] The court

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tide. *See generally* Richard Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 FLA. L. REV. 323 (1990).

[31] The difference between these two interpretations was further underscored by testimony that the property owners' method would have established the shoreline under water in some areas of the islands, even during low tide. *Ashford*, 50 Haw. at 317 n.4, 440 P.2d at 78 n.4.

[32] For the purpose of testimony in these cases, a *kama'aina* is "'a person familiar from childhood with any locality.'" *Id.* at 315 n.2, 440 P.2d at 77 n.2 (quoting *In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879)).

[33] *Id.* at 316-17, 440 P.2d at 77-78.

[34] *Id.* at 315, 440 P.2d at 77.

[35] 55 Haw. 176, 517 P.2d 57 (1973).

[36] *Id.* at 177, 517 P.2d at 59.

[37] *Id.* at 178, 517 P.2d at 59. The county argued that despite the location of the high water mark shown on the land court application, erosion had moved the seaward boundary further *mauka*. *Id.* The landowners contended that "land court proceedings are res judicata . . . [and] the certificate of registration shall be conclusive evidence of the location of the seaward boundary." *Id.* at 178, 517 P.2d at 60.

[38] *Id.* at 180, 517 P.2d at 61.

[39] *Id.* at 182, 517 P.2d at 62. Although the "trial court correctly determined that the seaward boundary lies along 'the upper reaches of the wash of waves,'" it erred in locating the shoreline at the debris line, which lay *makai* of the vegetation line. *Id.*

[40] *Id.* at 181-82, 517 P.2d at 61.

also emphasized that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible,"[41] justifying this as a result of the public trust doctrine.[42]

Four years after *Sotomura*, the Hawai'i Supreme Court revisited the shoreline definition once again in *In re Sanborn*.[43] The case arose from the Sanborns' attempt to obtain Kauai County approval of a beachfront subdivision.[44] At issue was whether the property's beachfront title line was to be determined according to Hawai'i's "general law of ocean boundaries," or by survey distances and azimuths contained in the Sanborns' land court registration.[45] The court reiterated that "the law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm or tidal waves."[46] The court concluded that this water mark is "a natural monument" that controls over even land court judgments based on distances and azimuths.[47]

### *B. Shoreline Setback—Hawai'i's Statutory Shoreline*

In 1970, the Hawai'i Land Use Law was amended to include the Shoreline Setback Law, which enabled counties to pass setback regulations controlling development of coastal property within a given distance from the shoreline.[48] In 1986, the setback provisions were incorporated under the Hawai'i Coastal Zone Management Act ("CZMA"), establishing a more comprehensive system of coastal management and protection.[49]

These setback statutes essentially adopt the *Ashford—Sotomura—Sanborn* shoreline definition as a reference line from which the setback is measured.[50]

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[41] *Id.* at 182, 517 P.2d at 61-62.

[42] *Id.* at 183-84, 517 P.2d at 63 ("Land below the high water mark, like flowing water, is a natural resource owned by the state 'subject to, but in some sense in trust for, the enjoyment of certain public rights.'" (quoting Bishop v. Mahiko, 35 Haw. 608, 647 (1940))). "The public trust doctrine, as this theory is commonly known, was adopted by this court in King v. Oahu Railway & Land Co., 11 Haw. 717 (1899)." *Id.*

[43] 57 Haw. 585, 562 P.2d 771 (1977).

[44] *Id.* at 586, 562 P.2d at 772.

[45] *Id.* at 588, 562 P.2d at 773.

[46] *Id.* (citing *Sotomura*, 55 Haw. at 181-82, 517 P.2d at 61-62).

[47] *Id.* at 594, 562 P.2d at 777. Like *Sotomura*, *Sanborn* reaffirmed that "land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes." *Id.* at 593-94, 562 P.2d at 776.

[48] *See generally* Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1, 6 (1991) (citing HAW. REV. STAT. § 205 (Supp. 1989) and HAW. REV. STAT. § 205-32 (1970) (repealed 1986)).

[49] *See* HAW. REV. STAT. § 205A (1993 & Supp. 2006).

[50] *See, e.g.*, HAW. REV. STAT. § 205A-1 (1993).

The CZMA's legislative history indicates the legislature's intent to follow the Hawai'i Supreme Court's precedent, its shared commitment to "reserve as much of the shore as possible to the public," and a desire to "'clarify the manner in which the shoreline is determined to protect the public interest.'"[51]

### *C. Re-emergence of Hawai'i Shoreline Litigation*

For a number of possible reasons,[52] litigation squarely concerning the interpretation of the shoreline definition did not reach the appellate level for nearly thirty years following the seminal *Ashford*, *Sotomura*, and *Sanborn* decisions.[53] In October 2006, the Hawai'i Supreme Court revisited the issue in *Diamond v. State*,[54] which centered on a dispute regarding the use of vegetation to determine the shoreline for CZMA setback purposes.[55]

As *Diamond* was making its way through the appeals process, the shoreline issue also re-emerged when two environmental groups, Public Access Shoreline Hawai'i ("PASH") and the Sierra Club (collectively, the "Groups") filed suit against the Hawai'i Board of Land and Natural Resources ("BLNR").[56] The Groups contended that the definition of "shoreline" in the administrative rules adopted by the BLNR pursuant to the CZMA, contained language that was contradictory to the underlying shoreline protection statute and Hawai'i shoreline case law.[57] At the time, the BLNR defined "shoreline" as "the upper reaches of the wash of the waves . . . usually evidenced by the edge of vegetation growth, *or where there is no vegetation in the immediate*

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[51] Diamond v. State, 112 Hawai'i 161, 173, 145 P.3d 704, 716 (2006) (quoting STAND. COMM. REP. NO. 550-86 [1986], *reprinted in* 1986 HAW. HOUSE J., at 1244).

[52] *See supra* note 14.

[53] Although subsequent cases addressed issues involving the shoreline, those cases did not focus on interpreting the definition to locate the shoreline. *See, e.g.*, Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) (addressing legal consequences of natural changes to the shoreline boundary due to erosion); Sotomura v. County of Hawai'i, 460 F. Supp. 473 (D. Haw. 1978) (finding Hawai'i Supreme Court's interpretation of the shoreline in County of Hawai'i v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), deprived property owners of due process and constituted a taking without just compensation); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992) (addressing legal consequences of natural changes to the shoreline boundary due to accretion); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (addressing legal consequences of natural changes to the shoreline boundary due to lava flow).

[54] 112 Hawai'i 161, 145 P.3d 704 (2006).

[55] *See id.* at 172-75, 145 P.3d at 715-18.

[56] *See* Complaint, Pub. Access Shoreline Hawaii v. Bd. of Land & Natural Res., No. 05-1-1332-07 VSM (Haw. Cir. Ct. filed July 25, 2005).

[57] *See id.* at 2. The shoreline setback law mandates the BLNR adopt rules prescribing procedures for official determinations of the shoreline. HAW. REV. STAT. § 205A-42 (1993). Pursuant to this statutory command, the BLNR devised the shoreline certification process. *See* HAW. ADMIN. R. § 13-222 (1988).

*vicinity*, the upper limit of debris left by the wash of the waves."[58] The Groups argued that the rule established an absolute preference for the vegetation line over the debris line, thereby allowing the State to favor coastal vegetation as an indicator of the shoreline, even if the debris line lay *mauka* of the growing plants.[59] The Groups also asserted that consideration of the debris line only "where there is no vegetation in the immediate vicinity" was not in harmony with the policy of "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[60] The additional language arguably caused the "backwards and harmful result of weakening shoreline protection and diminishing public uses and access"[61] by "creat[ing] a perverse incentive for landowners to grab as much public beach as possible by artificially inducing vegetation."[62]

In a settlement announced in December 2005, the Groups agreed to drop the lawsuit and BLNR officials agreed to begin the process of amending the rule.[63] In June 2006, the definition of "shoreline" in the administrative rules was amended, effectively bringing the shoreline definition in the Hawai'i Revised Statutes, Hawai'i Supreme Court case law, and Hawai'i Administrative Rules into harmony.[64]

## III. APPLYING THE SHORELINE DEFINITION

Official shoreline location happens in two ways: (1) shoreline certification, and (2) seaward boundary determinations, i.e., judicially determined property boundaries.[65] This section first provides a synopsis of the shoreline

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[58] HAW. ADMIN. R. § 13-222-2 (1988) (current version at HAW. ADMIN. R. § 13-222-2 (2006)) (emphasis added).

[59] *See* Complaint at 2, Pub. Access Shoreline Hawaii v. Bd. of Land & Natural Res., No. 05-1-1332-07 VSM (Haw. Cir. Ct. filed July 25, 2005).

[60] *See id.* at 2-3 (citing HAW. ADMIN. R. § 13-222-2 (1988) and *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968)).

[61] *Id.* at 3.

[62] Debra Barayuga, *State's Shoreline Rule Leads to Lawsuit*, HONOLULU STAR-BULL., July 26, 2005, *available at* http://starbulletin.com/2005/07/26/news/story1.html (quoting Isaac Moriwake, Earthjustice attorney representing Public Access Shoreline Hawai'i and the Sierra Club).

[63] *See, e.g.*, Tom Finnegan, *Groups Drop Shoreline Suit*, HONOLULU STAR-BULL., Dec. 13, 2005, *available at* http://starbulletin.com/2005/12/13/news/story08.html; Joint Stipulation for Dismissal Without Prejudice, Public Access Shoreline Hawaii v. Bd. of Land & Natural Res., No. 05-1-1332-07 VSM (Haw. Cir. Ct. Dec. 12, 2005).

[64] *See supra* note 17.

[65] *See generally* Press Release, Peter T. Young, Chairperson, Haw. Bd. of Land and Natural Res., Certified Shorelines Address Setbacks—Not Ownership or Access (Nov. 7, 2003) (on file with author), *available at* http://www.eng.hawaii.edu/~hals/Shoreline%20Viewpoint-Peter%20Young.pdf [hereinafter Certified Shorelines].

certification procedure, and then distinguishes "shoreline certifications" from "seaward boundaries."

### *A. Shoreline Certification Synopsis*

In 1988, the DLNR created the shoreline certification process to establish a baseline from which shoreline setbacks are measured.[66] Coastal property owners typically seek shoreline certification in order to acquire permits and variances necessary for improvements in the setback area.[67] However, the certification may also be utilized by property owners seeking an after-the-fact variance[68] or a subdivision application.[69]

To certify a shoreline, a property owner will usually hire a private licensed land surveyor to prepare a survey map and photograph and stake the suggested shoreline.[70] The surveyor's findings and supporting documents[71] are submitted to the state land surveyor for review.[72] Upon the State's receipt, public notice of the application is posted in The Environmental Notice,[73] and comments

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[66] *See* HAW. ADMIN. R. § 13-222 (1988). "The purpose of [Hawai'i Administrative Rules § 13-222] is to standardize the application procedure for shoreline certifications for purposes of implementing the shoreline setback law and other related laws." *Id.* § 13-222-1. A shoreline setback is the coastal area where property improvements are regulated by the CZMA. *See* HAW. REV. STAT. § 205A-42 to 43 (1993).

[67] See Interview with Sat Freedman, Associate, Damon Key Leong Kupchak Hastert, in Honolulu, Haw. (Oct. 18, 2006); Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

[68] *See, e.g.*, Interview with Sat Freedman, Associate, Damon Key Leong Kupchak Hastert, in Honolulu, Haw. (Oct. 18, 2006).

[69] *See, e.g.*, Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

[70] *See* HAW. ADMIN. R. § 13-222-7(b)(8) (1988). Maps submitted for shoreline certification must be based on a survey conducted within ninety days prior to the filing for a shoreline certification. *Id.* § 13-222-9(c).

[71] *See id.* § 13-222-7(b)(5) to (6) (requiring surveyor's maps and photos to be included with application). Many other details are required with the application. *See, e.g., id.* §§ 13-222-7 to 9. For example, the surveyor must designate the type of evidence used to locate the shoreline, such as the vegetation line, the debris line, the actual upper reach of the wash of the waves, the face of artificial structures such as seawalls, or a combination thereof. *Id.* § 13-222-9(e)(4).

[72] *Id.* § 13-222-10.

[73] *Id.* § 13-222-12(a). *The Environmental Notice* is published semi-monthly through the Office of Environmental Quality Control. *Id.*; *see also* HAW. REV. STAT. § 205A-42(b) (1993) (requiring public notice of applications for shoreline certification). *The Environmental Notice* is available at http://www.state.hi.us/health/oeqc/notice/current_issue.pdf. Pending applications can also be viewed on the website of the Land Survey division. *See* Shoreline Certifications—Department of Accounting and General Services, http://www.hawaii.gov/dags/survey/applications-for-shoreline-certification (last visited Feb. 2, 2007). Any interested person may also request to be placed on the DLNR's mailing list to receive notification of applications, proposed certifications, and rejections. HAW. ADMIN. R. § 13-222-12(b) (1988).

from the general public are accepted for fifteen calendar days.[74]

After the fifteen-day window, with the application materials and public comments in hand, the state surveyor may schedule a site inspection.[75] The state surveyor may also consult interested persons who submitted comments in response to the public notice and include them in the site visit.[76] As a practical matter, it seems that site inspections are frequently employed.[77] Once the state surveyor is satisfied with the location of the shoreline, the application is forwarded to the Chairperson of the BLNR for review and approval.[78]

Whether the application is proposed or rejected by the BLNR Chairperson, notice of the decision is published[79] and an appeals period begins.[80] If no timely appeals are filed, or if appeals are resolved in favor of the applicant, the shoreline is "certified"[81] and valid for twelve months.[82]

Standing to appeal a shoreline certification is limited to parties with an interest that is distinguishable from the broader public interest.[83] Because members of the general public do not necessarily have standing to appeal a proposed shoreline certification, their primary opportunity for input is during the application process. This heightens the importance of comments submitted upon notice of a shoreline certification application.

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[74] HAW. ADMIN. R. § 13-222-12(c) (1988); *see also* HAW. REV. STAT. § 205A-42(b) (1993).

[75] HAW. ADMIN. R. §§ 13-222-10(a) to (b) (1988).

[76] *Id.* § 13-222-10(b). In the past, the state surveyor's discretion *not* to consult with interested persons has been an issue of contention, with an allegation that practices of the state surveyor in this regard can change abruptly. *See* Alan D. McNarie, *Shoving at the Shoreline*, HAW. ISLAND J., Oct. 1-15, 2004, *available at* http://hawaiiislandjournal.com/2004/10a04a.html. Jerry Rothstein, founder of Public Access Shoreline Hawai'i ("PASH"), reported never being denied the opportunity to perform a timely site inspection for the sixteen years prior to the retirement of former state surveyor Randall Hashimoto. *Id.* However, Rothstein complained that then-acting state surveyor Mel Masuda "began turning down PASH requests for site visits unless 'credible facts or information' were attached with the requests." *Id.*

[77] *See* SHORELINE REPORT, *supra* note 22, at app. c. (listing more frequent site inspections as one of the changes being implemented by the DLNR); Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

[78] HAW. ADMIN. R. § 13-222-10(d) (1988).

[79] *Id.* § 13-222-10(e).

[80] *See id.* §§ 13-222-10(f) to (g), -26(c).

[81] *Id.* § 13-222-10(f) to (g). Automatic acceptance of a shoreline certification is possible if the DLNR fails to respond in a timely manner. *Id.* § 13-222-7(g).

[82] *Id.* § 13-222-11(a); *see also* HAW. REV. STAT. § 205A-42(a) (1993).

[83] *See* HAW. ADMIN. R. § 13-222-26(a) (1988) (limiting standing to the property owners who requested the certification, government agencies whose jurisdiction includes the land in question, persons or agencies who can show their interest is clearly distinguishable from that of the general public, and other persons or agencies who can show substantial interest in the matter).

In 2005, the DLNR and University of Hawai'i Sea Grant College partnered to create a coastal specialist position to assist in the identification of shorelines, making official the DLNR practice of involving a Sea Grant agent in site visits to controversial shorelines.[84] This can be interpreted as a recognition by the DLNR that shoreline determinations require "adopting science-based evaluation and interpretation" techniques that involve different evidence than is used in traditional surveying practices.[85] In addition to the vegetation line and debris line referenced by the definition, the DLNR has suggested other types of evidence that may be used to locate the shoreline. These include: elevation, salt deposits, rock coloration, and other geomorphologic indicators;[86] biological indicators;[87] neighboring shorelines;[88] anecdotal evidence provided by people familiar with the area;[89] and evaluation of seasonal wave run-up statistics and models.[90]

The DLNR has reported other changes in the shoreline certification process that are also not reflected in the administrative rules. These include: review by a five-member panel before signature by the DLNR chairperson; increased scrutiny and enforcement of rules related to landscaping near the shoreline; and outreach and education of surveyors with respect to DLNR policies and shoreline definition interpretation.[91]

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[84] *See* Press Release, Peter T. Young, Chairperson, Haw. Bd. of Land and Natural Res., DLNR Gets Sea Grant Specialists to Assist in Shoreline Certifications (Sept. 20, 2005) (on file with author), *available at* http://www.hawaii.gov/dlnr/chair/pio/HtmlNR/05-N95.htm.

[85] SHORELINE REPORT, *supra* note 22, at app. c; *see also* McNarie, *supra* note 76 (reporting that Sea Grant Coastal Specialist Dolan Eversole urges that "[w]hat we really have to get to is using all sets of evidence, as many pieces of evidence as possible in a given case").

[86] *See* HAW. ADMIN. R. § 13-222-16(b)(12) (1988); MORRIS ATTA ET AL., HAW. DEP'T OF LAND AND NATURAL RES., SHORELINE CERTIFICATION WORKSHOP MATERIALS, http://www.hawaii.gov/dlnr/occl/files/Shoreline/HALS_SHORELINE_files/frame.htm (last visited Feb. 2, 2007); McNarie, *supra* note 76.

[87] *E.g.*, ATTA ET AL., *supra* note 86.

[88] *Cf.* Diamond v. State, 112 Hawai'i 161, 167, 145 P.3d 704, 710 (2006).

[89] *See, e.g.*, McNarie, *supra* note 76 (quoting Sea Grant Coastal Specialist Dolan Eversole's description of appropriate evidence).

[90] SHORELINE REPORT, *supra* note 22, at app. c; McNarie, *supra* note 76 (quoting Sea Grant Coastal Specialist Dolan Eversole's description of appropriate evidence).

[91] SHORELINE REPORT, *supra* note 22, at app. c. Although surveyors in the Hawai'i Association of Land Surveyors are not required to participate in continuing education programs, the group's annual meetings include presentations intended to keep members informed of current rules and practices. Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

### B. Seaward Boundary Line

The difference between a "certified shoreline" and a "seaward boundary line" has become a confusing and potentially divisive issue.[92] Confusion is predictable because the definition of "shoreline" for certification purposes is essentially identical to the definition Hawai'i courts have used to determine property boundary lines.[93] Despite their similarity, however, the two lines "are not necessarily the same because their purposes, the impacts and the processes for determining these 'lines' are uniquely and significantly different."[94]

The most critical of these differences is that shoreline certifications are not designed to determine ownership.[95] Instead, the line of ownership dividing public and private coastal property is the seaward boundary. Markedly different from the shoreline certification process outlined above, determinations of seaward boundary lines often take the form of quiet title actions, eminent domain actions, or land court petition actions.[96] The state's responsibility to uphold the public trust and preserve its interest in property triggers the need for "a more rigorous and cautious approach."[97] In these situations, the state does not rely on shoreline certifications, but conducts its own survey in recognition of the "importance of lateral [shoreline] access over state-owned lands for recreation, native gathering practices and other purposes."[98]

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[92] *See* inversecondemnation.com, http://www.inversecondemnation.com (Oct. 25, 26, 28, 30, 2006). Honolulu attorney Robert Thomas posted a series of comments discussing how the local media confused shoreline certification with ownership and access in coverage of *Diamond*. *Id.* For an outline of the differences between certified shorelines and seaward boundary lines see Certified Shorelines, *supra* note 65.

[93] *See* Certified Shorelines, *supra* note 65; *see also supra* note 17.

[94] Certified Shorelines, *supra* note 65.

[95] HAW. ADMIN. R. § 13-222-1 (1988) (explaining that the purpose of shoreline certifications is to "implement[] shoreline setback law and other related laws"); Certified Shorelines, *supra* note 65. *But cf.* SHORELINE REPORT, *supra* note 22, at app. c. (noting disagreement among members of the working group on whether shoreline certifications delineated the *makai* property boundary). The working group noted that both certifications and boundaries use the same shoreline definition, and reported anecdotally that property owners often assume a certified shoreline marks ownership. *Id.*; *see also* Interview with Mark Sperry, Honolulu Real Estate Agent, Caron B Realty, in Honolulu, Haw. (Oct. 7, 2006) (reporting that a shoreline certification is often required as part of a home buyer's addendum to a "Deposit, Receipt, Offer, and Acceptance" form for shoreline property.)

[96] *See* Certified Shorelines, *supra* note 65 (citing County of Hawai'i v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973) and *In re* Castle, 54 Haw. 276, 506 P.2d 1 (1973) as examples of seaward boundary determinations).

[97] *Id.*

[98] *Id.*

## IV. INTERPRETING THE SHORELINE DEFINITION: *DIAMOND V. STATE*

The 2006 *Diamond* decision addressed whether an induced vegetation line can trump other evidence in defining a certified shoreline.[99] The case provided the opportunity for the court to interpret Hawai'i's shoreline definition. The background of the case includes three separate shoreline certifications, numerous site surveys, and two written opinions delivered by the BLNR.[100] This long history, which occupied nearly half of the supreme court's thirty-page opinion, illustrated two of the broader questions surrounding the location of the shoreline: *where* is the shoreline and *how* is it determined?[101] The court touched on both of these broader issues, but provided only limited guidance applicable to future shoreline certifications.

### *A. Facts of the Case*

In July 2002, Carl Stephens landscaped the seaward portion of his Kauai oceanfront lot by cutting several trees along the shoreline area of his property and planting irrigated vegetation, including salt-tolerant *naupaka*, in its place.[102] The landscaped area lay along a public right of way bordering Stephen's property,[103] and PASH and the Sierra Club, acting as *amici*, alleged that the newly planted vegetation covered twenty to thirty feet of public beach.[104]

In an effort to build on his property, Stephens applied for and was granted a series of three shoreline certifications from 2001 to 2002.[105] During the first certification, the state surveyor, Randall Hashimoto, conducted a site visit and noted that vegetation *makai* of the shoreline located by Stephens' surveyor was "'either planted or induced' by human activity."[106] Accordingly, Hashimoto did not use that vegetation to locate the shoreline, which was certified in October 2001.[107]

Stephens was "forced to redo the survey" in May 2002 to comply with county rules regarding his building permit.[108] Hashimoto accompanied

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[99] Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006).

[100] *See id.* at 164-69, 145 P.3d at 707-12.

[101] *See id.*

[102] *Id.* at 164, 145 P.3d at 707.

[103] *Id.*

[104] Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 2, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[105] *Diamond*, 112 Hawai'i at 165-67, 145 P.3d at 708-10.

[106] *Id.* at 165, 145 P.3d at 708. The court does not identify the source of the language "either planted or induced," but it is presumed to have come from the state surveyor's testimony.

[107] *Id.*

[108] *Id.*

Stephens' surveyor and used the *naupaka* he had rejected on his earlier visit.[109] The resulting shoreline was located five to eleven feet *makai* of its previous position.[110] Hashimoto later conducted another site visit, this time with local resident and environmental activist Caren Diamond present.[111] Diamond presented photographic evidence of the upper wash of the waves during winter surf to support a more *mauka* location of the shoreline.[112] Despite this evidence, the shoreline was certified at the *naupaka* as previously recommended by Hashimoto.[113] Diamond, along with attorney and neighbor Harold Bronstein, filed appeals with the BLNR, then with the Circuit Court of the Fifth Circuit, and ultimately with the Hawai'i Supreme Court.[114]

Even though Stephens' shoreline certification had already expired, the Hawai'i Supreme Court agreed to address whether the BLNR's denial of appeal was based on a misinterpretation of the shoreline definition in the CZMA.[115] The court avoided the issue of mootness by applying an exception for cases "'involving questions that affect the public interest and are capable of repetition yet avoiding review.'"[116] The court found that: (1) the definition was a "matter of vast public importance," and (2) the appeals process would be frustrated if the court refused to review the shoreline definition in a shoreline certification because the process generally takes longer than a certification's one-year life span.[117]

### *B. Where Is the Shoreline?*

Although the court found merit in the BLNR's argument that "[i]t is within the discretion and expertise of the DLNR to decide what is the best evidence

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[109] *Id.* Hashimoto later defended his use of the *naupaka* with the reasoning that if the vegetation withstood the yearly cycle of high surf, it would establish a stable vegetation line by which he could determine the shoreline. *Id.* He later stated that a vegetation line would have precedence over a debris line because it is "more stable." *Id.*

[110] *Id.* at 165-66, 145 P.3d at 708-09.

[111] *Id.* at 166, 145 P.3d at 709.

[112] *Id.*; *see also* Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 4, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[113] *Diamond*, 112 Hawai'i at 166, 145 P.3d at 709.

[114] *Id.* at 166-69, 145 P.3d at 709-12.

[115] *Id.* at 169-71, 145 P.3d at 712-14.

[116] *Id.* at 170, 145 P.3d at 713 (citing Okada Trucking Co., Ltd. v. Bd. of Water Supply, 99 Hawai'i 191, 196, 53 P.3d 799, 804 (2002)).

[117] *Diamond*, 112 Hawai'i at 172, 145 P.3d at 715. Although the court found that the BLNR's interpretation was not moot in a legal sense, the issue as it related to Stephens' property in particular was moot in a practical sense because the property, since sold, had already been built upon by the time the court rendered a decision. *See, e.g.*, Jan TenBruggencate, *Ruling Upholds Shoreline Access*, HONOLULU ADVERTISER, Oct. 26, 2006, at A1, *available at* http://the.honoluluadvertiser.com/article/2006/Oct/26/ln/FP610260344.html.

available that accurately reflects the location of the shoreline,"[118] it concluded that the BLNR did not use this discretion to comply with the statutory mandate to locate the shoreline at the upper reach of the wash of the waves.[119] The crux of the court's reasoning can be found in its examination of Hashimoto's testimony during the contested case hearing that followed the second certification (stating that he would use the vegetation line even if the waves washed *mauka*), and the BLNR's Order Denying Appeal following the third certification (stating that there was evidence that the waves sometimes washed *mauka* of the vegetation line).[120] Calling these perspectives "troubling,"[121] the court reasoned that Hashimoto and the BLNR failed to adhere to the "plain and obvious"[122] meaning of the CZMA shoreline definition by suggesting "the shoreline is not demarcated by the highest point that the waves reach on [the] shore in non-storm or tidal conditions."[123]

As simple as this plain language analysis seems, the court's conclusion illustrates one of the questions left open by the definition: where is the "upper reach of the wash of the waves"? The court defines the plain meaning of "upper" as the "highest—i.e., the furthest *mauka*—reach of the waves."[124] However, this seemingly clear definition may not be universally applicable. For example, where is the "upper" wash of the waves in the case of wave run-up that crests a dune, and is aided by gravity to wash further *mauka* down the back of the dune?[125] In this case, the "highest" point is arguably at the dune crest, but this is not the same as the point "furthest *mauka*." In much of its decision, the court relied heavily on *Sotomura*'s policy declaration that the location of the shoreline should extend "'to public use and ownership as much of Hawai'i's shoreline as is reasonably possible.'"[126] This policy suggests that gravity-aided wash of the waves can be used to define the shoreline as far *mauka* as possible. Shoreline photographs used as part of the Office of Conservation and Coastal Lands Integrated Shoreline Workshop mark the

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[118] *Diamond*, 112 Hawai'i at 172, 145 P.3d at 715.

[119] *Id.* at 173, 145 P.3d at 716.

[120] *Id.* at 172-73, 145 P.3d at 715-16.

[121] *Id.* at 173, 145 P.3d at 716.

[122] *Id.* at 172-73, 145 P.3d at 715-16 (citing Peterson v. Hawai'i Elec. Light. Co., 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997) for the proposition that the court's statutory construction must give effect to the plain and obvious meaning and language of a rule).

[123] *Id.* at 173, 145 P.3d at 716.

[124] *Id.* at 172, 145 P.3d at 715.

[125] *See* SHORELINE REPORT, *supra* note 22, at 10.

[126] *Diamond*, 112 Hawai'i at 173, 145 P.3d at 716 (citing County of Hawai'i v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973)).

shoreline at a debris line *mauka* of a dune crest, suggesting that the upper wash of the waves can indeed be pushed *mauka* by gravity-aided wash.[127]

A practical look at this issue can lead to the opposite conclusion. Regular wash of the waves with enough energy to crest a beach feature and take advantage of gravity could erode the feature, eventually removing gravity from the issue. Absent a long-term change in wave energy, it can therefore be assumed that waves that can take advantage of gravity are not representative of the seasonally recurring high waves, and do not threaten to limit the public's access to the beach. Another problem with strictly adhering to a "furthest *mauka*" rule is that it could push the certified shoreline far enough *mauka* to overlap with roads and houses, presenting a tangled takings "nightmare."[128] A paucity of any judicial precedent or clearly published DLNR policy on this issue leaves it ripe for litigation.

### *C. How to Define the Shoreline*

After refocusing the BLNR's interpretation of the CZMA on the upper reach of the wash of the waves, the court's decision then turned to the question of how this determination should, and should not, be reached. The decision focused on two of the narrower issues related to this how question: (1) whether there is a preference for the vegetation over the debris line; and (2) whether induced vegetation can be used to locate the shoreline.[129]

The court began this discussion noting legislative history that shows preferential language for the vegetation line over the debris line was removed in 1979.[130] Also, it was noted that *Sotomura* involved a vegetation line that was *mauka* of the debris line, such that the vegetation line could have been evidence of waves washing higher than the visible debris line.[131] As such, the court read *Sotomura*'s language extolling the virtues of the vegetation line as a "more permanent monument"[132] in the context of moving the shoreline *mauka*, in favor of the declared public policy of extending "'to public use and ownership as much of Hawai'i's shoreline as is reasonably possible.'"[133] The

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[127] *Cf.* ATTA ET AL., *supra* note 86, at slide 13 (gravity-aided wash is illustrated by the slide titled "Shoreline Certification Guidelines," showing a debris line that lies *mauka*, and downhill, of a scarp).

[128] McNarie, *supra* note 76 (quoting Dolan Eversole, University of Hawai'i Sea Grant Coastal Specialist, who argues for a balanced approach because "[i]f we go with the uppermost reach . . . we're going to be condemning roads and houses. It's going to be a nightmare").

[129] *Diamond*, 112 Hawai'i at 173-74, 145 P.3d at 716-17.

[130] *Id.* at 173 n.8, 145 P.3d at 716 n.8 (citing 1979 Haw. Sess. L. Act 200, § 1 at 416).

[131] *Id.* at 175, 145 P.3d at 718.

[132] County of Hawai'i v. Sotomura, 55 Haw. 182, 517 P.2d 57 (1973).

[133] *Diamond*, 112 Hawai'i at 174, 145 P.3d at 717 (citing *Sotomura* 55 Haw. at 182, 517 P.2d at 61-62). The BLNR also relied on *Sotomura*, but asserted that the decision created a per

court flatly rejected the BLNR's proposition that *Sotomura* created a per se preference for the vegetation line, for three commingled reasons: (1) the vegetation line is not always permanent, such as when it has been recently introduced;[134] (2) *Sotomura* did not contemplate owners planting and promoting salt-tolerant vegetation;[135] and (3) unlike *Sotomura*, the vegetation on Stephens' property moved the shoreline *makai*, contrary to the policy of extending more of the beach to public use and access.[136]

Without belaboring the point, the court recognized that the definition states that the upper wash of the waves is "usually" evidenced by the vegetation line and the debris line.[137] This suggests that the court's decision applies, in a practical sense, only to those shoreline certifications on the fringe, where for some reason the vegetation or debris lines do not acceptably mark the upper wash of the waves. A discussion of what constitutes a "usual case" and what marks an "outlier" is largely absent from the court's decision. However, one example of a possible outlier is addressed by the final portion of the court's decision—induced vegetation.

The court found that Stephens' vegetation line was not an adequate indicator of the shoreline because it was "artificially planted."[138] The CZMA does not define the term "vegetation," but it is defined by Hawaii Administrative Rules § 13-222-2 as "any plant, tree, shrub, grass or groups, clusters, or patches of the same, *naturally rooted and growing*."[139] Diamond and Bronstein contended that Stephens' vegetation line was not "naturally rooted and growing," while the BLNR followed Hashimoto's logic that "because it had survived more than one year without human intervention" the vegetation was a good indicator of the shoreline.[140]

The court agreed with Diamond and Bronstein, once again on policy grounds, finding that by allowing induced vegetation to determine the shoreline, the BLNR "encourage[d] private land owners to plant and promote salt-tolerant vegetation to extend their land further *makai*."[141] This allowed the court to avoid the deference generally granted to an administrative agency's

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se preference for the vegetation line over the debris line, because customary boundaries, in order to be known to the people, must be "easily recognizable" and "not so evanescent as being a point where someone happens to observe the run-up of a wave." *Id.* at 169, 145 P.3d at 712.

[134] *Id.* at 175, 145 P.3d at 718.

[135] *Id.*

[136] *Id.* at 173, 145 P.3d at 717-18 (citing *Sotomura*, 55 Haw. at 181-82, 517 P.2d at 61-62).

[137] *Id.* at 173-74, 145 P.3d at 716-17.

[138] *Id.* at 175, 145 P.3d at 718.

[139] *See also id.* (citing Haw. Admin R. § 13-222-2 (2006)) (emphasis added).

[140] *Id.*

[141] *Id.*

interpretation of a rule,[142] by finding that the interpretation was inconsistent with the policy and objectives set forth in the CZMA, as well as *Sotomura*.[143]

The court cast its decision as a "reconfirm[ation]" of those policies.[144] However, the only guidance provided for future certifications is that the decision "reject[s] attempts by landowners to evade this policy by artificial extensions of the vegetation lines on their properties."[145] It is thus difficult to determine how artificial vegetation will be distinguished from natural vegetation in future certifications. It does not appear that the court has created a blanket rule banning the use of "artificial" vegetation—whatever that may be—in determining the shoreline.[146] Rather, in its decision not to announce such a rule, the court seems to have granted the DLNR continued deference to interpret "naturally rooted and growing," subject to the limitation that merely because vegetation survives a single wave season, it is not necessarily naturally rooted and growing.[147]

Clearly, *Diamond* is not the final word on the use of vegetation as a proxy for the upper reach of the wash of the waves. Although use of the vegetation line presents problems, its use is not unique to the Hawaiian shoreline. The vegetation line is used in Oregon to determine the landward limit of the public's right to beach access,[148] in Texas to determine property boundaries based on civil law land grants,[149] and can even be applied to the determination

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[142] *Id.* (citing Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984)).

[143] *Id.* (citing *Camara*, 67 Haw. at 216, 685 P.2d at 797 and *In re* Water Use Permit Apps., 94 Hawai'i 97, 145, 9 P.3d 409, 457 (2000)); *see also* HAW. REV. STAT. § 205A-2 (1993) (enumerating the CZMA's objectives and policies).

[144] *Diamond*, 112 Hawai'i at 175-76, 145 P.3d at 718-19.

[145] *Id.*

[146] Honolulu attorney Robert Thomas pointed out the folly of such a rule soon after the court's decision, noting "obvious issues of proof" and declaring the impossibility of applying such a rule. *See* inversecondemnation.com, http://www.inversecondemnation.com (Oct. 26, 2006). Thomas asked: "Will the mere touch of man anywhere in the planting or growing process be sufficient to qualify vegetation as 'artificial' under the court's new rule?" *Id.*

[147] *See Diamond*, 112 Haw. at 175, 145 P.3d at 718.

[148] *See* OR. REV. STAT. ANN. § 390.605(2) (2005) ("'Ocean Shore' means the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by O.R.S. 390.770 or the line of established vegetation, whichever is farther inland."). *See generally*, State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969); Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Beach of Oregon Beaches*, 22 ENVTL. L. 731 (1992).

[149] *See generally* Matcha v. Mattox, 711 S.W.2d 95 (Tex. App. 1986); Thomas M. Murray, Comment, *The Texas Courts' Adventures in Locating Texas Coastal Boundaries: Redrawing a Line in the Sand:* Kenedy Memorial Foundation v. Dewhurst *Defining an Exception to* Luttes v. State, 35 ST. MARY'S L.J. 459 (2004). The use of the vegetation line in Texas is especially illuminating, given the magnified economic interest created by the role that mineral rights can play in shaping shoreline disputes. *See* Gunther Greulich, *Historic MHW or Shoreline? The Ongoing Littoral Dilemma*, 66 SURVEYING & LAND INFO. SCI. 27, 39 (2006).

of the shoreline in jurisdictions that use a MHW definition.[150] These examples suggest that vegetation *can* be a reliable proxy for the shoreline.

The looming desire for a relatively precise, replicable, and permanent marker of the shoreline argues against using the sometimes transient vegetation line.[151] However, if permanence and replicability were the bellwether of shoreline markers, then the azimuths, metes, and bounds system used for typical property boundary determinations would also be used to determine shorelines.[152]

It has been suggested that vegetation is an acceptable tool for determining the shoreline for coastal zone management purposes, but not for precise property boundaries.[153] However, vegetation *can* be an acceptable land boundary marker,[154] and the concept of a "precise" shoreline boundary is unrealistic given the dynamic nature of the shore.[155] Furthermore, there exists a strong argument that determination of the shoreline for coastal zone management purposes requires even *more* precision than seaward boundary determinations. Since regulation of the coastal zone can have the effect of barring property owners from developing parts of their property, severely limiting the value of that property,[156] private property owners have a vested

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[150] *See generally* Greulich, *supra* note 149, at 39. MHW merely defines a reference plane. In MHW jurisdictions, the intersection of this reference plane with the shore is the shoreline. Evidence other than tide heights is required to physically locate this intersection.

[151] These traits are generally provided as justification for using predictable tide heights to define the shoreline. *See, e.g., In re* Ashford, 50 Haw. 314, 321, 440 P.2d 76, 80 (1968) (Marumoto, J. dissenting) (arguing that the majority had effectively rejected "a practice scientific in concept, uniform in application and precise end result").

[152] *See, e.g.*, Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 9, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[153] Greulich, *supra* note 149, at 38. *But see In re* Boundaries of Pulehunui, 4 Haw. 239 (1879) (describing the use of natural features to define Hawaiian land boundaries); Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850, 1-26 (June 1956) (unpublished M.A. thesis, University of Hawai'i) (on file with author) (describing in detail ancient Hawaiian land divisions and their relation to "the character and conditions of the immediate environment").

[154] *See, e.g.*, Sowerwine v. Nielson, 671 P.2d 295, 299 (Wyo. 1983) (discussing the importance of natural monuments, including trees, in delineating property boundaries); Ryan v. Boucher, 534 N.Y.S.2d 472, 473 (App. Div. 1988) ("A discernible line of trees may be used to describe a boundary line . . . ."). Also note that even in jurisdictions that define the shoreline relative to tide height, vegetation can play an important role. Although the tide height can be measured with precision, it is the intersection of this plane with the shore that defines the shoreline. *See, e.g.*, Harkins v. Del Pozzi, 310 P.2d 532, 534 (Wash. 1957) ("The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation . . . .").

[155] *See, e.g.*, BRUCE S. FLUSHMAN, WATER BOUNDARIES 73-75 (2002) ("On closer inspection" even the certainty of a MHW shoreline "vanishes.").

[156] *See, e.g.*, Shaffer v. Earl Thacker Co., Ltd., 3 Haw. App. 81, 85, 641 P.2d 983, 987 (1982) ("The greatest value of the . . . property is the fact that it is not subject to [a] setback.");

interest in a precise shoreline certification. Conversely, misapplied regulation can allow development too close to the beach, eventually leading to loss of public beach area. Both development and beach loss can be far more permanent than a seaward boundary, creating a significant public interest in a precise shoreline definition.

The definition's other answer to the "how?" question—the debris line—suffers from limited practical utility. The debris line can become difficult to identify within a few days of the high wash of waves.[157] If a suitable debris line remains visible, it is likely that a survey could be conducted when the high wash of the waves can be observed directly. Despite this limited utility, the debris line is a more direct indicator of the upper wash of the waves than the vegetation line, and can counter concerns that the wash of the waves is too "evanescent" to be reasonably determined.[158]

Perhaps the most sensible conclusion to be drawn is that any single piece of evidence, in isolation from other lines of available evidence, makes a poor marker of the shoreline.[159] The court's decision in *Diamond* is practically, but not explicitly, a subtle endorsement of this conclusion. Diamond and Bronstein submitted several different types of evidence regarding the upper wash of the waves, including *kama'aina* testimony, photographs, and expert testimony.[160]

This also appears to be the conclusion reached by the BLNR after consultation with Sea Grant experts,[161] and is similar to the conclusion drawn by jurisdictions that use the ordinary high water mark ("OHWM")[162] to locate

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*see also* Interview with John Jubinsky, Gen. Counsel, Title Guaranty of Hawai'i Inc., in Honolulu, Haw. (Oct. 20, 2006) (noting that the value of property is severely limited if the owner is not permitted to build).

[157] *See* Robynne Boyd, *Our Beaches Are Disappearing*, HONOLULU WEEKLY, June 23, 2004, *available at* http://homepage.mac.com/juanwilson/islandbreath/01-access/access06shore definition.html (quoting Zoe Norcross, Sea Grant Coastal Process Extension Agent for Maui County, who states that "[t]here's not exactly a clear line that is formed by the highest reach of the wave, after a few days or weeks it can be obscured").

[158] Diamond v. State, 112 Hawai'i 161, 168-69, 145 P.3d 704, 711-12 (2006) (quoting the BLNR's position that "reason dictates that the boundaries could not be so evanescent as being a point where someone happens to observe the run-up of a wave").

[159] *See, e.g.*, Greulich, *supra* note 149, at 40 (concluding that vegetation should not be used in isolation of other evidence to determine the shoreline in MHW jurisdictions).

[160] *See* Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 11-12, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[161] *See* SHORELINE REPORT, *supra* note 22, at app. c; McNarie, *supra* note 76; ATTA ET AL., *supra* note 86.

[162] Ordinary high water ("OHW") jurisdictions, such as Florida, use a reference plane at the height of regularly recurring high tide to define the shoreline. *See generally* Hamann & Wade, *supra* note 30, at 342-76.

the shoreline.[163] Both OHWM and "upper reach of the wash of the waves" suffer issues related to temporal variation in their location.[164] Judicial scrutiny applied to OHWM has validated several lines of evidence, including some of those proposed by the BLNR, and can help to solve some of these issues.[165] Evidence used in OHWM shoreline determinations can include aerial and ground photography, photogrammetry, and eyewitness testimony.[166]

For Hawai'i's shoreline determinations, it remains to be seen if a more comprehensive approach settles these issues of proof, or merely provides even more ammunition for contention in locating a given shoreline.

## V. COUNTING FOR THE FUTURE—BEYOND *DIAMOND*

*Diamond*'s heavy reliance on *Sotomura* illustrates one of the vexing twists of the shoreline definition. *Sotomura*, and *Ashford* before it, were cases concerning seaward boundaries, not shoreline certifications. As noted by BLNR chairperson Peter Young, the basic reasons for determining the shoreline for these two purposes are very different.[167] Why, then, is *Sotomura*'s policy statement, in favor of public *use* and *ownership* given such weight in *Diamond*, which concerns the setback baseline for a building permit on private property? The simple answer is that the policies announced by the CZMA are similar to those announced in *Sotomura*. As noted by the court in *Diamond*, one of the objectives of CZMA is to "[p]rotect beaches for public use and recreation."[168]

To understand the question in more depth, it is important to recognize that development of private portions of the coastal zone can have a drastic impact on public beaches. The clearest manifestation of this proposition is found in the construction of seawalls, which are generally built on eroding beaches to

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[163] *See generally id.* at 348-76.

[164] To illustrate the imprecision of OHW, it is described as some level "higher than low or average stages, but does not include extremely high water stages . . . ." *Id.* at 364-72. The "when?" question is also an issue in OHW jurisdictions. *See id.* at 366-67 (citing, for example, Heckman Ranches v. State, 589 P.2d 540 (Idaho 1979), which explains that periodic inundation of land will place the OHW above that inundation if it destroys the agricultural value of the soil).

[165] *See e.g.*, Macnamara v. Kissimmee River Valley Sportsmans' Assoc., 648 So. 2d 155, 159 (Fla. Dist. Ct. App. 1994) (per curiam) (endorsing use of "the best evidence attainable and best methods available" to determine OHW) (quoting Martin v. Busch, 112 So. 274, 283 (Fla. 1927)). *See generally* Hamann & Wade, *supra* note 30.

[166] *See* Hamann & Wade, *supra* note 30, at 372. *See generally* Elizabeth H. Boak & Ian L. Turner, *Shoreline Definition and Detection: A Review*, 21 J. COASTAL RES. 688 (2005).

[167] *See* Certified Shorelines, *supra* note 65; *see also* discussion *supra* Part III.B.

[168] Diamond v. State, 112 Hawai'i 161, 175, 145 P.3d 704, 718 (2006) (citing HAW. REV. STAT. § 205A-2(b)(9) (2001)).

protect structures on property lying *mauka*.[169] It is well demonstrated that seawalls can accelerate erosion, eventually leaving no dry sand beach for public use.[170] Structures built too close to the beach also contribute to passive erosion by limiting the *mauka* input of material to the beach.[171] These types of development can thus contribute to the already alarming disappearance of Hawaiian beaches. Coastal geologists have found that approximately twenty-five percent of Oahu's beaches,[172] and twenty percent of Maui's beaches,[173] have been lost or significantly narrowed by erosion. It is suspected that "a thorough analysis of all sandy shoreline in the state would yield much higher numbers of beach loss."[174] The impact of such beach loss is of particularly noteworthy concern given the importance of beaches to the State's tourism economy,[175] and "incurs costs to all aspects of Hawaiian life."[176] In this

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[169] For an introduction to seawalls and their effects on beach areas, see generally Todd. T. Cardiff, Comment, *Conflict in the California Coastal Act, Sand and Seawalls*, 38 CAL. W. L. REV. 255, 255-61 (2001). Caren Diamond called irrigated shorefront vegetation "de facto vegetative seawalls". Jan TenBruggencate, *Erosion Hasn't Slowed Shoreline Construction*, HONOLULU ADVERTISER, Sept. 18, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/Sep/18/ln/FP609180340.html.

[170] *See, e.g.*, COASTAL LANDS PROGRAM, HAW. DEP'T OF LAND AND NATURAL RES., HAWAII COASTAL EROSION MANAGEMENT PLAN 12 (2000) [hereinafter COASTAL EROSION] (citing, for example, O.H. Pilkey & H.L. Wright, *Seawalls Versus Beaches*, J. COASTAL RES. (SPECIAL ISSUE) 41-64 (1988)), *available at* http://www.hawaii.gov/dlnr/occl/files/coemap.pdf.

[171] *Id.* at 12 (citing O.H. Pilkey & H.L. Wright, *Seawalls Versus Beaches*, J. COASTAL RES. (SPECIAL ISSUE) 41-64 (1988)).

[172] *Id.* at 13-14 (citing C.H. Fletcher & R.A. Mullane, *Beach Loss Along Armored Shorelines of Oahu, Hawaiian Islands*, 13 J. COASTAL RES. 209-15 (1998)).

[173] Surfrider Foundation, State of the Beach Report 2006, http://www.surfrider.org/stateofthebeach/05-sr/index.asp (follow "Hawaii" hyperlink; then follow "Beach Erosion" hyperlink) (last visited Feb. 2, 2007).

[174] COASTAL EROSION, *supra* note 170, at 4.

[175] In 2003, accommodation and food services accounted for 12.8% of the Hawai'i's payroll. *See* ALMANAC OF THE 50 STATES 97 (2006 ed.) (compiling payroll data from BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS (2003)). Compare this to California and Florida, coastal states with well developed tourism industries, where these industries were responsible for less than 4.5% of the states' payroll. *Id.* at 35, 81; *see also* COASTAL EROSION, *supra* note 170, at 4 ("Beach loss seriously impacts the visitor economy in Hawaii." (citing TRAVEL INDUS. OF AM. & OFFICE OF TOURISM INDUS., U.S. DEP'T OF COMMERCE, TRAVEL AND TOURISM CONGRESSIONAL DISTRICT ECONOMIC IMPACT STUDY (1997))). For a broad summary of the economic consequences of shoreline management, see LINDA K. LENT, U.S. ARMY CORPS OF ENGINEERS, NATIONAL SHORELINE MANAGEMENT STUDY, ECONOMICS OF THE SHORELINE (2004), *available at* http://www.iwr.usace.army.mil/NSMS/Economics.pdf. Note also that ocean recreation can play a substantial role in the economy. *See, e.g.*, U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 1 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/welcome.html.

[176] COASTAL EROSION, *supra* note 170, at 15 ("The beaches are among the principle reasons many Hawaiians call these islands home.").

context, it is easy to defend *Diamond*'s reliance on *Sotomura*'s policy. CZMA regulations can just as easily protect, or threaten,[177] beach access as can the determination of a public—private property boundary.[178]

Given that *Diamond* relied on precedent set by cases involving seaward boundaries, the natural question to ask is whether the court's decision will be applied to future seaward boundary determinations.[179] It has been argued that the issue of public/private boundary was not before the court in *Diamond*, and therefore the case carries no precedent for seaward boundary cases.[180] While the direct applicability of *Diamond*'s CZMA interpretation is indeed limited in this way, it might not be as limited in a practical sense.[181] The definition interpreted in *Diamond* is substantially identical to the one found in *Ashford*, and the court relied heavily on *Sotomura* to formulate its interpretation. Despite the fact that the *Sotomura* decision was found by a federal court to be a compensable taking,[182] *Diamond* demonstrates that the state *Sotomura* decision has not been abandoned by the Hawai'i Supreme Court.[183] Although

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[177] PASH's late Jerry Rothstein used the tag "administrative erosion" to refer to administrative decisions that, directly or indirectly, restrict public coastal access. Surfrider Foundation, State of the Beach Report 2006, http://www.surfrider.org/stateofthebeach/05-sr/index.asp (follow "Hawaii" hyperlink; then follow "Beach Access" hyperlink) (last visited Feb. 2, 2007).

[178] *See* McNarie, *supra* note 76 (quoting PASH founder Jerry Rothstein for the contention that improper shoreline certifications can lead to legal but potentially destructive seawalls).

[179] *See, e.g.*, inversecondemnation.com, http://www.inversecondemnation.com (Oct. 28, 2006).

[180] *See* inversecondemnation.com, http://www.inversecondemnation.com (Oct. 25, 28, 2006).

[181] Public beach users are not likely to heed legal details of where private property ends and public beach begins. Repeated references to "beach access" by the local press during the coverage of *Diamond* made it even more likely that the public will assert its rights to the beachfront. *See, e.g.*, TenBruggencate, *supra* note 117.

[182] *See* Sotomura v. County of Hawai'i, 460 F. Supp. 473 (D. Haw. 1978). *But see* Sullivan, *supra* note 23, at 130. Sullivan states:

> The *Sotomura* [federal] case was not appealed by the State of Hawai'i. It therefore stands today to cast continuing doubt not only on the constitutional validity of the Hawai'i Supreme Court's decisions both in *Sotomura* and it's predecessor, *Ashford*, but on the manner in which the Hawai'i Supreme Court applied 'tradition, custom, and usage' as a source of law.

*Id.* Note that the state *did* attempt to appeal the district court's decision, but the appeal was dismissed because it was not filed in a timely manner. *See* Sotomura v. County of Hawai'i, 679 F.2d 152 (9th Cir. 1982).

[183] The *Sotomura* federal case is not the final word on the federal court's acceptance of the *Ashford* shoreline. For example, in Napeahi v. Paty, 921 F.2d 897, 901-903 (9th Cir. 1990), the court found "ample basis" to accept the trial court's determination that an "along the sea" boundary was located in a manner consistent with *Ashford*, and remanded the case for a determination of whether the land in question was submerged "within the meaning of *Ashford* [and] *Sotomura*."

CZMA setback issues do not raise the same specter of unconstitutional taking as seaward boundary cases,[184] it is still difficult to understand why the court would drift from *Diamond*'s *Sotomura*-based principles next time it is required to decide the location of a seaward boundary.

Whether *Diamond* is applied in this manner or not, one thing is clear: Justice Marumoto's prediction that *Ashford* would "'count for the future'" continues to ring true.[185] It is unlikely that the issue of shoreline location will go away soon. Just as coastal property derives its value in part from its scarcity, one can assume that the public's interest in staking a claim to beach areas will only increase as dwindling beaches are sought out by an increasing population.

### *A. Departure from Common Law*

Conceptually, *Ashford*'s departure from the common law's MHW shoreline definition can be troubling.[186] However, Hawai'i is not alone in departing from the common law in the practical determination of the shoreline.[187] It has been argued that the difficulty in establishing clear and consistent shoreline boundaries has led to the general practice of determining the scope of beach access "more by past practice . . . than by the constitutional, statutory, or case law of the [s]tate."[188]

The wave-pounded shores of Hawai'i dramatically alter the context in which *Ashford* was decided. Hawai'i differs from many common law jurisdictions in its physical setting. In England, where the mean high water ("MHW") definition of the shoreline developed, the tide can vary by more than fifteen vertical feet,[189] and many multiples of that horizontally.[190] In contrast, Hawai'i's shores are characterized by small tidal fluctuations (typically one to two feet)[191] overshadowed by seasonally large surf (often reaching more than

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[184] *See generally* Hwang, *supra* note 48.

[185] *In re* Ashford 50 Haw. 314, 318 n.1, 440 P.2d 76, 78 n.1 (1968) (Marumoto, J., dissenting) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 165-66 (1921)).

[186] *See* Sullivan, *supra* note 23, at 125-28.

[187] *See generally* Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 OCEAN & COASTAL L.J. 47 (2005/2006).

[188] *Id.* at 48.

[189] *See, e.g.*, BBC Weather Tide Tables, http://www.bbc.co.uk/weather/coast/tides/ (last visited Feb. 2, 2007).

[190] The horizontal amplification of these large tidal variations is striking. In Blackpool, England, the tide creates an approximately half-mile ebb twice a day. *See, e.g.*, Blackpool Tourist Info, http://www.blackpool.com/tourist.html (last visited Feb. 2, 2007).

[191] *See, e.g.*, *Ashford*, 50 Haw. at 335, 440 P.2d at 89 (Marumoto, J., dissenting) (citing Halstead v. Gay, 7 Haw. 587, 587 (1889)).

thirty vertical feet). It thus seems natural and sensible that the shoreline in Hawai'i is defined by waves, rather than tides.[192] As *Sotomura* illustrates, *Ashford* should not be understood simply as a customary usage decision based on the practices of surveyors at the time of the Mahele, but rather as recognition of a traditional practice that protected public beach access.[193] While dissenting Justice Marumoto took little interest in such "hoary" traditions,[194] a strong public trust doctrine breathes new life into this aspect of the *Ashford* decision.[195]

In a slightly more practical sense, the definition can be troubling in other ways. Its imprecision creates room for bias, which can arise from any number of pecuniary, moral, or political motivations.[196] However, room for bias is not unique to Hawai'i's shoreline definition. Even if a "fixed" shoreline reference, such as the MHW mark, is used, the shoreline will remain ambulatory because the intersection of that fixed reference and the shore will move with erosion, accretion, avulsion, and lava deposition.[197] Furthermore, a surveyor's determination of the shoreline, even when located against a fixed reference, is inherently uncertain and courts have recognized this fact.[198] In this light, imprecision in the location of the shoreline becomes primarily an issue of proof that is common to all shoreline location disputes (albeit one that can be especially difficult to resolve in coastal settings).[199] This issue of proof

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[192] *But see* BRUCE S. FLUSHMAN, WATER BOUNDARIES 95 (2002) (finding it remarkable that the civil law and common law systems developed "similar rules of law for determining the effect of the dynamics of shoreline movement on adjacent property boundaries," despite the fact that the English coast is "battered" by the open ocean, while the Mediterranean Sea is "relatively calm and tideless").

[193] *See* County of Hawai'i v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973).

[194] *Ashford*, 50 Haw. at 330, 440 P.2d at 86 (Marumoto, J., dissenting) ("The effect of [the state's *kama'aina* witness] testimony is that throughout the Hawaiian kingdom, by tradition and custom, dating from the hoary past, vegetation line was the seaward limit of private title to oceanside lands and below that line was the seashore or beach which belonged to the public.").

[195] *Cf.* Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 650 (1989) (contending that once the public gains beach access by an easement, by custom, or otherwise, it is protected by the public trust doctrine).

[196] SHORELINE REPORT, *supra* note 22, at 3 (noting room for bias in interpreting the shoreline definition).

[197] *See, e.g.*, Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 224-25 (1974).

[198] *See* BRUCE S. FLUSHMAN, WATER BOUNDARIES 140 (2002) ("'We recognize that Dr. []'s opinion is not free from doubt, but there are many cases in which certainty is unobtainable. No closed-circuit television camera keeps sentinel over the weathered shores . . . .'" (quoting Alexander Hamilton Life Ins. Co. v. Virgin Islands, 757 F.2d 534, 543 (3d Cir. 1985))).

[199] *Id.* ("'Dr. [] has the status of an expert because he has knowledge, training, and experience in his calling, and he is thereby privileged to express an opinion . . . . This opinion need not be categorical in order to merit reliance; rather, in the context of a civil case, it simply

emphasizes the importance in the practical details of the way in which the shoreline is located.

### *B. When Is the Shoreline Determined?*

The *Diamond* court did not explicitly address a shortcoming of the BLNR's position during Stephens's certifications: *when* does wave run-up define the upper reach of the wash of the waves? By refocusing the shoreline on the upper reach of the wash of the waves, a highly time-dependent variable, the court made this "when?" question much more important to the shoreline certification process.

The BLNR identified *naupaka* as an "ideal indicator of the upper wash of the waves because of its salt tolerance and ability to withstand *occasional* salt water inundation, such as may be found in storm *or other unusually high wave conditions*, while not surviving if constantly inundated or subjected to ripping or undermining by wave action."[200] These references to "occasional" inundation and "other unusually high wave conditions" demonstrate the BLNR's failure to fully acknowledge the definition's mandate to examine the upper reach of the wash of the waves *during the season* in which the waves are highest.[201] The plain language of the definition thus calls for neither "constant" inundation nor "unusually high wave[s]," but rather recognizes that the waves used to determine the shoreline can occur seasonally and creates specific exceptions for unusually high run-up caused by "seismic or storm waves."[202] During the period between Hashimoto's October 2001 site visit (rejecting the *naupaka*), and his May 2002 site visit (accepting the *naupaka*), there were only two named storms in the Eastern Pacific, and neither created unusually high wave run-up on the north shore of Kauai.[203] Similarly, there

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must be sufficiently persuasive to convince a trier of fact . . . .'" (quoting Alexander Hamilton Life Ins. Co. v. Virgin Islands, 757 F.2d 534, 543 (3d Cir. 1985))).

[200] Diamond v. State, 112 Hawai'i 161, 166, 145 P.3d 704, 709 (2006) (emphasis added).

[201] *See id.*

[202] HAW. REV. STAT. § 205A-1 (2001) ("'Shoreline' means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.").

[203] *See* National Hurricane Center, 2001 East Pacific Hurricane Archive, Tropical Cyclone Report: Hurricane Narda, http://www.nhc.noaa.gov/2001narda.html (last visited Feb. 2, 2007); National Hurricane Center, *supra*, at Tropical Cyclone Report: Hurricane Octave, http://www.nhc.noaa.gov/2001octave.html (last visited Feb. 2, 2007). Neither statute, case law, nor administrative materials clarify what qualifies as a "storm wave", but licensed surveyor Pat Cummins reported that the BLNR's policy as understood by surveyors refers to named storms. Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

were no reported tsunamis affecting Kauai during this period. Thus, wave run-up between the two site visits was the result of seasonally high waves of the type apparently contemplated by plain language chosen by the legislature,[204] when it turned to the wash of the waves "during the season of the year in which the highest wash of the waves occurs" to define the shoreline.[205]

Diamond and Bronstein's position on the issue of when wave run-up defines the shoreline called for the shoreline to be located at the "annually recurring highest reach of the highest wash of the waves."[206] Although the court rejected the BLNR's position that waves that wash *mauka* of the vegetation line do not define the shoreline, neither did it explicitly endorse Diamond and Bronstein's position. This leaves for another day a determination of which waves will determine the shoreline, and which waves are included within the scope of the term "seismic or storm waves."

### *C. Who Determines the Shoreline?*

*Diamond* also did not address another question that can arise in shoreline determination: *who* determines the shoreline? This is closely related to the thorny issue of enforcement.

Clearly, surveyors are particularly important to the shoreline determinations. This importance is magnified by the rule that surveyors' findings can be granted a presumption of competence by the courts.[207] Locating the shoreline, however, can require understanding of lines of evidence that do not fall within the typical province of a surveyor's expertise.[208] *Diamond* requires that a surveyor distinguish naturally-rooted vegetation from "artificial" vegetation, and BLNR policy apparently requires that he or she spot salt-tolerant

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[204] *Cf. Diamond*, 112 Hawai'i at 172, 145 P.3d at 715 (applying plain language statutory construction to "ascertain the effect of the intention of the legislature") (citing Peterson v. Hawaiian Elec. Light Co., Inc. 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997)).

[205] HAW. REV. STAT. § 205A-1 (2001).

[206] *Diamond*, 112 Hawai'i at 173, 145 P.3d at 716.

[207] *See* Hudson v. Erickson, 216 P.2d 379, 383 (Wyo. 1950) ("'In the case of official surveys, it will always be presumed that the surveyor did his duty, and that his work was accurate.'") (quoting 11 C.J.S. *Boundaries* § 104, at 692)). *See generally* Hamann & Wade, *supra* note 30, at 391.

[208] *C.f.* Tara Godvin, *More Science Urged to Decide Definition of State's Shoreline*, HONOLULU ADVERTISER, Mar. 10, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/Mar/10/ln/FP603100372.html (reporting that BLNR Chairperson Peter Young was "uncomfortable with surveyors being the only ones in the field charting the shoreline, which prompted him to bring the University of Hawai'i in on the process"). The need for experts in other fields led the DLNR to have non-surveyors assist during shoreline certification site inspections. *See* Young, *supra* note 84 ("The inspections are made to get evidence and consider all aspects of the coastline that could affect the location of the shoreline (i.e. evidence of dunes, debris, vegetation, etc.).").

species.[209] It is nonsensical to grant all surveyors a special presumption of botanical expertise, or special knowledge of seasonal wave statistics.

It is clear that public input is important to shoreline determinations. *Kama'aina* testimony gives the public a recognized voice in seaward boundary determinations.[210] Similarly, the rules allowing for public comment on shoreline certifications, along with the discretion given to the state surveyor to allow consultation during site visits,[211] makes "[p]ublic input invaluable in the shoreline review process."[212] Public participation is not limited to formal shoreline certifications; remember that Caren Diamond photographed Carl Stephens' landscaping efforts years before his first shoreline certification application.[213]

In enforcement terms, public participation is common and valuable in environmental regulation.[214] The primary benefit of community participation is that it widens the scope of detection, providing a cost-effective way to deter violators who may be able to otherwise avoid close government oversight.[215] The benefits of this public input are not limitless, however. The public cannot be expected to have the same technical skills as the state surveyor and coastal specialists,[216] and unless they are allowed by the state surveyor to participate in a site visit, will not be granted access to private property.

Although public participation creates an economic benefit to government agencies such as the DLNR, these public resources are limited. Note that

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[209] *See* ATTA ET AL., *supra* note 86, at slide 17 (slide titled "Shoreline Certification Salt-Tolerant Vegetation" depicts several salt-tolerant species).

[210] *See, e.g., In re* Ashford, 50 Haw. 314, 316-17, 440 P.2d 76, 78 (1968); *see also In re* Boundaries of Pulehunui, 4 Haw. 239 (1879) (allowing *kama'aina* testimony on the location of ancient Hawaiian land boundaries).

[211] *See* HAW. ADMIN. R. § 13-222-12(c) (1988) (defining public comment period); *see also* HAW. REV. STAT. § 205A-42(b) (2001) (creating public comment period); *see, e.g., Diamond*, 112 Hawai'i 161, 145 P.3d 704 (noting that Caren Diamond accompanied the state surveyor on site visit).

[212] *See* Press Release, Haw. Dep't of Accounting and General Servs., DAGS Offers New Online Access to Subdivision and Shoreline Maps (Sept. 13, 2006) (on file with author), *available at* http://www.hawaii.gov/dags/news-releases/dags-offers-new-online-access-to-subdivision-and-shoreline-maps ("Public input is invaluable in the shoreline review process and the new webpage facilitates participation in that process.").

[213] *See* Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 2, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[214] *See* David Kimo Frankel, *Enforcement of Environmental Laws in Hawai'i*, 16 U. HAW. L. REV. 85, 108-09 (1994); U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 180 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/welcome.html.

[215] *See generally* Frankel, *supra* note 214, at 108-09. This widened detection net may be especially helpful in Hawai'i. It is difficult to imagine that the DLNR's Division of Conservation and Resources Enforcement has resources available to dedicate enough officers to monitor *every* shorefront property for the propagation of vegetation *makai* of the property line.

[216] *See id.* at 109.

Caren Diamond's co-plaintiff, Harold Bronstein, was also her attorney and neighbor.[217] Without this sort of fortunate association, it seems far less likely that Ms. Diamond could have mounted a "successful" challenge to Stephens' shoreline certification.[218] Even where public participation is focused and organized, it can be difficult to successfully recruit and maintain enough volunteers.[219] Unlike some models of environmental regulation, public input in shoreline determinations does not offer a monetary reward that can be used to create community interest.[220]

If the shoreline determination process is to rely on public input, community interest is vital. However, this model presupposes an informed, active, and aware community, which may not always be the case. The 2004 U.S. Ocean Commission concluded that "the American public feels little sense of urgency for safeguarding our coastal and ocean resources."[221] While the Hawaiian community may be more active and knowledgeable about shoreline issues than the general American public, a system that relies too heavily on this assumption risks lax enforcement that is likely to result in future conflicts between public and private land owners.

For private property owners, public input adds yet another layer to what is already a time-consuming, multi-jurisdictional process.[222] Carl Stephens was required to wait through five appeals and nearly three years before he could build on his property,[223] which he eventually sold because of the headache of

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[217] *See, e.g.*, Joan Conrow, *Over the Hedge*, HONOLULU WEEKLY, Dec. 13-19, 2006, at 7, *available at* http://honoluluweekly.com/cover/2006/12/over-the-hedge/.

[218] Whether the challenge was successful is a matter of perspective. Stephens was granted his shoreline certification, and the property was developed, despite Diamond and Bronstein's victory before the Hawai'i Supreme Court. *See, e.g.*, TenBruggencate, *supra* note 117.

[219] For example, PASH encountered this problem in its shoreline monitoring efforts. *See, e.g.*, McNarie, *supra* note 76 (PASH founder Jerry Rothstein calling for more public participation).

[220] *Cf.* Frankel, *supra* note 214, at 108 (describing several environmental regulation schemes that include monetary rewards for public participation).

[221] U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 242 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf. The commission states:

> While the public has a general sense that the ocean is important, most people lack a full awareness and understanding of the ocean, its health, the benefits it provides, and its connection to the nation's collective well-being. This information gap is a significant obstacle in achieving responsible use of our nation's ocean and coastal resources, empowering public involvement in ocean-related decision making, and realizing support for wise investments in, and management of, ocean-related activities.

*Id.*

[222] For a discussion of how shoreline certification fits into the larger scheme of permitting and regulation in coastal areas, see generally COASTAL EROSION, *supra* note 170, at 21.

[223] *See* Answering Brief of Defendant-Appellee at 3, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

the process.[224] Even a less contested shoreline certification is likely to take far more time than the forty-five to sixty days suggested by the DNLR.[225]

Jurisdictional division of the shoreline area can also complicate the process; while beaches are managed by the State, dunes are managed by the counties. Similarly, while the State determines the shoreline as a baseline for setback, the actual setback distance and permitting process is governed by the counties.[226] For some developments, federal jurisdiction adds yet another layer to this process. While the State controls submerged lands seaward of the shoreline to the limit of its jurisdiction,[227] federal regulations can apply to navigable waters seaward of the MHW mark,[228] requiring developments that alter those waters to seek U.S. Army Corps of Engineers approval.[229]

It is unlikely that Carl Stephens is the only property owner to find these processes burdensome and frustrating. This frustration is compounded when one recognizes that it is very difficult to "win" a litigated shoreline dispute. Stephens sold his property rather than wait through the appeals process for his building permit, and Caren Diamond and her neighbors were not able to stop the property from being developed in what they contended was the no-build setback.[230] In essence, both parties lost.

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[224] *See* TenBruggencate, *supra* note 117. Carl Stephens lamented that "[y]ou get the shoreline certified, and they appeal it, and by the time you go through the protests, your certification expires and you have to start over. My place is now being built, but I've since sold it. I was just tired of it." *Id.*

[225] In practice, the process takes a minimum of three to five months. *See* Posting of Sat K. Freedman to Damon Key Leong Kupchak Hastert Articles Blog, http://www.hawaiilawyer.com/pubs/skf_shorelines_9_2006.htm (Sept. 4, 2006). Three to five months is much longer than the forty-five to sixty days suggested by the DLNR's Customer Support website. Haw. Dep't of Land and Natural Res., Customer Support Site, http://hawaiideptland.custhelp.com (search "Will I need a shoreline certification to subdivide my beachfront property") (last visited Feb. 2, 2007).

[226] *See* HAW. REV. STAT. § 205A-43 (2001) (creating a minimum setback of twenty feet, and a maximum of forty feet).

[227] *See, e.g.*, 43 U.S.C. § 1312 (2005).

[228] *See, e.g.*, 43 U.S.C. § 1311(d) (2005).

[229] *See, e.g.*, 33 U.S.C. § 403 (2005) (prohibiting the alteration of navigable waters without a U.S. Army Corp. of Engineers' permit); *see also* 33 U.S.C. § 1344 (2005) (prohibiting discharge of dredged materials into U.S. waters). *See generally* COASTAL EROSION, *supra* note 170, at 17.

[230] *See, e.g.*, TenBruggencate, *supra* note 117.

## VI. CONCLUSION—*HO'OLAULIMA*—MANY HANDS WORKING TOGETHER[231]

Given the strong interests involved, disputes over the shoreline are inevitable. The dynamic nature of the shore makes these disputes complex, and calls for an organic approach to its use, development, and regulation.

The clearest lesson that can be drawn from *Diamond* is that although Hawai'i's shoreline definition is simple, its interpretation and implementation are not. Relying on the court to provide direction in specific cases is an inefficient method of solving shoreline disputes, and it can be difficult to determine the impact of court guidance on future shoreline determinations. In accord with its desire to clarify the issue,[232] the Legislature should repeatedly reaffirm the policy of preserving the public's interest in the shoreline, and ensure adequate funding for the DLNR to continue to develop, implement, and enforce an improved shoreline determination process. The process must effectuate the public's right to beach access, but in a manner that is reasonably predictable and fair to property owners.[233]

One should not expect that formal legal solutions—a regulation here, a court decision there—can quiet shoreline disputes in one fell swoop. Instead, this legal world merely provides a framework for people to find a way to share a

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[231] The authors recognize COASTAL EROSION, *supra* note 170, at 16, as a source that recognizes the native Hawaiian concept that resolution of divisive coastal issues can be facilitated by "*Ho'olaulima*" or "many hands working together."

> Solutions to the apparent conflict of landowner expectations on retreating coastlines subject to coastal hazards, are not easy, they are not cheap, and they will require that all parties come to the table willing to define levels of acceptable change to past practices of coastal use. Parties with aspirations to conflict, to place blame, and guided by distrust, will achieve only dissension, discord, and ultimately failure. The result will be continued beach loss. Parties with the intention to compromise, to reach understanding, and to work in the spirit of achievement and accomplishment will promote the ability of this generation to pass on a healthy and viable coastal environment to our children and grandchildren.

*Id.*

[232] Diamond v. State, 112 Hawai'i 161, 173, 145 P.3d 704, 716 (2006) (citing STAND. COMM. REP. NO. 550-86 [1986], *reprinted in* 1986 HAW. HOUSE J., at 1244).

[233] One way of encouraging healthy public discourse on the BLNR's interpretation of the definition is to make its interpretation of the definition more accessible, perhaps by publishing it in administrative rules. *See* HAW. REV. STAT. § 91-3 (Supp. 2006) (requiring public discussion prior to enactment of administrative rules). The BLNR should note the rising tide of ecology-based management, an approach that has moved from the province of environmentalists into the public eye, and is sure to call for heightened protection of threatened areas of the shoreline. For an example of ecology-based management principles reaching the general public, see generally Joel K. Bourne, *Loving Our Coasts to Death*, NATIONAL GEOGRAPHIC, July 2006, at 64-87. *See also* COASTAL EROSION, *supra* note 170, at 15 (beach and dune loss affects ecosystems).

valuable Hawaiian resource. This sharing is the essence of *aloha*, as it is embodied in Hawaiian law.[234]

Like Chief Justice Richardson in *Ashford*, public and private property owners alike should fundamentally shift their shoreline frame of reference away from typical notions of property and boundaries. To accept the notion of an imprecise, fuzzy, and shared shoreline is to accept that all parties must enter the shoreline arena prepared to share its benefits *and* its risks.[235]

For private property owners, who already accept and pay for the physical risks associated with coastal property,[236] it is important to recognize the strong public interest in preserving access to beaches, and accept the likelihood that regulation will limit their autonomy with respect to the use and development of their land.[237] As *Diamond* illustrates, fighting this likelihood through litigation is merely an expensive way of publicizing a threatened right of beach access. For the public, it is important to recognize the special value that property owners attach to their coastal homes, and avoid the perception that regulation is being used as a substitute for taking private property.

Simeon L. Vance[238] & Richard J. Wallsgrove[239]

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[234] *See, e.g.*, HAW. REV. STAT. § 5-7.5 (1993) ("'Aloha' means mutual regard and affection and extends warmth in caring with no obligation in return. 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence.") For one perspective on how this spirit of aloha is manifested in Hawaiian property law, see Posting of Prof. Alfred L. Brophy to PropertyProf Blog, http:// http://lawprofessors.typepad.com/property/2006/04/aloha_jurisprud.html (Apr. 18, 2006).

[235] An illustration of the effects and risks of a dynamic shoreline is the fact that title insurers are likely to specifically exempt their policies from shoreline determinations. Interview with John Jubinsky, Gen. Counsel, Title Guaranty of Hawai'i Inc., in Honolulu, Haw. (Oct. 20, 2006) ("[The shoreline] [l]iterally is a moving boundary . . . . It is where it is.").

[236] For an overview of the risks associated with owning coastal property, see generally DOLAN EVERSOLE & ZOE NORCROSS-NU'U, UNIV. OF HAWAI'I SEA GRANT COLLEGE PROGRAM, NATURAL HAZARD CONSIDERATIONS FOR PURCHASING COASTAL REAL ESTATE IN HAWAI'I, Aug. 2006, *available at* http://www.hawaii.gov/dlnr/occl/files/Purchasing%20Coastal%20Real%20Estate.pdf.

[237] This concept is analogous to the limits placed on owners of historically important buildings. *Cf., e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

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# When Nobody Asks: The Toxic Legacy of Oahu's Pineapple Lands

## I. INTRODUCTION

Pineapple has been grown on the island of Oahu for more than 100 years.[1] In that time, the pineapple industry has employed numerous chemicals to protect pineapple plants from insects, weeds, fungus, and disease.[2] Other chemicals were also applied to nourish the soils, when, inevitably, their quality degraded as a single crop was grown intensively on the same property year after year.[3]

The particular chemicals used by the pineapple farmers, and the agricultural industry at large, had to change over the years as information became available about the dangerous side effects those chemicals presented to human health, the natural environment, and the food chain.[4] Today, chemical fertilizers and pesticides are used less in agricultural production than they used to be,[5] and the chemicals available are under more scrutiny than they have ever been.[6]

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[1] Dan Nakaso & Will Hoover, *Del Monte Quits Pineapple Here*, HONOLULU ADVERTISER, Feb. 2, 2006, at A1 ("Del Monte's presence in the Islands began in 1902 when its predecessor, California Packing Corp., began growing pineapples in Wahiawa.").

[2] *See generally infra* Part II.

[3] *See* Nancy M. Trautmann et al., *Modern Agriculture: Its Effects on the Environment*, 1985 CORNELL COOPERATIVE EXTENSION, *available at* http://pmep.cce.cornell.edu/facts-slides-self/facts/mod-ag-grw85.html (last visited Feb. 7, 2007) ("[I]ntensive agriculture can impair soil quality by depleting the natural supplies of trace elements and organic matter." When "diversity is replaced by a single species grown year after year, some trace elements are depleted if not replaced by fertilization."); *see infra* Part II.

[4] *See infra* Part II.A. The Environmental Protection Agency ("EPA") acknowledges the history of widespread legal use of dangerous chemicals. U.S. ENVTL. PROT. AGENCY, PESTICIDES: HEALTH AND SAFETY, PESTICIDES AND FOOD, HOW THE GOVERNMENT REGULATES PESTICIDES, http://www.epa.gov/pesticides/food/govt.htm (last visited Feb. 3, 2007) ("Recognizing pesticides registered in the past may not meet today's current safety standards, EPA is reviewing and reregistering older pesticides, taking action to reduce risks where appropriate.").

[5] An October 2002 report by the University of Hawai'i at Manoa College of Tropical Agriculture and Human Resources noted that the practice of the pineapple production industry at the time was "to apply only the minimum amount of pesticide required to achieve control, to wait as long as possible between applications, and to minimize the number of applications." DUANE P. BARTHOLOMEW ET AL., UNIV. OF HAW. AT MANOA, PINEAPPLE CULTIVATION IN HAWAI'I, FRUITS AND NUTS 1 (2002), http://www.ctahr.hawaii.edu/oc/freepubs/pdf/F_N-7.pdf. This approach aimed to "reduce environmental and health risks while ensuring adequate control of pests and maximum economic benefit." *Id.*

[6] The EPA is now reregistering pesticides "to ensure that older pesticides meet current safety standards." U.S. ENVTL. PROT. AGENCY, PESTICIDES: REGULATING PESTICIDES, REVIEWING SAFETY OF OLDER PESTICIDES, http://www.epa.gov/pesticides/regulating/index.htm#review (last visited Feb. 3, 2007).

Despite this, many agricultural chemicals were widely used before they were eventually banned for being too dangerous for continued use.[7]

The soil of agricultural land represents a mixed history of chemicals that are harmless, were once considered harmless, or are considered harmless for now. For land that continues to cultivate crops, this history is considered acceptable, but what about land that will become homes and playgrounds?

Weed and insect controls commonly used to grow pineapple and other crops have been found in the groundwater of some California communities more than twenty years after use of the chemicals stopped.[8] The same chemicals were also applied to land used to grow pineapple on Oahu.[9] Much of that same land has been and continues to be transformed into residential neighborhoods, as landowners have discovered that growing houses can be much more profitable than growing pineapple.[10] The question one might ask is: How safe is it to put a house in a pineapple field? What are the risks to human health that lie under the soil of a particular field? At present, it is impossible to answer these questions. In Hawai'i, land that has been contaminated by chemicals used in pineapple production can be reclassified and sold for use as homes, schools, and playgrounds without requiring landowners to prove that the land is safe or free from dangerous contamination.

How can this be? The main reason these landowners do not have to prove the land is safe from contamination is that no one is asking them to do it. In enacting sweeping exemptions for crop cultivation activities,[11] federal and state legislators did not anticipate the large-scale transformation of agricultural lands to residential housing that many parts of Hawai'i and other former

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> Changes to the way a pesticide is used may be necesasry [sic] to protect consumers, workers or the environment. EPA is also in the process of reassessing tolerances (maximum residue limits) for pesticides on food. In conducting these reassessments, EPA places special consideration on potential exposure risks to chidren [sic] who may be more vulnerable to risks from pesticides.

*Id.*

[7] *See infra* Part II.A.

[8] *See* ENVTL. WORKING GROUP, TAP WATER IN 38 CENT. CAL. CITIES TAINTED WITH BANNED PESTICIDE—SOME BOTTLE-FED INFANTS MAY EXCEED 'SAFE' DOSE BEFORE AGE 1 (1999), http://www.ewg.org/reports_content/dbcp/dbcp.pdf (last visited Feb. 7, 2007) [hereinafter EWG TAP WATER].

[9] *See* County of Maui Dep't of Water Supply, Hamakuapoko Wells, http://mauiwater.org/hpoko.html (last visited Feb. 3, 2007) [hereinafter Hamakuapoko Wells]; Clark C.K. Liu, Fate and Transport of Chemicals in Soils, http://www.eng.hawaii.edu/~liu/Chem%20Trans%20in%20Soil/Chemical%20Trans%20in%20Soil.html (last visited Feb. 3, 2007).

[10] *See generally infra* note 12.

[11] *See infra* Part II.B.

farming communities have seen.[12] This major shift in land use raises questions about the appropriate use of land over time and the public health and safety risks not currently contemplated by Hawai'i land use law.

This Note reviews Hawai'i's current process for changing land from agricultural use to residential use and identifies the gaps in the current process that are exposing the public to an accumulation of unmonitored and unregulated toxins. Part II identifies and discusses toxins used on pineapple lands in Hawai'i, the health threats those toxins pose, and the lack of regulation of those chemicals when used for crop cultivation. Part III describes the land use regulation framework in Hawai'i at the state and county levels and discusses how that framework does not take into consideration the possible contamination of crop lands when approving land use changes. Part IV explores the possible adjustments that could be made to the land use change process to ensure proper evaluation of agricultural lands before they could be used for anything other than agriculture. This Note suggests that the most effective change to this process would be to require the State Land Use Commission ("LUC")[13] to request a showing of proof that no unsafe levels of toxins exist on agricultural lands before reclassifying those lands. The health risks created by the toxic legacy of Hawai'i's pineapple lands could be drastically reduced by requiring the LUC to consider the potential effects on public health that proposed agricultural land use changes present. This could be accomplished by adding the phrase "preservation and maintenance of the public health" to the current decision-making criteria used by the LUC in evaluating petitions for land reclassification.[14]

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[12] On Oahu, more than 2,300 acres of land zoned for agriculture were rezoned for urban use between 2000 and 2005. *See* DEP'T OF PLANNING AND PERMITTING, ANNUAL REPORTS FOR FISCAL YEARS 2000, 2002-2005, *available at* http://honoluludpp.org/planning/DevPlanLandUseAnnual.asp (FY 2000, Table IV-2; FY 2002, Table III-1; FY 2004, Table III-1; FY 2005, Table III-1). Across the state, more than 25,000 acres of land have been reclassified from the Agricultural district between 1969 and 2005. *See* DEP'T OF BUSINESS, ECONOMIC DEV. & TOURISM, 2005 STATE OF HAWAII DATA BOOK, *available at* http://www.hawaii.gov/dbedt/info/economic/databook/db2005/section06.xls (Table 6.03—Estimated Acreage Of Land Use Districts: 1969 To 2005). Between 1994 and 1998 alone, 4,759 single family and duplex dwellings were built on Oahu. *See id.*

[13] The nine-member Land Use Commission ("LUC") is responsible for approving reclassification requests for all land parcels of fifteen acres or greater currently classified as agricultural, rural or urban. *See* HAW. REV. STAT. §§ 205-1, 205-3.1 (2001).

[14] This addition would require an amendment to the statute (HAW. REV. STAT. § 205-17 (2001)) and to the administrative rule (HAW. ADMIN R. §15-15-77 (1999)), which define the LUC decision-making criteria for boundary amendment petitions. *See infra* Parts II.A, IV.D.

## II. THE LEGACY OF PINEAPPLE LANDS

Imagine a hypothetical Oahu couple—the Kobayashis. While in their mid-thirties, the Kobayashis decide to purchase their first home, a three-bedroom house in a new subdivision in Wahiawa. Although the house and half-acre lot will mean a higher monthly housing expense, the Kobayashis decide the expense is worthwhile because they have always wanted enough space for a garden and a swing set for their kids. As an added benefit, the new house is within walking distance of a new elementary school. With the cost of housing often putting homeownership out of reach for local families,[15] the Kobayashis decide that this new house is everything they had been looking for.

What the Kobayashis (and other unsuspecting new homeowners) will not realize is that the land their new house sits on had been used to intensively grow pineapple for more than sixty years. During that time, chemical fertilizers,[16] herbicides,[17] insecticides,[18] nematicides,[19] and fungicides[20] (including chemicals that are now banned by the Environmental Protection Agency ("EPA"), such as DBCP[21] and TCP[22]) were regularly and legally

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[15] A January 2006 report by the Joint Legislative Housing and Homeless Task Force estimated that 32,580 housing units would need to be built on Oahu by 2009, and 21,890 of those units would be needed by households earning less than $54,250 per year for a family of four. James Gonser, *No Quick Fix Seen for Rentals Shortage*, HONOLULU ADVERTISER, Feb. 27, 2006, at A1.

[16] Pineapple has high requirements for fertilizer nitrogen, potassium, and iron. DUANE P. BARTHOLOMEW ET AL., *supra* note 5, at 7. Fertilizers are applied to pineapple crops before planting and as often as every two weeks after the crop has been planted. *See id.* at 1, 7, 8.

[17] To control weeds, herbicides may be applied to pineapple as a spray "immediately after planting and at later stages during the crop cycle." *Id.* at 7.

[18] Pineapples are susceptible to insect pests such as scales, thrips, mites, and mealybugs. *See id.* at 8. Insecticides may be applied to pineapple crops prior to planting and after planting through broadcast or spot application. *See id.* at 1.

[19] According to the U.S. Department of Agriculture ("USDA"), two kinds of nematodes infest "nearly all fields" in pineapple production in Hawai'i. U.S. DEP'T OF AGRIC., CROP PROFILE FOR PINEAPPLES IN HAWAII (2000), http://pestdata.ncsu.edu/cropprofiles/docs/hipineapples.html [hereinafter CROP PROFILE]. In 2000, there were ten products registered for nematode control for pineapple in Hawai'i, and those products, or nematicides, were the largest (by weight) category of pesticides used in pineapple cropping. *Id.* Nematicides are applied to the soil prior to planting the pineapple crop using soil fumigants to protect the root system from disease. *See* BARTHOLOMEW ET AL., *supra* note 5, at 2.

[20] "Fungicides are used to control diseases primarily associated with root and butt rots" in pineapple. CROP PROFILE, *supra* note 19. In 2000, eight chemical products were registered for use as fungicides on pineapple in Hawai'i. *Id.* Fungicides are applied as a dip to the crowns of the pineapples before they are planted. *Id.* Chemical fungicides may also be applied as a spray after planting. *See* BARTHOLOMEW ET AL., *supra* note 5, at 1.

[21] 1,2-Dibromo-3-chloropropane ("DBCP") was used in the past as a soil fumigant and nematocide on crops, including pineapple. U.S. ENVTL. PROT. AGENCY, 1,2-DIBROMO-3-

applied to the land that has become their new house lot. Some of these chemicals can persist in the soil and groundwater for years.[23]

While the planning and permitting for this new subdivision dragged on, pineapple cultivation continued until six months before construction began for the housing development. Chemicals such as atrazine, bromacil, and hexazinone are still widely used in pineapple production and have been found in groundwater sources on Oahu and Maui.[24] These new chemicals were

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CHLOROPROPANE (DBCP), http://www.epa.gov/ttn/atw/hlthef/dibromo-.html (last visited Feb. 3, 2007) [hereinafter EPA DBCP]. The EPA has identified DBCP as a probable human carcinogen. *Id.* The potential health risks associated with DBCP include "cancer, developmental toxicity, endocrine toxicity, gastrointestinal or liver toxicity, kidney toxicity, neurotoxicity, reproductive toxicity, respiratory toxicity, and skin sensitivity." ENVTL. WORKING GROUP, NAT'L CONTAMINANT REPORT FOR 1,2 DIBROMO-3-CHLOROPROPANE (DBCP), http://www.ewg.org/tapwater/contaminants/contaminant.php?contamcode=2931 (last visited Feb. 3, 2007) [hereinafter EWG DBCP].

From 1977 to 1979, the EPA suspended the registration of all pesticides containing DBCP except for those used on pineapples in Hawai'i. *See* EPA DBCP, *supra*. DBCP was used on pineapple in Hawai'i until 1984. *See* Hamakuapoko Wells, *supra* note 9. DBCP has been detected in water wells in Hawai'i, as well as California, Florida, Alabama, South Carolina, Kentucky, Arizona, New York, Illinois, North Carolina, Indiana, and New Jersey. *Id.*

[22] TCP or 1,2,3-trichloropropane is a chemical structurally related to DBCP and was also used to fumigate the soil in pineapple fields. *See* Hamakuapoko Wells, *supra* note 9. The potential health risks associated with 1,2,3-Trichloropropane include "cancer, cardiovascular or blood toxicity, gastrointestinal or liver toxicity, kidney toxicity, neurotoxicity, reproductive toxicity, and respiratory toxicity." ENVTL. WORKING GROUP, NAT'L CONTAMINANT REPORT FOR 1,2,3-TRICHLOROPROPANE, http://www.ewg.org/tapwater/contaminants/contaminant.php?contamcode=2414 (last visited Feb. 3, 2007) [hereinafter EWG TCP]. Between 1998 and 2003, 3.1 million people in seventy communities across the country were exposed to TCP in their drinking water. *Id.* TCP is unregulated in drinking water and does not have maximum legal limit. *Id.*

[23] DBCP leaches into groundwater and can still be found in water wells even though it has not been produced commercially for more than two decades. *See* EWG DBCP, *supra* note 21 ("read more" link). DBCP breaks down very slowly in water, with half-life estimates by the EPA ranging from thirty-eight to 141 years. *Id.*

[24] Atrazine, bromacil, and hexazinone are herbicides used on pineapples. *See* CROP PROFILE, *supra* note 19. Atrazine's potential health risks include cancer, damage to the liver, immune system, nervous system, and reproductive organs, and skin sensitivity. *See* ENVTL. WORKING GROUP, NAT'L CONTAMINANT REPORT FOR ATRAZINE, http://www.ewg.org/tapwater/contaminants/contaminant.php?contamcode=2050 (last visited Feb. 3, 2007) [hereinafter EWG Atrazine]. Bromacil's potential health risks include cancer and endocrine system damage. *See* ENVTL. WORKING GROUP, NAT'L CONTAMINANT REPORT FOR BROMACIL, http://www.ewg.org/tapwater/contaminants/contaminant.php?contamcode=2098 (last visited Feb. 3, 2007) [hereinafter EWG Bromacil]. Hexazinone has not been found to be carcinogenic, but it is slightly toxic and can cause serious and irreversible eye irritation. EXTENSION TOXICOLOGY NETWORK, PESTICIDE INFO. PROFILES, HEXAZINONE, http://extoxnet.orst.edu/pips/hexazin.htm [hereinafter ETN Hexazinone] (the website is the result of a 1996 Pesticide Information Project of the Cooperative Extension Offices of Cornell University, Oregon State University, the

applied to the same soil and groundwater that other chemicals, now banned, had been applied to for decades.

Given the history of the Kobayashis' new house lot, how safe will their vegetable garden be? How safe is the dirt in which their kids will play? How safe is the playground at the new school down the street? The answers to these questions are unknown, because no one seems to be asking the right questions before the pineapple fields turn into house lots.

### *A. Decades of Toxic Applications to Soil and Water*

DBCP or 1,2 dibromo-3-chloropropane is just one example of the chemicals commonly applied to current and former pineapple lands in Hawai'i. According to the Environmental Working Group ("EWG"),[25] "DBCP is a potent carcinogen and perhaps the most powerful testicular toxin ever made."[26] The EWG report found:

> The pesticide causes genetic mutations and cancer in every species of animal on which it has been tested [through methods of] ingestion, contact with the skin, and inhalation. It is classified as a probable human carcinogen by the U.S. Environmental Protection Agency, and the World Health Organization classifies it as "having sufficient evidence of carcinogenicity."[27]

One study discussed in the EWG report found that "DBCP can 'abolish' testicular function in test animals that are administered just a single dose of the compound."[28]

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University of Idaho, and the University of California at Davis and the Institute for Environmental Toxicology, Michigan State University) (last visited Feb. 3, 2007).

In 1998, according to the National Foundation for Integrated Pest Management Education, Bromacil and Hexazinone were "two of the most widely used herbicides in pineapple culture," and "due to their persistence and solubility, [the herbicides] have [a] relatively high potential[] to leach to groundwater." PESTICIDE ENVTL. STEWARDSHIP PROGRAM, NAT'L FOUND. FOR INTEGRATED PEST MGMT. EDUC., HERBICIDE MGMT. PLAN, http://www.pesp.org/1998/pgah98.htm (last visited Feb. 3, 2007).

"Atrazine is the most common groundwater contaminant in the State of Hawaii." PESTICIDE ENVTL. STEWARDSHIP PROGRAM, U.S. ENVTL. PROT. AGENCY, MAUI AG TECH LLC'S 2006 STRATEGY, http://www.epa.gov/oppbppd1/PESP/strategies/2006/maui06.htm (last visited Feb. 3, 2007). Bromacil and hexazinone "have been detected in groundwater wells on the islands of Oahu and Maui." *Id.*

[25] Environmental Working Group is a not-for-profit environmental research firm based in Washington, D.C. Envtl. Working Group, http://www.ewg.org (last visited Feb. 3, 2007).

[26] *See* EWG TAP WATER, *supra* note 8.

[27] *Id.*

[28] *Id.*

Despite the fact that the EPA banned DBCP in 1979, DBCP continued to be applied to pineapple fields in Hawai'i until 1985.[29] Twenty-two years may seem like enough time to eliminate any potential risks to the public, but information about DBCP contamination in California wells suggests otherwise.[30] Twenty years after it was banned in California, DBCP was still found in the tap water of at least one million Californians at levels that present a high degree of risk.[31] Under average groundwater conditions in California, it takes 140 years for DBCP to completely degrade.[32] According to the EWG, "for all practical purposes DBCP will remain in the drinking water of these communities until action is taken to clean it up or bring alternative water supplies to the affected areas."[33]

DBCP is just one of the chemicals known to be used in large-scale pineapple cultivation in Hawai'i.[34] It is possible that DBCP does not last as long in Hawai'i's groundwater, and it is possible that the other myriad of chemicals sprayed on pineapple lands may break down to safe levels, as well. Unfortunately, this will remain pure speculation until someone starts asking for proof.

### *B. The Regulation and Monitoring of Toxin Applications to Pineapple Crops Is Non-Existent*

Despite their use of intense chemical applications, agricultural activities, including those associated with pineapple production, are explicitly or impliedly exempt from the federal and state environmental laws that most people assume are protecting them from harm.[35] As observed by J.B. Ruhl, farming activities have played an important part in the history of the United

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[29] *See* EPA DBCP, *supra* note 21.

[30] *See* EWG TAP WATER, *supra* note 8.

[31] *See id.* at 1.

[32] *See id.* at 2.

[33] *Id.*

[34] *See supra* notes 16-20.

[35] J.B. Ruhl presents a detailed analysis of the damage caused by the exemption of farms from environmental regulations in *Farms, Their Environmental Harms, and Environmental Laws*, 27 ECOLOGY L.Q. 263, 293 (2000).

> The anti-law of farms and the environment comes in two forms. Some laws, while not expressly exempting or even mentioning farms, are structured in such a way that farms escape most if not all of the regulatory impact. Other laws expressly exempt farms from regulatory programs that would otherwise clearly apply to them.

*Id.*

States and have maintained special privileges, even within the complex web of environmental regulations that have developed since the 1970s.[36]

Federal and Hawai'i environmental laws that protect people and the environment from polluted water, polluted soil, hazardous waste, and dangerous pesticides have largely left crop farmers to use their own best judgment to prevent toxic contamination of soil and water.[37] Although nothing prevents states from enacting more aggressive environmental laws,[38] Hawai'i's statutes are no more restrictive of crop cultivators than the federal statutes that favor farm exemptions and self-regulation.[39]

Under Hawai'i's Water Pollution Law,[40] crop cultivation and return flows from irrigated agriculture do not require a permit for discharges of pollutants into state waters.[41] Hawai'i's Nonpoint Source Pollution Management and Control Law[42] could provide broader protection from crop-based water pollution, however, nonpoint source pollution control is achieved primarily through incentive programs, education, and the promotion of best management practices.[43] Few mandatory requirements are imposed on crop cultivation regarding nonpoint source pollution.[44]

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[36] *See id.* at 266 ("Farming in America is a deeply-rooted cultural institution with many noble qualities and important economic and social benefits, but it is also an industry with much in common with other industries, their owners, and their workers."). "Farms are virtually unregulated by the expansive body of environmental law that has developed in the United States in the past 30 years." *Id.* at 265.

[37] *See generally id.* at 293 ("There is no unified code of environmental law for farms. . . . To date . . . states have generally not chosen to regulate the environmental impacts of farms in any comprehensive manner.").

[38] *See id.* ("Although the general theme at the federal level is hands-off, no express or implied preemption prevents states from more aggressively regulating farms.").

[39] *See infra* notes 40-56 and accompanying text.

[40] HAW. REV. STAT. §§ 342D-1 to -111 (1993 & Supp. 2006). Hawai'i's Water Pollution Law contains a general prohibition against discharges into any waters of "controllable sources of pollutants" and a permit program to monitor discharges from "point sources" of pollution. NAT'L CTR. FOR AGRIC. LAW RES. & INFO., STATE ENVIRONMENTAL LAWS AFFECTING HAWAI'I AGRICULTURE HI-3, *available at* http://www.nasda.org/nasda/nasda/Foundation/state/Hawaii.pdf [hereinafter STATE ENVIRONMENTAL LAWS].

[41] *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-2 to -3.

[42] HAW. REV. STAT. §§ 342E-1 to -4 (1993). Hawai'i's Nonpoint Source Pollution Management and Control Law addresses the "nonpoint sources" of pollution that are not covered by the Hawai'i Water Pollution Law. *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-4.

[43] *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-4.

[44] *See id.* at HI-3.

Hawai'i's Safe Drinking Water Law[45] and the federal Safe Drinking Water Act[46] may also sound promising. However, these laws apply to the Department of Health ("DOH"), not to farmers. The state and federal drinking water laws require the DOH to monitor public drinking water supplies and enforce drinking water standards, but do not directly affect the actions of farmers.[47]

Hawai'i's Solid Waste Pollution Act[48] "specifically excludes dissolved materials in irrigation return flows"[49] from its definition of solid waste, which covers pesticides and fertilizers found in the irrigation water of pineapple fields. Even Hawai'i's Hazardous Waste Law[50] does not prevent contamination from crop fields[51] because "wastes from the growing and harvesting of crops" are specifically excluded from the definition of hazardous waste.[52]

Nor can protection be found in the Hawai'i Pesticides Law,[53] which regulates the distribution, sale, and transportation of pesticides. Once in the hands of the consumer, the Act only requires that registered pesticides be used and applied in a manner consistent with their labeling, that proper records be kept, and that the pesticides be applied only by certified applicators for certain chemicals.[54]

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[45] HAW. REV. STAT. §§ 340E-1 to -9 (1993 & Supp. 2006).

[46] Safe Drinking Water Act of 1974, 42 U.S.C. §§ 300f-300j-26 (2000). The Safe Drinking Water Act "established national standards for water at the tap, authorized land use control demonstration programs to designate critical aquifer protection areas for sole or primary source aquifers to prevent their contamination, and regulated the injection of wastes and drilling fluids into the ground." A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 233, 233 (1997) (citations omitted).

[47] Federal and state drinking water laws can apply to the actions of farmers if they discharge pollution into underground wells or operate in a wellhead protection area. *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-5 to -6.

[48] HAW. REV. STAT. §§ 342H-1 to -57 (1993) (regulating the disposal of waste that is not considered hazardous).

[49] *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-8.

[50] HAW. REV. STAT. §§ 342J-1 to -56 (1993) (regulating the disposal of waste that is considered hazardous).

[51] *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-9. Hawai'i's definition of hazardous waste parallels the federal definition stating:

> [Hazardous waste] means a waste or combination of wastes that, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may: (i) [C]ause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or (ii) [P]ose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed or otherwise managed.

*Id.* at HI-8 to -9.

[52] *See id.* at HI-8 to -9.

[53] HAW. REV. STAT. §§ 149A-1 to -53 (1993 & Supp. 2006).

[54] *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-11.

Hawai'i's Environmental Response Law is intended to protect the public by enabling the quick response to and clean up of hazardous substances released into the environment.[55] Unfortunately, its definition of "release" specifically excludes "[a]ny release resulting from the normal application of fertilizer" and "[a]ny release resulting from the legal application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act."[56]

Disturbing as this lack of vigorous regulation may be, the practical reality is that as of 2002, more than two million farms were putting more than 930 million acres of land into agricultural production across the country.[57] Even if each of those farms applied a single fertilizer or a single pesticide only once a year, monitoring and regulation of that annual activity would be an enormous task.[58] The reality, however, is that modern farms (big and small) often apply fertilizers, pesticides, insecticides, herbicides, and other chemicals multiple times in a given year, particularly in climates with a year-round growing season like Hawai'i.[59]

The implications of this unregulated activity are that any contamination of the soil or water resulting from these agricultural activities is not prohibited or accounted for by the law.[60] Even more troubling is that the parties responsible for causing this contamination are not liable for cleaning it up, reimbursing the government for cleaning it up, or compensating anyone harmed as a result of any contamination.[61] This lack of accountability continues even after the land is no longer in agricultural production.

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[55] HAW. REV. STAT. § 128D-4(a) (1993).

[56] *Id.* § 128D-1.

[57] NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC.—2002 CENSUS OF AGRIC., *available at* http://www.nass.usda.gov/Census_of_Agriculture/index.asp ("U.S. by Table, Table 1"). More than 5,000 farms account for 1.3 million acres of Hawai'i land in agricultural production. *Id.* ("All States by Table, Table 1").

[58] *See* Ruhl, *supra* note 35, at 329-30.

[59] *See generally id.* at 282-86 ("Every year, over 750 million pounds of pesticides are applied to agricultural crops yearly in the United States. Since 1979, agriculture has been responsible for about 80% of all pesticide use in the United States, and pesticide use on farms has nearly tripled since 1964. Four of the most prevalent herbicides—atrazine, simazine, alachor and metolachor—are applied nationwide . . . ." (citations and internal quotation marks omitted)).

"In Hawai'i, pineapple fruit is harvested year round for both the fresh market and cannery operations." LEONARD P. GIANESSI ET AL., NAT'L CTR. FOR FOOD & AGRIC. POLICY, PLANT BIOTECHNOLOGY: CURRENT AND POTENTIAL IMPACT FOR IMPROVING PEST MGMT. *in* U.S. AGRIC., AN ANALYSIS OF 40 CASE STUDIES 2 (2002), *available at* http://www.ncfap.org/40CaseStudies/CaseStudies/PineappleNR.pdf.

[60] *See supra* Part II.B.

[61] *See id.*

## III. HOW DOES THE LEGACY PERSIST?

### *A. No Protection from the State Government*

In 1961, the Hawai'i Legislature created a statewide zoning system to address a trend of scattered subdivisions, expensive and unplanned expansion of public services, and the conversion of prime agricultural land to residential use.[62] All lands in the state of Hawai'i were eventually divided into four districts or classifications of land use: Urban, Rural, Agricultural, or Conservation.[63] The Hawai'i State Plan helped determine which lands were suited for which districts.[64] The LUC was created and charged with ensuring that areas of state concern would be addressed and considered in the land use decision-making process.[65]

Under this system, lands may begin in one district and be reclassified to another. This reclassification occurs when a landowner, developer, the State, or a county agency petitions the LUC for a district boundary amendment.[66] This petition is the first step in turning former pineapple fields (classified as Agricultural) into land for houses and schools (classified as Urban or sometimes Rural).

The district boundary amendment process requires petitioners to submit a petition to the LUC as well as serve copies on "the county planning department and planning commission within which the subject land is situated."[67] A copy of the petition must also be provided to "any potential intervenor."[68] This is a crucial stage of the process because any possible

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[62] Land Use Comm'n, State of Haw., About the LUC, History, Purpose of the Law, http://luc.state.hi.us/about.htm (last visited Feb. 3, 2007).

[63] *See* HAW. REV. STAT. § 205-2(a) (2001).

[64] *See* HAW. REV. STAT. § 226-1 (2001); *see also* HAW. REV. STAT. § 205-16 (2001) (requiring that all amendments to land use district boundaries conform to the Hawai'i state plan, as well).

[65] *See* Land Use Comm'n, State of Haw., About the LUC, History, Role of the Commission, http://luc.state.hi.us/about.htm (last visited Feb. 3, 2007); *see also* HAW. REV. STAT. § 205-2 (2001).

[66] HAW. ADMIN. R. § 15-15-46 (2000). The LUC reviews all applications to reclassify lands classified as Conservation. *See id.* § 15-15-77(c)-(e). However, "[i]n an effort to streamline the decision-making process, the law was amended in 1985 to allow applicants for land use changes of [fifteen] acres or less to apply directly to the counties." Land Use Comm'n, State of Haw., About the LUC, Dist. Boundary Amendment Procedures, Fifteen Acre Rule, http://luc.state.hi.us/about.htm (last visited Feb. 3, 2007). This Note focuses on land use changes of fifteen acres or more that would likely be involved in large housing developments.

[67] HAW. ADMIN. R. §15-15-48 (2000); *see id.* § 15-15-47.

[68] *Id.* § 15-15-48(b). A person with an interest in the boundary amendment petition may file a notice of intent to intervene. *See id.* § 15-15-52(b). All departments and agencies of the state and of the county in which the land is situated, any person with a property interest in the land,

concerns about the property's history must be raised at this stage (often by neighbors or community members) to be included in the official record as the piece of property proceeds down its path of transformation.

A boundary amendment petition attempts to capture the complete picture of a piece of property by looking not only at its present use, but also at its past and future uses.[69] The petition must describe the proposed use or development for the property, including any planned development, residential, or commercial use.[70] An assessment of "the impacts of the proposed use or development upon the environment, agriculture, recreational, cultural, historic, scenic, flora and fauna, groundwater, or other resources of the area" must also be included.[71]

It is important to note that these impacts are often described in a forward-looking manner, describing how the requested boundary amendment will not harm the surrounding community or the natural or historical resources. For instance, the availability and proposed uses of the groundwater may be discussed in a petition, but the groundwater quality will only be discussed to examine if the proposed boundary amendment will worsen any existing contamination. There is no requirement to assess whether the existing groundwater quality will negatively impact the proposed uses of the property.

The petition provides a limited view of the property's past. It requires a description of the property and surrounding areas identifying "the use of the property over the past two years," the soil classification, any agricultural lands of importance to the State of Hawai'i, the productivity rating of those lands, the flood and drainage conditions, and topography of the property.[72] Notably missing from these requirements is the identification of any chemicals regularly applied to the property and the measured level of those chemicals remaining in the soil.

The land use law does require conformity of any proposed boundary amendment with the planning efforts of the state and counties. The petitioner must assess for the LUC the conformity of the proposed reclassification with

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or any person who can demonstrate they will be directly and immediately affected by the proposed change may be allowed to intervene in the petition process upon timely application. *See id.* § 15-15-52(c).

[69] *See id.* § 15-15-50(c)(5), (9). To view the property's present use, the petition requires, among other things: a description of the property, acreage, tax map key number, maps, the reclassification sought, the present use of property, and identification of the petitioner's property interest in the property. *Id.* § 15-15-50(c)(3)-(5).

[70] *Id.* § 15-15-50(c)(6).

[71] *Id.* § 15-15-50(c)(10). This rule requires an assessment of the proposed development's impact upon the environment, groundwater, and other resources, but does not require an assessment of the potential impacts of the environment, groundwater, and other resources on the proposed development. *See id.*

[72] *Id.* § 15-15-50(c)(9).

the "applicable goals, objectives, and policies of the Hawai'i state plan, chapter 226, HRS, and applicable priority guidelines and functional plan policies."[73] An assessment of the conformity with the applicable county general plans, development or community plans, zoning designation and policies, and proposed amendments is also required.[74] Any written comments that have been received by the petitioner regarding the proposed boundary amendment from governmental, non-governmental agencies, organizations, or individuals must also be included in the petition.[75]

Significantly, the petitioner must send a notification of petition filing to possible intervenors included on an LUC mailing list.[76] The notification tells the public that they can review the petition at the LUC office or respective county planning department and can contact the office of the commission for information on participating in the hearing.[77] The notification also informs potential intervenors that they may file a notice of intent to intervene with the commission within thirty days of the date of notification.[78]

If the petition is found to be properly filed and accepted for processing, the LUC conducts a hearing on the island where the property is located.[79] The LUC conducts a quasi-judicial proceeding, where evidence can be presented, testimony can be given by witnesses and witnesses can be cross-examined.[80] After the hearing, the LUC can approve the petition, deny the petition, or modify the petition by imposing conditions.[81]

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[73] *Id.* § 15-15-50(c)(16). Chapter 226 of the Hawai'i Revised Statutes ("HRS") refers to the Hawai'i State Planning Act. HAW. REV. STAT. §§ 226-1 to -107 (2001).

[74] HAW. ADMIN. R. § 15-15-50(c)(18).

[75] *Id.* § 15-15-50(c)(21).

[76] *Id.* § 15-15-50(d)(8).

[77] *Id.* § 15-15-50(d)(7)-(9).

[78] *Id.* § 15-15-50(d)(8).

[79] *Id.* §§ 15-15-50(f), -51(a). The commission must conduct the hearing not less than sixty days and not more than one hundred eighty days after the petition is properly filed. *Id.* § 15-15-51(a). Notification of the hearing is sent to the office of planning, the planning commission, the appropriate county planning department, all people with a property interest in the property, and all people who have requested advance notice of boundary amendment proceedings. *Id.* § 15-15-51(b). Notice of the hearing is published at least once in the county where the property is located and filed with the lieutenant governor's office. *Id.* § 15-15-51(c).

[80] *Id.* §§ 15-15-34, -55.1 to -68.

[81] *Id.* § 15-15-74(b). The decision must be established by a two-thirds vote of the members of the commission. *Id.*

In considering whether to grant or deny the petition, the LUC's decision-making criteria requires the LUC to consider six factors.[82] The third factor considers the proposed reclassification's impact on six areas of state concern:

> [1] Preservation or maintenance of important natural systems or habitats; [2] Maintenance of valued cultural, historical, or natural resources; [3] Maintenance of other natural resources relevant to Hawai'i's economy including, but not limited to agricultural resources; [4] Commitment of state funds and resources; [5] Provision for employment opportunities and economic development; and [6] Provision for housing opportunities for all income groups, particularly the low, low-moderate, and gap groups.[83]

To approve a boundary amendment, the LUC must find after considering all the factors that "upon the clear preponderance of the evidence that the proposed boundary amendment is reasonable, not violative of section 205-2, HRS, and consistent with the policies and criteria established pursuant to sections 205-16, 205-17, and 205A-2, HRS."[84]

If the boundary amendment petition for fifteen acres or more is approved, it may be subject to twenty-four or more conditions that include compliance with the representations made to the commission regarding use of the land, providing notice to the commission about intent to sell the property, and contributing a fair-share portion of school facility, infrastructure, and civil defense costs for the property.[85] The petitioner is also required to have a professional archaeologist conduct an archaeological inventory survey that

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[82] The factors are: (1) the extent to which the proposed reclassification conforms with the goals, objectives, and policies of the Hawai'i state plan, (2) the extent to which the proposed reclassification conforms to the district standards, (3) the impact of the proposed reclassification on six different areas of state concern, (4) how the proposed reclassification would fit into the county general plan, (5) what representations and commitments have been made by the petitioner and if the petitioner has the economic ability to carry them out, and (6) if the land being reclassified is agricultural land, whether removing those lands from the agricultural district will impair agricultural production or is reasonably necessary for urban growth. *Id.* § 15-15-77(b).

[83] *Id.* § 15-15-77(b)(3)(A)-(F).

[84] *Id.* § 15-15-77(a) (2000). HRS § 205-2 directs the LUC to establish standards for grouping all lands into the four land use district classifications and to give consideration to the master plan or general plan of the counties when establishing the land use district boundaries for each of the counties. HAW. REV. STAT. § 205-2 (2001 & Supp. 2006). HRS § 205-16 prohibits adoption of a land use district boundary amendment that does not conform to the Hawai'i state plan. *Id.* § 205-16. HRS § 205-17 requires the LUC to specifically consider five decision-making criteria when reviewing a petition for a reclassification of a district boundary amendment. *Id.* § 205-17. These criteria have been incorporated into Hawai'i Administrative Rule § 15-15-77(b). HAW. ADMIN. R. § 15-15-77(b) (2000). HRS § 205A-2 sets out the objectives and policies of the coastal zone management program, which protects coastal resources from degradation. HAW. REV. STAT. § 205A-2 (2001).

[85] *See* HAW. ADMIN. R. § 15-15-90(e) (2000).

must be submitted to the State Department of Land and Natural Resources.[86] If significant archeological sites are found on the property, the petitioner must make commitments to mitigate damage to those sites.[87]

This mandatory commitment to mitigate any damage to archeological sites represents an affirmative duty that is already placed on petitioners as a condition of the boundary amendment approval. Requiring a similar professional survey of the land for hazardous chemical levels and a commitment to any necessary remediation of the property for safe use would not be a great departure from the purpose of the currently available conditions.

Presently, the LUC does not make a separate, independent inquiry into the potential hazardous chemical levels of a property subject to a reclassification petition.[88] The current petition content requirements do not ask the petitioner to provide that information,[89] and the current decision-making criteria for the LUC do not require the LUC to consider the potential hazardous chemical levels on the property before approving the amendment.[90]

According to LUC Executive Director, Anthony Ching, "the LUC is the judge."[91] "The Office of Planning represents the State," said Ching.[92] "Absent the State weighing in on the issue, the LUC would not look into it, unless it was raised through public testimony or a community party or advocacy group seeking to intervene."[93] The LUC relies on the Office of Planning to distribute the amendment petitions to all the appropriate state departments (including the Department of Health) and for those departments to represent the State's interest (such as groundwater quality) in the petition proceedings.[94] Unfortunately, those state departments are often relying on what is already contained in the petition, as well. If the petition does not include information about potential chemical contamination of the property from regular agricultural use, the Department of Health does not conduct an independent investigation or testing of the site. It is possible, as Ching pointed out, for members of the community or advocacy groups to raise the issue. Once that

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[86] *Id.* § 15-15-90(e)(12).

[87] *See id.*

[88] Telephone Interview with Anthony Ching, Executive Dir., Land Use Comm'n, State of Haw. (Nov. 9, 2006) [hereinafter Ching Telephone Interview].

[89] If the property is currently in the conservation land use district, it will require that an Environmental Impact Statement ("EIS") be included with the boundary amendment petition. *See* HAW. ADMIN. R. § 15-15-50(b) (2000). This document may or may not capture information about the current level of hazardous chemicals in the property's soil, but either way, it is not required for property currently in the agricultural land use district.

[90] Ching Telephone Interview, *supra* note 88.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

happens, it is possible that a more intense investigation may take place. Without addressing potential chemical contamination of agricultural property in the petition requirements or the LUC decision-making criteria, members of the community become primarily responsible for discovering and protecting against any possible harm. The question then becomes: what if the land is in an isolated area without much public access? Who will raise the issue then?

If the LUC approves the district boundary amendment without conditions, the petitioner is free to pursue the appropriate county-level zoning changes necessary to allow construction of a subdivision.

### *B. No Protection from City and County Government*

To allow houses, schools, and other similar structures to be built on former pineapple land, the land must be rezoned for these proposed uses.[95] The rezoning process requires an amendment to the Land Use Ordinance ("LUO").[96]

Any amendment to a county general plan by a private party proposing a development designation requires an Environmental Assessment ("EA") under the Hawai'i Environmental Policy Act ("HEPA").[97] The purpose of HEPA is to "establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision

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[95] HONOLULU, HAW., LAND USE ORDINANCE § 21-3.70 (a)-(b) (2003).

> The purpose of the residential district is to allow for a range of residential densities. The primary use shall be detached residences. Other types of dwellings may also be allowed, including zero lot line, cluster and common wall housing arrangements. Nondwelling uses which support and complement residential neighborhood activities shall also be permitted. . . . The intent of the R-20 and R-10 districts is to provide areas for large lot developments. These areas would be located typically at the outskirts of urban development and may be applied as a transitional district between preservation, agricultural or country districts and urban districts. They would also be applied to lands where residential use is desirable but some development constraints are present.

*Id.*

[96] *Id.* § 21-1.20(a).

> The purpose of the LUO is to regulate land use in a manner that will encourage orderly development in accordance with adopted land use policies, including the Oahu general plan and development plans, and to promote and protect the public health, safety and welfare by, more particularly: (1) Minimizing adverse effects resulting from the inappropriate location, use or design of sites and structures; (2) Conserving the city's natural, historic and scenic resources and encouraging design which enhances the physical form of the city; and (3) Assisting the public in identifying and understanding regulations affecting the development and use of land.

*Id.*

[97] *See* DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 62-63 (1994).

making along with economic and technical considerations."[98] If the assessment determines that the proposed project may have a significant effect on the environment, a full-blown Environmental Impact Statement ("EIS") may be required.[99] Both the assessment and the statement, if one is required, must be made public.[100] However, these documents are intended to be only disclosure documents.[101] A finding of adverse environmental impacts does not defeat the proposed action.[102]

*1. Zoning change process does not require proof of safe soil*

The landowner must apply to the Department of Planning and Permitting ("DPP")[103] for the zoning change. Before the application can be submitted to the DPP, the applicant must have a pre-application meeting and informal review of the project with the DPP, and the project must be presented to the neighborhood board of the district where the project will be located.[104] If any issues or concerns are raised at the neighborhood presentation, those concerns must be included in the application to the DPP.[105] Theoretically, members of the community in a proposed project area could raise questions about possible contamination of the property for the first time at this presentation.

The application, including issues and concerns from the community, is submitted to the Director of the DPP, who requests comments and recommendations from pertinent government agencies[106] about any potential issues related to the proposed project.[107] If no questions about contamination

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[98] HAW. REV. STAT. § 343-1 (1993).

[99] *See* CALLIES, *supra* note 97, at 63.

[100] *See id.*

[101] *See id.*

[102] *See id.* at 64.

[103] City & County of Honolulu, Dep't of Planning and Permitting—Planning Info. page, http://www.honoluludpp.org/planning/ (last visited Feb. 3, 2007).

> The Department of Planning and Permitting, Planning Division helps establish, promote, and implement long-range planning programs for Honolulu which reflect the community's values, priorities, and visions for the future. It is responsible for the framework that coordinates planned population and land use growth with supportive infrastructure improvements. The Planning Division is responsible for maintaining and updating the Oahu General Plan, regional Development/Sustainable Communities Plans, Development Plan Land Use Annual and Biennial Reports, Special Area and Neighborhood Master Plans.

*Id.*

[104] *See* HONOLULU, HAW., LAND USE ORDINANCE § 21-2.40-2(a)-(b) (2003).

[105] *See id.* § 21-2.40-2(c)(1).

[106] Pertinent agencies may include the Clean Water Branch, Safe Drinking Water Branch, or Office of Hazard Evaluation and Emergency Response of the Department of Health.

[107] *See* HONOLULU, HAW., LAND USE ORDINANCE § 21-2.40-2(c)(4) (2003).

were raised at the community hearing, it is unlikely that potential contamination of the property would be one of the issues discussed with the other government agencies regarding this project. If the application is accepted by the DPP, after consulting with the other agencies, the director submits a report and proposed ordinance to the Planning Commission for consideration.

The Planning Commission then holds a public hearing on the proposed ordinance and submits any recommendations with the director's report and proposed ordinance to the City Council.[108] The City Council also holds a public hearing and can decide to approve the ordinance, approve it with modifications or conditions, or deny the ordinance.[109]

If the City Council decides to grant the ordinance with conditions, it may put those conditions in a "unilateral agreement" with the applicant that requires some kind of compliance by the applicant before the zone change will be approved.[110] The conditions are only required if the council finds them "necessary to prevent circumstances which may be adverse to the public health, safety, and welfare."[111] However, these conditions will most likely not include testing or remediation of a contaminated property, because environmental contamination is not normally raised at the zone change request stage.[112] The City does not have an environmental regulatory agency and relies on the State Department of Health and the federal Environmental Protection Agency for guidance.[113]

The zone change application would normally be circulated among appropriate state and city agencies as well. For instance, the Hazard Evaluation and Emergency Response Office ("HEER") of the Department of Health may be asked to comment on the application.[114] Comments are based on the application and accompanying documents, but not on an independent investigation of the property by HEER.[115] HEER uses standard language in its comments for property that has formerly been used for intensive agriculture,

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[108] *Id.* § 21-2.70(b)(1).

[109] *Id.* § 21-2.70(b)(2).

[110] *Id.* § 21-2.80(e).

[111] *Id.* § 21-2.80(b). "The conditions shall be reasonably conceived to fulfill needs directly emanating from the land use proposed in the following respects: (1) Protection of the public from the potentially deleterious effects of the proposed use; or (2) Fulfillment of the need for public service demands created by the proposed use." *Id.* § 21-2.80(c).

[112] *See* E-mail from Charles K. Djou, Councilmember, Honolulu City Council, to author (Nov. 19, 2006, 15:53 HST) [hereinafter Djou Email] (on file with the author).

[113] *See id.*

[114] Telephone Interview with Roger Brewer, Environmental Risk Assessor, Office of Hazard Evaluation and Emergency Response, Haw. Dep't of Health, in Honolulu (Sept. 29, 2006) [hereinafter Brewer Telephone Interview].

[115] *Id.*

and recommends that an investigation be done to determine if there have been any releases of hazardous substances on the property.[116] If contamination of the site from a release is found, HEER recommends removal and remediation procedures be conducted that must meet approval by the DOH before the land use change is granted.[117]

A key question at this phase is whether the contamination that may result from normal pineapple cultivation activity would qualify as a "release" for HEER's purposes. As stated earlier, "certain wastes generated by agricultural operations are specifically excluded from the definition of hazardous waste" under Hawai'i's Hazardous Waste Law, including wastes from the growing and harvesting of crops.[118] If the only contamination on the property at issue was not the result of a "release," the standard language currently used in HEER's recommendations may not require removal and remediation of contaminants on the property.

According to one Honolulu city councilmember, "theoretically, there is nothing preventing land contaminated by pesticides from being rezoned at the city level."[119] To an extent, the City assumes that current federal and state environmental laws would have required that an investigation into potential contamination would have taken place prior to a request for building permits issued by the City.[120]

### 2. *Land contamination testing is not required for subdivision permit approval*

Once the land has been reclassified as Urban and rezoned for residential use, for example, the landowner has all the approval necessary to make nonagricultural use of former pineapple fields. The size and density of any buildings constructed on the land will be defined by zoning, but the landowner has done all that is required to prove that the land is safe enough for houses and schools.

Subdivision of the land into lots for houses or schools does require further approval from the DPP. A subdivision permit requires two stages of approval, with the review of a preliminary map and a final map of the proposed subdivision.[121] Like the rezoning process, however, the subdivision

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[116] *Id.*

[117] Letter from Keith Kawaoka, Manager, Hazard Evaluation & Emergency Response Office, to Kelvin Sunada, Manager, Envtl. Planning Office (June 22, 2006) (on file with author).

[118] *See* STATE ENVIRONMENTAL LAWS, *supra* note 40, at HI-9.

[119] Djou Email, *supra* note 112.

[120] *See id.*

[121] *See* HONOLULU, HAW., SUBDIVISION RULES AND REGULATIONS §§ 2-201 to 3-303 (2005).

application process does not specifically ask the landowner to demonstrate that the property's soil and water are free from contamination.[122]

As part of the review process for considering approval of a subdivision application, the subdivision must meet specific design standards.[123] The standard for land suitability states:

> No subdivision shall be granted tentative approval of the preliminary map or approval of the final map if the land is found . . . to be unsuitable for the proposed use by reason of . . . ground water or seepage conditions, . . . or other features or conditions likely to be harmful or dangerous to the health, safety, or welfare of future residents of the proposed subdivision or of the surrounding neighborhood or community, unless satisfactory protective improvements or other measures have be[en] proposed or taken by the subdivider and approved by the Chief Engineer or other appropriate agency.[124]

Although land suitability may prevent the preliminary or final approval of a subdivision application, the determination of land suitability is not based upon contamination testing of a particular property to be subdivided.[125] Unless contamination data is specifically requested by the Chief Engineer or other governmental agencies that review the application, the basic application information, which does not include contamination data, will determine a subdivision's suitability for a particular piece of property.[126]

Again, as in the rezoning process, approval of a subdivision is based on basic information provided by the landowner and any issues raised by the community or interested government agencies. The subdivision approval process does not provide any protection from the toxic legacy of pineapple cultivation. As the current process is defined, unless a landowner voluntarily includes contamination data in the subdivision application, the DPP cannot make a truly informed decision regarding "conditions likely to be harmful or

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[122] *See* HONOLULU, HAW., REV. ORDINANCES § 22-3.3(a) (1990).

[123] *See* HONOLULU, HAW., SUBDIVISION RULES AND REGULATIONS § 4 (2005).

[124] *Id.* § 4-403.

[125] *See id.* §§ 4-403, 2-201(c), 2-203(a), 3-301(c), 3-303(a).

[126] *See id.* § 2-203. Requirements for the preliminary map include the name, address, and signature of the owners of the land to be subdivided, the geographic location and description of the subdivision, the unique name proposed for the subdivision, the overall development plan of the total area where the subdivision is located, lot layout and approximate lot dimensions, total number of lots, and total area of the proposed subdivision, locations and dimensions of existing and proposed streets and easements, existing draining facilities, method of sewage disposal and source of water supply, location of waterways and areas subject to inundation or storm water overflow, location of slopes, location of existing buildings, proposed use of the lots, locations of proposed easements to be dedicated to the City, and shoreline setbacks. *See id.* § 2-201(c)(1)-(12).

dangerous to the health, safety, or welfare of future residents of the proposed subdivision or of the surrounding neighborhood or community."[127]

### C. *Burden of Protection Rests Entirely on Concerned Citizens*

It appears that, in Hawai'i, the list of people inquiring about the safety of former agricultural lands on their way to becoming house lots is a short one. In fact, it contains only the names of concerned members of the community who attend the public hearings. At every stage of the state and municipal government process, inquiry into risks to the public health and welfare must be initiated by lay people. Despite the expertise that exists in the Department of Health (in the Clean Water and Safe Drinking Water Branches of the Environmental Management Division, the Hazard Evaluation and Emergency Response, and the Environmental Planning Office), there is no affirmative duty requiring these government agencies to physically investigate potentially contaminated lands proposed for residential use without a complaint being brought from outside their offices. And even then, the investigation may be limited to reports and assessments prepared by the landowner's consultant, reports that are reviewed without any independent testing of the property in question.[128]

## IV. HOW CAN THE TOXIC LEGACY BE STOPPED?

### A. *The Department of Agriculture Has No Authority When Crop Cultivation Ends*

The Department of Agriculture has jurisdiction over land only while the land is in pineapple cultivation. Even at that point, however, the ability of the Department of Agriculture or any other agency to regulate or restrict the application of pesticides and other chemicals would be limited by the exemptions in the current federal and state environmental laws. One possibility is that Hawai'i environmental laws could be revised to be more restrictive of agricultural application of chemicals, because the federal statutes only establish the minimum requirements of environmental regulation. Nothing prevents Hawai'i from enacting stricter state environmental laws.[129] Preventing further unregulated application of chemicals may be the obvious

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[127] *Id.* § 4-403.

[128] Brewer Telephone Interview, *supra* note 114.

[129] *See* Ruhl, *supra* note 35, at 293 ("Although the general theme at the federal level is hands-off, no express or implied preemption prevents states from more aggressively regulating farms.").

solution to the problem of future contamination, but it does not address the problem of future health risks from lands that have already been contaminated.

### *B. Department of Health Has No Mandate Under Current Statutes*

Unless an inquiry is initiated outside of the Department of Health by community members or other government agencies, the Department of Health is not required to investigate the contamination levels of property at issue in a petition for land use changes.[130] The Department of Health cannot play a role in the land use change process until the law requires proof of safe soil and water before agricultural lands are developed for housing.

### *C. Conditions at the County Level Would Be Too Late and Inconsistent*

#### *1. Conditions applied at the rezoning stage*

A zone change applicant could be required to prove that any residual contamination of a property is within safe levels for all permitted uses of the proposed zone before a change request would be granted. If the property was found unsafe for the proposed zone, removal or remediation of the contaminant (regardless of whether it was the result of a "release" or not) to safe levels could be required before the zone change was granted. This is similar to what is currently recommended by the HEER, but would not be limited to contamination from "releases" on the property.

The downside to applying the condition of remediation at this stage in the process is that the burden of remediation may fall on unsuspecting land purchasers or developers. If the property is purchased after it has been granted a district boundary amendment (where no contamination inquiry was required) but before it has been granted a zone change (where a contamination inquiry would be required), the original polluter may be able to sell the property at a higher price while avoiding all expense of rehabilitating the property to safe contamination levels.[131]

Another disadvantage to applying a condition of remediation at the zone change phase is that the end result may not be consistent across the state. Any change to the rules and requirements governing a zone change would have to

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[130] *See generally* HAW. ADMIN. R. §15-15-50(21) (2000).

[131] If the contamination resulted from the cumulative effect of normal crop cultivation, the contamination would not have been documented, regulated, or even anticipated within the current structure of environmental laws. *See supra* Part II.B. If the contamination occurred, therefore, by "legal" means, it is possible that neither the landowner nor the purchaser would have reason to suspect contamination that should be accounted for during negotiations for sale of the property.

be adopted and incorporated by each of the four counties that create their own county-level land use processes and procedures.

*2. Conditions applied to subdivision permit approval*

Remediation[132] could be imposed as a condition before the preliminary map of the subdivision received temporary approval. Requiring the removal or remediation of property contamination as a condition of temporary approval would be consistent with "protective measures or improvements to make the land suitable for the proposed uses" currently required by the City's subdivision rules and regulations.[133]

Conditions placed on any permit must survive the test for constitutionality set out by *Nollan v. California Coastal Commission*[134] and *Dolan v. City of Tigard*.[135] The test requires that the condition furthers a legitimate public purpose and is reasonably related to the permit being requested, and the burden of the condition is roughly proportional to the benefit received by the applicant.[136] Removal or remediation of toxin contamination on property under review for a subdivision permit would further the protection of public health and safety, a legitimate public purpose. Remediation of the property is also a benefit closely related to the proposed activity because increasing the level of safety on the property would not be as critical if the applicant was not attempting to change the use of the land. And, though remediation would be

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[132] Under Hawai'i's Environmental Response Law, a "remedy" or "remedial action" is defined as:

> [A]ctions consistent with permanent correction taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance or pollutant or contaminant into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

HAW. REV. STAT. § 128D-1 (1993 & Supp. 2006).

A "removal action" is defined as:

> [T]he cleanup of released hazardous substances or pollutants or contaminants from the environment, such actions as may be necessary to take in the event of the threat of release of hazardous substances or pollutants or contaminants into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances or pollutants or contaminants, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

*Id.*

[133] HONOLULU, HAW., SUBDIVISION RULES AND REGULATIONS § 4-403 (2005).

[134] 483 U.S. 825 (1987).

[135] 512 U.S. 374 (1994).

[136] *See Dolan*, 512 U.S. 374; *see also Nollan*, 483 U.S. 825.

costly, the property value of undeveloped land is increased when it is converted for use as residential housing.[137] The benefit of a substantial profit increase would meet the rough proportionality test.

The downside to applying the condition at this stage is that the burden of remediation would be born entirely by the new owner or developer, unless the original contaminator were applying for the change. Realistically, however, the new owner or developer may be in a better position to pay for the remediation, and it may not be considered a problem if the proposed project were anticipated to be profitable enough.

At this stage, however, it would be late in the process to impose a condition of remediation. Although the condition would likely pass the *Nollan/Dolan* test for constitutionality, the condition may still be challenged. A significant amount of planning would have been done and expenses incurred by the developer by this stage without including the costs of removal or remediation in the project's anticipated budget. Without prior notice to the developer about a required investigation into possible contamination from crop cultivation on the property, forcing the developer to conduct contamination removal as a requirement for subdivision permit approval would likely be seen as unfair.

### *D. Land Use Commission Inquiry Would Be Timely and Consistent*

At the State Land Use Commission stage, a petition for a district boundary amendment from an agricultural to an urban or to a rural district could be required to identify the type and level of chemicals existing in the soil and water of the property (regardless of the whether they were part of a "release"). Once the level of contamination is identified, the district boundary amendment could be conditioned on remediation of the property to levels that are safe for all permitted uses of the proposed district or classification.

The benefit of requiring a showing at this stage of the land use change is that it would be comprehensive (for boundary amendments of more than fifteen acres), protecting all counties and all islands with a requirement for remediation before any land use change occurred.[138] It would occur early enough that the necessary remediation would be part of the planning timeline

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[137] *See, e.g.*, Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 420 (2002) ("Whatever its broader worth to society as farmland, to the immediate parties involved the land is more valuable converted.").

[138] *See supra* note 66 and accompanying text. The separate counties would still need to adopt a similar requirement for the boundary amendment approval process for petitions involving fifteen acres or less. *See* HAW. ADMIN. R. § 15-15-77(d) (2000) ( "Amendments of land use district boundary in other than conservation districts involving land areas fifteen acres or less shall be determined by the appropriate county land use decision-making authority for the district.").

and costs considered before a piece of property is purchased or developed by a current owner of agricultural land. If remediation of the property is not adequate to make the land safe for the all permitted uses in the classification proposed, the land use would not change. The current owner, who may possibly be the contaminator, would be held accountable for making the property safe before selling at the more profitable rate for land classified as Urban or Rural. If the current owner does not attempt to reclassify the land, this remediation requirement would put the property buyer or developer on notice that they should factor remediation of the property into the purchase price or agreement of sale.

Another benefit of creating the inquiry at this stage of the land use change is that leverage still exists against the polluter. Once the property is reclassified, there is no incentive for the original owner or applicator to remediate the property before selling it. The burden of remediation would be left on future property owners, developers, or the general public. Remediation costs may not deter some developers if the anticipated profit on the property is great, but a showing of unsafe levels of contamination at the boundary amendment stage would give the developer notice of the remediation requirement when purchasing the property.

Most importantly, requiring remediation at the boundary amendment stage, or at the very least requiring proof of safety, prevents unnecessary harm to future residents and unnecessary litigation and expenses for injuries that could have been avoided. Property developers and future landowners would be protected through prevention and the public would be protected by a showing of proof that the land is safe at the earliest stage of planning.

## V. THE TOXIC LEGACY OF PINEAPPLE LANDS SHOULD BE DETECTED AND ELIMINATED THROUGH THE BOUNDARY AMENDMENT PROCESS

The state government already has the authority and the responsibility to protect Hawai'i's residents from the dangers posed by contaminated pineapple lands. The Constitution of the State of Hawai'i states: "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."[139]

The LUC, specifically, has the authority to address the problem posed by contaminated pineapple lands because all LUC decisions must be made in compliance with the Hawai'i State Plan.[140] The Hawai'i State Plan sets forth

[139] HAW. CONST. art. XI, § 9.

[140] With regard to the objectives and policies for the physical environment, the State Plan states, among other things, that it shall be the policy to: "Take into account the physical attributes of areas when planning and designing activities and facilities . . . . Provide public

as a goal of the state: "A desired physical environment, characterized by beauty, cleanliness, quiet, stable natural systems, and uniqueness, that enhances the mental and physical well-being of the people."[141] To reach that goal through the objectives and policies for the physical environment, the State Plan states, planning shall: "[p]romote the proper management of Hawai'i's land and water resources[;]"[142] "[p]romote effective measures to achieve desired quality in Hawai'i's surface, ground, and coastal waters[;]"[143] "[e]ncourage actions to maintain or improve aural and air quality levels to enhance the health and well-being of Hawai'i's people."[144]

Additionally, the LUC cannot approve an amendment to a land use district boundary unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is *reasonable*,[145] not violative of the district boundary standards,[146] and consistent with district boundary amendment policies and criteria.[147] If the boundary amendment must be reasonable to be approved, is it "reasonable" to reclassify land without questioning its effect on the "health and well-being of Hawai'i's people"?[148]

### *A. The Authority and Responsibility Already Lies with the LUC*

Currently, the LUC must consider a number of factors before granting a petition for a boundary amendment, which include six areas of state concern.[149] Adding a seventh impact consideration for "preservation of public health" would put an affirmative duty on the LUC to request information from the petitioner about the current safety of the property and its impact on people in the community (including future homeowners on the property). Consideration of onsite contamination would factor into whether a proposed use for the property was "reasonable."

To provide the LUC with the necessary information to determine reasonableness, an EA should be triggered by requests to reclassify agricultural lands

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incentives that encourage private actions to protect significant natural resources from degradation or unnecessary depletion . . . . Pursue compatible relationships among activities, facilities, and natural resources." HAW. REV. STAT. § 226-11(b)(3), (7), (8) (2001).

[141] *Id.* § 226-4(2).

[142] *Id.* § 226-13(b)(2).

[143] *Id.* § 226-13(b)(3).

[144] *Id.* § 226-13(b)(4).

[145] *Id.* § 205-4(h).

[146] The district boundary standards are set forth in sections 205-2 and 205-41 to 205-51. *Id.* §§ 205-2, 205-41 to -51 (2001 & Supp. 2006).

[147] *See id.* § 205-17.

[148] *Id.* § 226-13(b)(4).

[149] *See* HAW. ADMIN. R. § 15-15-77(b)(3)(A)-(F); *supra* text accompanying note 83.

to Urban or Rural districts.[150] This boundary amendment EA should also include the following additional requirements: (1) identification and current levels of potentially harmful chemicals found in the property's water and soil; (2) the "acceptable" or safe range of those chemicals for human exposure via digestion, skin contact, and inhalation; (3) any known risks posed to human health by the identified chemicals, and (4) proposed plans for clean up or mitigation to safe levels.

The LUC should not grant the reclassification of agricultural lands if the preservation of public health will be compromised. The landowner must be expected to demonstrate upon clear preponderance of the evidence that the property at issue is within the acceptable safety levels for all the permitted uses of the proposed land classification.

### *B. A "Preservation of Public Health" Criterion Would Make the Necessary Inquiries Mandatory*

With a concern for the preservation of public health in place, property owners would be required to show that lands are safe enough to prevent exposing future homeowners on the property to unnecessary health risks. If the showing were not made, the boundary amendment would not be granted. The burden would be on the landowner to make the property safe. If the burden were not met, and the boundary amendment were not granted, a serious risk to the public health would be avoided. This prevention protects the public and future residents of the land from the burden of increased health risks and long-term damage caused by the unregulated contamination of soil and groundwater by crop cultivation activities.

## VI. CONCLUSION

The transformation of agricultural lands to residential and urban uses continues at a steady pace on Oahu. The unknown risks associated with that drastic land use change are not being investigated, documented, or mitigated under the current land use laws of the state of Hawai'i or City and County of Honolulu. The toxic legacy of Oahu's pineapple lands will be passed on to each generation of residents unless affirmative action is taken to evaluate the safety of those lands. Oahu's families are relying to their detriment on the system of land use regulation to discover and eradicate the dangerous conditions that may be waiting just under the surface of their new soil.

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[150] Currently, an Environmental Assessment ("EA") is only triggered by reclassification of lands in the Conservation district. *See* HAW. REV. STAT. § 343-5(a)(7) (1993 & Supp. 2006).

To fulfill the existing objectives of Hawai'i's Constitution and the State Land Use Law, HRS § 205-17 should be amended to require the LUC to also consider "preservation of public health" in land reclassification. EA requirements for boundary amendments should also include: (1) identification and current levels of potentially harmful chemicals found in the property water and soil; (2) the "acceptable" or safe range of those chemicals for human exposure via digestion, skin contact and inhalation; (3) known risks posed to human health by the identified chemicals; and (4) proposed plans for clean up or mitigation to safe levels.

For the preservation of public health, the reclassification of agricultural land should not be granted unless the property is found to be within acceptable safety levels for all the permitted uses of the proposed land classification.

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# The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai'i: A Soft Law Proposal

## I. INTRODUCTION

On June 20, 2006, opponents of the patenting of *kalo*, or taro, tore up copies of the plant patents on the new hybridized varieties of the Native Hawaiian people's staple, symbolizing that no entity or person owned the sacred plant.[1] The University of Hawai'i ("UH") relinquished its patents to the three plant varieties after months of pressure from many in the Native Hawaiian community.[2] "'It is as if the patents were never filed.'... 'Anyone throughout the world may now plant them, may propagate them, sell them.'"[3] The patent termination event included Hawaiian *oli*, or chants, honoring the sacred relationship Native Hawaiians have with *kalo* and culminated in copies of the three patents UH held being torn up.[4] But why the controversy over these patents? How did this resolution come about and what led to UH relinquishing its patent rights? Finally, what can be done to ensure that clashes such as these are avoided in the future?

This controversy is just the latest collision between Western notions of property and the worldview and lifestyle of indigenous peoples around the world, including Native Hawaiians.[5] Intellectual property ("IP") law seeks to reward individual effort and investment while balancing the rights of the public with the rights of the inventor, in the case of patent law, or the author, in the case of copyright law.[6] This system has dramatically evolved where today the necessity for IP protections for private interests has increased

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[1] Susan Essoyan, *Activists Tear Up 3 UH Patents for Taro*, HONOLULU STAR-BULL., June 21, 2006, at A1, *available at* http://starbulletin.com/2006/06/21/news/story03.html.

[2] *Id.*

[3] *Id.* (quoting Gary Ostrander, University of Hawai'i at Manoa Vice Chancellor for Research).

[4] *Id*; Walter Ritte, Jr. & Le'a Malia Kanehe, *Kuleana No Haloa (Responsibility for Taro): Protecting the Sacred Ancestor from Ownership and Genetic Modification*, *in* PACIFIC GENES & LIFE PATENTS 130, 135 (Aroha Te Pareake Mead & Steven Ratuva eds., 2007).

[5] *See* Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 72-73 (2005) ("Incidents involving theft of traditional knowledge and blatant appropriation of culture have become more widely acknowledged in recent decades . . . .").

[6] *See* Marcia Ellen DeGeer, Note, *Biopiracy: The Appropriation of Indigenous Peoples' Cultural Knowledge*, 9 NEW ENG. J. INT'L & COMP. L. 179, 183 (2003).

prodigiously due the potential to generate immense wealth.[7] This is reflected in the practice of bioprospecting, where pharmaceutical and other life sciences research companies scour the globe and all of its biodiversity in search of plants and animals that are useful to mankind either in producing a new strain of food crop or a profitable new pharmaceutical.[8]

Western intellectual property regimes' ("IPRs") globalization through various avenues such as the World Trade Organization ("WTO") and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"),[9] has caused a head on collision with indigenous systems of stewardship of indigenous, traditional knowledge and cultural heritage around the world.[10] The application of IPRs to non-western cultures, particularly indigenous peoples, has been dubious and problematic.[11] Consequently, charges of misappropriation of indigenous, traditional knowledge, as well as concerns over whether Western appropriation of such knowledge may, in the end, severely erode and damage indigenous cultures that gave rise to the requisite knowledge, have risen and multiplied.[12] The recognition of indigenous intellectual property rights, however, has been slow or non-existent, especially in the United States. Although many countries have

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[7] Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 795 (2001).

[8] George Wei, *Fitting Biological Products Within the Intellectual Property Framework: Challenges Facing the Policy Makers, in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES 28, 30 (Burton Ong ed., 2004).

[9] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 1125, 1197 [hereinafter TRIPs Agreement]. The TRIPs Agreement is the most comprehensive multilateral agreement on IP and covers the areas of copyright, trademark, patents, industrial designs, geographical indications, trade secrets, and other types of undisclosed information. World Trade Organization, Overview: The TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last visited Mar. 11, 2007). TRIPs, which came into effect on January 1, 1995, effectively instituted Western IP law worldwide. DeGeer, *supra* note 6, at 192-93. Its main purpose is to encourage trade and protect property rights by promoting effective and enforceable IP laws in member states. *Id.* TRIPs accomplishes many things, including (1) establishing for all WTO member countries a set of minimum standards governing IP rights, (2) specifying criminal and civil enforcement obligations, and (3) establishing procedures for the acquisition and maintenance of IP rights. Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283, 1288 (1998). The sinister side of the TRIPs Agreement is that there is concern that it will lead to an IP rights stratification between technology have and have not nations where industrialized nations will dominate the field. *Id.* at 1288-90.

[10] *See* Ikechi Mgbeoji, *Patents and Traditional Knowledge of the Uses of Plants: Is a Communal Patent Regime Part of the Solution to the Scourge of Bio Piracy?*, 9 IND. J. GLOBAL LEGAL STUD. 163, 163-64 (2001).

[11] *Id.* at 163.

[12] *Id.* at 163-64.

adopted *sui generis*[13] IPRs that recognize the collective IP rights of indigenous peoples, the United States has unfortunately not been amenable to similar provisions.[14] Therefore, the development of other avenues to safeguard indigenous, traditional knowledge, as well as means to provide stability to various economic interests, is necessary under the current IP regime.

This Note proposes a soft law[15] framework in the form of an institutional policy that organizations dealing with IP and indigenous, traditional knowledge, such as UH, can adopt to better ensure that the needs and interests of indigenous holders of such knowledge are safeguarded. Its central thesis is that in light of the lack of recognition of IP rights of indigenous peoples, the adoption of a proactive and progressive institutional policy by organizations operating in indigenous IP areas may provide some timely assistance in protecting indigenous, traditional knowledge and cultural heritage. In light of the unwillingness of the United States to recognize the rights of indigenous peoples, such an approach may offer some safeguards to indigenous, traditional knowledge. Moreover, adopting an institutional policy regarding traditional knowledge is relatively easy and simple to do. This approach, although it does not guarantee enforceable legal protection, may influence players in markets such as Hawai'i to adopt appropriate policies, operating

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[13] "*Sui generis* is Latin for 'unique' or 'of its own kind.'" Donna Craig, *Biological Resources, Intellectual Property Rights and International Human Rights: Impacts on Indigenous and Local Communities*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES, *supra* note 8, at 352, 368. In IP law, developing a *sui generis* IPR is developing an alternative IPR that is governed by fundamentally different principles and modes of protection. *Id.* A *sui generis* system can be a whole new IPR, modification of existing IPR, or a completely new IPR right. *Id.* at 369. Many have come to recognize that current IP law is inadequate in protecting indigenous culture and heritage. *Id.* In 2000, Panama passed Law No. 20, the first *sui generis* indigenous IPR in the world. Irma De Obaldia, Comment, *Western Intellectual Property and Indigenous Cultures: The Case of the Panamanian Indigenous Intellectual Property Law*, 23 B.U. INT'L L.J. 337, 338 (2005). This law grants to Panama's indigenous groups the "exclusive, collective and perpetual rights to their creations, inventions and traditional expressions." *Id.*

[14] Although the United States has never taken an official position on developing a *sui generis* IPR protecting the rights of indigenous peoples, in reality, it is likely to oppose real *sui generis* protection of the IP rights of indigenous peoples. E-mail from Le'a Kanehe, Legal Analyst, Indigenous Peoples Council on Biocolonialism, to author (Feb. 8, 2007, 08:48 HST) (on file with author). U.S. opposition to the United Nations Draft Declaration on the Rights of Indigenous Peoples is evidence of U.S. opposition to measures which could protect the rights of indigenous peoples. *Id.*

[15] Soft law is guidelines and codes of conduct that are not legally binding. Lauren E. Godshall, Comment, *Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law*, 15 GEO. INT'L ENVTL. L. REV. 497, 521 (2003). Soft law can be relevant in that it can shape political discourse regarding a topic as well as provide moral force to arguments. *Id.* Soft law is usually found in the provisions of treaties not yet in force or in the many resolutions that international conferences adopt. *Id.* "If repeated in enough contexts, soft law may eventually become accepted as customary international law." *Id.*

procedures, and codes of ethical conduct that may provide assistance in protecting indigenous, traditional knowledge. In sum, this Note argues that a soft law framework can be one piece of the puzzle in creating a workable framework to safeguard traditional knowledge of indigenous peoples.

Part II examines various definitions of indigenous, traditional knowledge. Part III focuses on why Western IP law does not "fit" with indigenous systems of knowledge. Part IV examines the issues surrounding the taro patent controversy in Hawai'i. Part V proposes a soft law framework which can be embodied in institutional policies, best practices, or codes of ethics that may be another useful tool in protecting the traditional knowledge and cultural heritage of indigenous peoples, especially in Hawai'i.

## II. TRADITIONAL KNOWLEDGE AND CULTURAL EXPRESSION

There are an estimated three hundred million indigenous people living in seventy countries worldwide.[16] They live in varied environments ranging from rainforests to deserts and coastal environments.[17] Typically, they are distinct cultural communities that are historically, culturally, socially, and economically tied to their traditional lands and resources.[18] These indigenous peoples have created and stewarded significant resources and knowledge regarding their ecological environment that could possibly have a considerable global impact.[19] For example, an estimated seventy-four percent of the one hundred nineteen drugs developed from plants on the market today were initially developed from traditional herbal medicines.[20] It has also been shown that the use of indigenous, traditional knowledge "can increase success ratio in trials for useful substances from one in ten thousand to one in two."[21] In 1994, the estimated annual world market for pharmaceuticals developed from traditional medicinal knowledge totaled thirty-two billion dollars.[22] "The

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[16] Office of the High Commissioner for Human Rights, Working Group on Indigenous Populations, *Leaflet No. 1: Indigenous Peoples and the United Nations System: An Overview* 4 (2001), *available at* http://www.unhchr.ch/html/racism/indileaflet1.doc.

[17] Craig, *supra* note 13, at 352.

[18] *Id.*

[19] *Id.* at 353.

[20] AFRICAN CENTER FOR TECHNOLOGICAL STUDIES, INTELLECTUAL PROPERTY PROTECTION AND TRADITIONAL KNOWLEDGE: AN EXPLORATION IN INTERNATIONAL POLICY DISCOURSE 7 (1998).

[21] Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 928 (1996).

[22] STEPHEN SUPPAN, INSTITUTE FOR AGRICULTURAL AND TRADE POLICY, TRADE AND GLOBAL GOVERNANCE PROGRAM, AMENDING WTO INTELLECTUAL PROPERTY RULES TO PREVENT BIO-PIRACY & IMPROVE PATENT QUALITY 2 (2006).

importance of ethno-botanical information in drug discovery is well acknowledged."[23] For this reason, there has been a growing international effort in recent years to seek out and capitalize on traditional knowledge, often to the detriment of the indigenous stewards of this knowledge.[24]

Indigenous, traditional knowledge has been defined in various ways.[25] Given that traditional knowledge is incredibly diverse and highly dynamic, one specific definition is inadequate to capture its breadth and depth. Therefore, to grasp the scope of practices and items that may fall under what is termed indigenous, traditional knowledge, it is helpful to explore various working definitions.

Victoria Tauli-Corpuz[26] defines indigenous, traditional knowledge as:

> the creative production of human thought and craftmanship, language, cultural expressions which are created, acquired and inspired, such as songs, dances, stores, ceremonies, symbols and designs, poetry, artworks; scientific, agricultural, technical, and ecological knowledge and the skills required to implement this knowledge and technologies.[27]

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[23] Pushpam Kumar & Nori Tarui, *Identifying the Contribution of Indigenous Knowledge in Bioprospecting for Effective Conservation Strategy* 12, *in* CHALLENGES OF INDIAN ECONOMY (Nirmal Sengupta ed., 2007), *available at* http://ma.caudillweb.com/documents/bridging/papers/kumar.pushpam.pdf.

[24] *Id.* at 11-17.

[25] *See* World Intellectual Property Organization [WIPO], Intergovernmental Comm. on Intellectual Prop. and Genetic Res., Traditional Knowledge and Folklore, *Traditional Knowledge—Operational Terms and Definitions* 8-10, WIPO Doc. WIPO/GRTKF/IC/3/9 (May 20, 2002). For example, the Philippines Indigenous Peoples' Rights Act of 1997 defines indigenous knowledge systems and practices as:

> systems, institutions, mechanisms and technologies comprising an [sic] unique body of knowledge evolved through time that embody patterns of relationships between and among peoples and between peoples, their lands and resource environment, including such spheres of relationships which may include social, political, cultural, economic, religious spheres and which are the direct outcome of the indigenous peoples' [sic] responses to certain needs consisting of adaptive mechanisms which have allowed indigenous peoples to survive and thrive within their given socio-cultural and bio-physical conditions.

*Id.* at Annex II, pp. 1.

[26] Victoria Tauli-Corpuz is Executive Director of the Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education). VICTORIA TAULI-CORPUZ, BIODIVERSITY, TRADITIONAL KNOWLEDGE AND RIGHTS OF INDIGENOUS PEOPLES, at i-ii (2006). The Tebtebba Foundation is an indigenous policy research center that is focused on advocating for the recognition and respect of indigenous rights worldwide. Tebtebba Foundation, http://www.tebtebba.org/about_us/about_us.htm (last visited Mar. 11, 2007).

[27] TAULI-CORPUZ, *supra* note 26, at 1.

Her definition places traditional knowledge in the larger context of cultural heritage.[28] Cultural heritage includes the institutions and various socio-political, cultural, and economic systems that have been bestowed upon indigenous peoples from their ancestors and by their natural environment.[29] Included among these systems and institutions are worldviews, belief systems, morality, customary law and norms, knowledge of sacred sites and natural features, as well as traditional knowledge.[30] According to Tauli-Corpuz, heritage cannot be divided and classified by component parts or differentiated as all aspects of heritage are equally important.[31] Traditional knowledge, cultural, and resource rights, along with self-determination and territorial rights are all intertwined and inextricably linked with heritage.[32] Any attempt to sever these relationships threatens the very existence of cultural heritage and its various components.[33] Therefore, according to this definition of traditional knowledge, it is intertwined with all other aspects of life and threats to traditional knowledge threaten the culture and very existence of indigenous peoples.

In 2003, *Ka Aha Pono*: Native Hawaiian Intellectual Property Rights Conference was held in Honolulu, Hawai'i to foster understanding and awareness about IP law and the misappropriation of Native Hawaiian traditional knowledge.[34] The Conference produced the *Paoakalani* Declaration,[35] "an organic document expressing [Native Hawaiian] self-determination to protect and 'perpetuate [their] culture under threat of theft and commercialization of the traditional knowledge of [Native Hawaiians] . . . .'"[36] According to the *Paoakalani* Declaration, Native Hawaiian traditional knowledge:

> encompasses our cultural information, knowledge, uses, practices, expressions, and artforms unique to our way of life maintained and established across [Hawai'i] since time immemorial. This traditional knowledge is based upon millennia of observation, habitation, and experience and is a communal right held by the [Hawaiian nation] and in some instances by *ohana* and traditional

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 2.

[33] *Id.*

[34] Stewart Yerton, *Biotech Brouhaha: Some Native Hawaiian Leaders Harbor Concerns About Developing the State's Life Sciences Industries*, HONOLULU STAR-BULL., July 24, 2005, at D1, *available at* http://starbulletin.com/2005/07/24/business/story1.html.

[35] Paoakalani Declaration, Ka Aha Pono '03: Native Hawaiian Intellectual Property Rights Conference, Waikiki, Hawai'i, Oct. 2003, *reprinted in* R. Hokulei Lindsey, *Responsibility with Accountability: The Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 HOW. L.J. 763, 778-79 (2005) [hereinafter Paoakalani Declaration].

[36] Lindsey, *supra* note 35, at 771 (quoting Paoakalani Declaration, *supra* note 35, at 775).

> institutions and communities. The expression of traditional knowledge is dynamic and cannot be fixed in time, place or form and therefore, cannot be relegated to western structures or regulated by western intellectual property laws. We retain rights to our traditional knowledge consistent with our [Native Hawaiian] worldview, including but not limited to ownership, control, and access. We also retain the right to protect our traditional knowledge from misuse and exploitation by individuals or entities who act in derogation of and inconsistent with our worldview, customs, traditions and laws.[37]

An important feature of indigenous, traditional knowledge is its link to a community and that community's right to self-determination. These links are made explicit in the *Paoakalani* Declaration, which states that Native Hawaiians "have the right of self-determination. By virtue of that right we freely determine our political status and freely pursue our economic, social, and cultural development, which includes determining appropriate use of our traditional knowledge, cultural expressions and artforms, and natural and biological resources."[38] In the Native Hawaiian context, traditional knowledge is communally held and, therefore, the community's right of self-determination goes hand in hand with the protection of indigenous, traditional knowledge.[39]

The Declaration of the Rights of Indigenous Peoples, as passed by the United Nations ("UN") Human Rights Council, is a comprehensive statement on the rights of indigenous peoples and covers issues ranging from collective rights, cultural rights, education, health, and language.[40] Article 11 states that "[i]ndigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts [sic], designs, ceremonies, technologies and visual and performing arts and literature."[41] Furthermore, Article 31 states that

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions,

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[37] Paoakalani Declaration, *supra* note 35, at 778-79.

[38] *Id.* at 776. The Declaration further states that Native Hawaiian "traditional knowledge [is], by . . . inherent birth right, the *kuleana* and property of [Native Hawaiians] and the inheritance of future generations of [the Hawaiian] people." *Id.*

[39] Lindsey, *supra* note 35, at 773-74.

[40] U.N. Human Rights Council, *Report to the General Assembly on the First Session of the Human Rights Council*, 57, U.N. Doc. A/HRC/1/L.10 (June 30, 2006) [hereinafter Draft Report], *available at* http://www.ohchr.org/english/bodies/hrcouncil/1session/documentation.htm. The UN General Assembly was expected to vote on the Declaration by December 2006, but the measure was deferred for consideration until the end of the sixty-first session in 2007. Press Release, Sixty-first Gen. Assembly, Third Comm. Approves Draft Resolution on Right to Dev.; Votes to Defer Action Concerning Declaration on Indigenous Peoples, U.N. Doc. GA/SHC/3878 (Nov. 28, 2006), *available at* http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm.

[41] Draft Report, *supra* note 40, at 63.

> as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[42]

Although not legally binding on member states, if approved, the Declaration will significantly bolster the rights of indigenous peoples to exercise power and control over their IP.[43]

Professor Erica-Irene A. Daes, longtime chairperson of the United Nations Working Group on Indigenous Populations,[44] describes traditional knowledge as part of the larger category of IP of indigenous peoples.[45] Daes describes a

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[42] *Id.* at 69.

[43] Although a declaration is not binding on UN Member States and not considered to be a primary source of international law, it is influential on future state actions and over time, norms of customary international law can emerge from these state practices and declarations. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 rep. n.2 (1987); *see also* Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 368-69 (2004). State practice can be:

> 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 and must usually have continued for a period of time long enough to signify understanding and acquiescence.

Van Dyke, *supra*, at 368-69 (footnotes omitted).

[44] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 113 (2d ed. 2004).

[45] WIPO, *supra* note 25, Annex III, at 2. Describing traditional knowledge, Daes states:

> The intellectual property of indigenous peoples may be usefully divided into three groups: (i) folklore and crafts; (ii) biodiversity; and (iii) indigenous knowledge.
>
> Folklore and crafts include various forms of oral literature, music, dance, artistic motifs and designs crafts such as basketry, beading, carving, weaving and painting. . . .
>
> The biodiversity of the traditional territories of indigenous peoples may also be considered as part of the intellectual property of indigenous peoples requiring protection. Biodiversity refers, inter alia, to plant varieties which have been developed through experiment and cultivation for use as food, medicine or materials for houses, boats or other kinds of construction or use.
>
> *Indigenous knowledge* refers to the knowledge held, evolved and passed on by indigenous peoples about their environment, plants and animals, and the interaction of the two. Many indigenous peoples have developed techniques and skills which allow them to survive and flourish in fragile ecosystems without causing depletion of resources or damage to the environment. The various forms of sustainable development practiced by indigenous peoples in forests, mountain and valley areas, dry-lands, tundra and arctic regions derive from a successful application of technology in agro-forestry, terracing,

structure in which indigenous peoples have created systems of managing this "property" for themselves. Such a definitional structure provides moral force in recognizing the IP rights of indigenous peoples, particularly through *sui generis* systems.

## III. WORLDVIEW COLLISION: WESTERN INTELLECTUAL PROPERTY DOES NOT "FIT"

"The indigenous view of the world . . . is the antithesis to the Western paradigm: communitarian, not individual, focused on sharing rather than shielding things, respect for land and all living things as sacred rather than as objects ripe for exploitation and consumption."[46]

This statement epitomizes the fundamental tensions between the Western IP law system and indigenous views regarding traditional knowledge. It is evident that the Western system of property, especially IP, does not "fit" with indigenous systems of managing traditional knowledge and is therefore ill-suited to fully protect the resources of indigenous peoples.[47] This phenomenon can be traced to major worldview and cultural differences between Western and indigenous people. Maui Solomon, a respected *Moriori* and *Maori* attorney from *Aotearoa* (New Zealand), explains that "there can be seen a fundamental clash between the ideological underpinnings of the Intellectual Property Rights system and the philosophical underpinnings of . . . Indigenous Peoples Rights and Obligations."[48] This clash is best exhibited by the incentives that drive IP versus the ones that motivate indigenous peoples to develop traditional knowledge.

### *A. Incentives: Profit Versus Cultural Maintenance*

Historically, economic profit and private property considerations have been the major forces driving Western IP laws.[49] IPRs emerged to grant monopoly protection to those who made significant investments in developing an

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resource management, animal and livestock controls, fish harvesting and in other areas. In particular, many indigenous peoples have a knowledge of plants suitable as medicines and this traditional medicine has been and continues to be in many cases a source for Western pharmacology.

*Id.*

[46] Siegfried Wiessner, *Defending Indigenous Peoples' Heritage: An Introduction*, 14 ST. THOMAS L. REV. 271, 272 (2001).

[47] *See* Riley, *supra* note 5, at 79.

[48] Maui Solomon, *Intellectual Property Rights and Indigenous Peoples Rights and Obligations*, IN MOTION MAG., Apr. 22, 2001, http://www.inmotionmagazine.com/ra01/ms2.html.

[49] DeGeer, *supra* note 6, at 183-85.

invention, new technique, musical work, or piece of writing.[50] They are a means of creating incentives in a market economy where market value and culture are separate and distinct.[51] Simply put, natural resources such as biodiversity are viewed as a means for economic exploitation and gain.[52] For indigenous people, however, profit has never been a major incentive in developing traditional knowledge and cultural expressions.[53] Typically, the incentive to develop traditional knowledge and cultural expression, especially in the Hawaiian context, has been cultural maintenance, self-determination, and sustainability.[54] "Indigenous [p]eoples regard their very existence as linked or related to other life-systems, yet this relatedness is not considered alienable."[55]

For many indigenous peoples around the world, the tangible and intangible aspects of their culture, the physical materials of their culture as well as the traditions, histories, customs, traditional knowledge, and spiritual beliefs are all intertwined with the environment in which they live.[56] For example, a *Maori* person of *Aotearoa* (New Zealand) may view a native tree and pay respect to it as one of his familial ancestors.[57] However, in the Western context, a scientist may view this same tree and think of the countless ways it can be "improved" through genetic modification, so that the tree is more fruitful or can grow to maturity faster.[58] The indigenous *Maori* approach is justified by the *whakapapa*, or genealogy, of the *Maori* people that links them to creation and all created things.[59] On the other hand, the Western approach is justified through the aegis of modern progress and technological advancement.[60] Although these cultural viewpoints are of equal value to their holders, they are not amoral. They are linked to systems of morality and lifestyle that bring definition and structure to their respective communities. This, essentially, is where the conflicts lie.

For indigenous peoples, the physical, natural, cultural, and spiritual worlds are interwoven.[61] Their very existence as individuals and distinct communities

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[50] *Id.*

[51] Riley, *supra* note 5, at 87.

[52] Solomon, *supra* note 48.

[53] DeGeer, *supra* note 6, at 181.

[54] *See* Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-modification of Culture*, 48 How. L.J. 737, 744 (2005); Solomon, *supra* note 48.

[55] Conway-Jones, *supra* note 54, at 744 (citation omitted).

[56] Riley, *supra* note 5, at 77.

[57] Solomon, *supra* note 48.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See* Riley, *supra* note 5, at 77.

is defined by these effects and provide deep meaning to their lives.[62] Cultural maintenance and the protection of tangible and intangible cultural property, including traditional knowledge and cultural heritage, are necessary to the very survival and existence of indigenous peoples.[63] Therefore, the appropriation and commodification of cultural products, traditional knowledge, and cultural expressions can have a deleterious effect on native peoples.[64]

### *B. Individual Versus Communal*

"[O]ur system struggles to assign intellectual property rights to authors who fail to evoke the Romantic image of the solitary artist scribbling away in an unheated garret or the unkempt scientist waking from a fitful nap . . . with a sudden flash of insight."[65] This ideal of a single author or inventor has persisted with IP law to this day.[66] IP is individualistic by nature. Even a patent that is held by a multinational corporation and developed through collaborative effort must list the individual inventor who supposedly "invented" the product.[67] Although IP law does provide for group or concurrent ownership, the structure and provisions of this type of ownership is narrow and lacking at best.[68]

For many indigenous peoples, traditional knowledge and cultural heritage is communally created and held through inter-generational transmission of knowledge and rights.[69] These creations are in some ways "accidental" according to a Western view of innovation, in that the impetus for their creation was not profit or to exert ownership control, but are expressions of the

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[62] *See id.*

[63] *See id.*

[64] *See id.* at 78.

[65] Scafidi, *supra* note 7, at 795. Much of copyright law is derived from the principle of the Romantic author, one who is a "lone genius, independent inventor, creative rebel" and is the sole creator of a piece of work. Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 179-184 (2000). This conception emerged out of the mid-eighteenth century Romantic movement in literature and art where individuality, individual attainment, and the importance of the self pervaded Western culture. *Id.* Thus, the author became one who did not collaborate with a team of thinkers, but one whose "individual creative spirit" led to the creation of a piece of work that broke away from "all traditions and previous works." *Id.* Although authorship is an incredibly collaborative work today, the law has yet to catch up to this reality and still clings to and has, at its core, this notion of Romantic authorship. *Id.*

[66] Scafidi, *supra* note 7, at 806.

[67] *Id.* at 795.

[68] *See id.* at 795-98.

[69] Eliana Torelly de Carvalho, *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals of a Sui Generis System*, 11 MO. ENVTL. L. & POL'Y REV. 38, 63 (2003).

"internal dynamics, shared experiences, and value systems"[70] of the community.[71] IP law, however, provides little to no protection for these creations of culture.[72]

For example, the decision of *Yumbulul v. Reserve Bank of Australia*,[73] which involved an Australian aboriginal artist named Terry Yumbulul, evidences the large differences between Western and indigenous approaches to traditional knowledge and cultural heritage.[74] Yumbulul, an artist who was authorized by the customary laws of his tribe to paint his tribe's sacred arts, created a work of art called the "Morning Star Pole."[75] These poles were works of art that were zealously guarded by Yumbulul's tribe, the Galpu, as the poles commemorated the deaths of influential tribal members as well as signified the importance of certain inter-clan relationships.[76] As a communal creation, the Galpu felt that the poles should not be created or displayed in any fashion that went contrary to their intended use or offended the sensitivities of the tribe.[77] Yumbulul created five Morning Star Poles which he licensed to the Aboriginal Artists Agency to reproduce and market.[78] The Australian Reserve Bank, interested in utilizing the artwork as a design element on a bank note, reached an agreement with the Agency to reproduce the artwork.[79]

To the shock and dismay of Yumbulul and the Galpu, in late 1988 the Reserve Bank publicly released a bi-centennial bank note that included a depiction of the Morning Star Poles.[80] The Federal Court for Australia held that although Yumbulul was not fluent in English, was uneducated, and may not have understood the licensing agreement, he sufficiently understood the provisions of the agreement.[81] Furthermore, the court failed to recognize aboriginal customary law that dictated when and how sacred works of art could be depicted and transferred.[82] The court ignored the Galpu's communal right to the poles and that Yumbulul was merely the steward of the art for the whole community.[83] The trial judge commented that "Australia's copyright

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[70] Scafidi, *supra* note 7, at 810.

[71] *Id.*

[72] *See* DeGeer, *supra* note 6, at 184-92.

[73] Yumbulul v. Reserve Bank of Australia (1991) 21 I.P.R. 481, *available at* http://www.austlii.edu.au/.

[74] *See id.*

[75] *Id.* ¶ 3.

[76] *Id.* ¶ 4.

[77] *Id.* ¶ 21.

[78] *Id.* ¶ 19.

[79] *Id.* ¶ 20.

[80] *Id.*

[81] *Id.* ¶¶ 16, 19, 22.

[82] *Id.* ¶¶ 4, 5.

[83] *Id.* ¶¶ 3-5.

law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin."[84]

### *C. Indigenous Property?*

*Yumbulul v. Reserve Bank of Australia* illustrates another significant divergence between Western IP law and indigenous systems of managing IP. For the most part, indigenous people do not view their traditional knowledge and cultural heritage as "property" at all.[85] They view themselves merely as stewards or custodians of this heritage and knowledge, which collectively belongs to their people and subsequent generations.[86] Possessing some form of knowledge typically brings with it a certain set of responsibilities and protocol one must follow and abide by.[87]

According to Tauli-Corpuz, indigenous peoples are often uncomfortable with the use of the term "property" in reference to traditional knowledge, resources, and land, as they view all of these as items bestowed upon them, to be stewarded, not strictly owned.[88] There is a reciprocal relationship between indigenous peoples and their natural environment and thus, in some ways indigenous peoples view themselves as custodians or caretakers of traditional knowledge, natural resources, and territories they have inherited.[89]

Professor Erica Irene A. Daes has concluded:

> [I]ndigenous peoples do not view their heritage in terms of property at all—that is something which has an owner and is used for the purpose of extracting economic benefits—but in terms of community and individual responsibility. Possessing a song, story or other medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships, rather than a bundle of economic rights. . . . To sell it is necessarily to bring the relationship to an end.[90]

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[84] *Id.* ¶ 21.

[85] TAULI-CORPUZ, *supra* note 26, at 13.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] U.N. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, ¶ 26, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 28, 1993) (*prepared by* Special Rapporteur, Erica-Irene A. Daes).

Individual property *ownership*, however, is a fundamental tenet of the Western worldview and undergirds Western property law regimes.[91] "The concept of property is powerful. . . . [It holds] a fundamental place in our constitutional structure. . . . Property has been more than simply an imaginative or symbolic concept: it has been the medium through which struggles between individual and collective goals have been refracted."[92] Simply put, property *ownership* is of utmost importance in the Western system, which inherently conflicts with indigenous systems of stewardship.

### *D. Patent and Copyright Law*

Presently, there are many barriers to the legal protection of traditional knowledge and cultural heritage in our IP law system. Many of the requirements necessary for IP protection simply cannot be met by indigenous peoples.[93] American IP law is divided into protections for patents, copyrights, trademarks, industrial designs, and trade secrets.[94] This section will briefly review portions of American IP law to demonstrate its shortcomings in providing protections to traditional knowledge and cultural heritage.

It is typically very difficult to apply patent law to traditional knowledge. Granted by a government, a patent gives exclusive rights to an inventor or discoverer to manufacture, distribute, and capitalize on the invention for a limited period of time.[95] The purpose of patents is to create incentives by granting a limited monopoly to the inventor to spur inventing and discovery for the betterment of society.[96] To receive patent protection an invention must be new or novel, non-obvious, and useful.[97]

For traditional knowledge, the requirements necessary for patent protection are often very hard to meet. First, traditional knowledge and cultural

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[91] *See* Conway-Jones, *supra* note 54, at 756 n.19; Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128 (1990). Professor Danielle Conway-Jones states:

> Western property ownership confers three basic rights: to possess and enjoy, to alienate, and to destroy. Those rights assume private, individual ownership, and the result of such ownership notions is a view of land and personal property as subject to private, individual control. The Western property model does not accommodate the concept of a reciprocal relationship with the land or other property or a concept of communal ownership of goods and resources.

Conway-Jones, *supra* note 54, at 746 n.19.

[92] Underkuffler, *supra* note 91, at 128.

[93] Mariaan de Beer, *Protecting Echoes of the Past: Intellectual Property and Expressions of Culture*, 12 CANTERBURY L.R. 94, 97 (2006).

[94] Godshall, *supra* note 15, at 510.

[95] DeGeer, *supra* note 6, at 182-83; Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 8 (2001).

[96] DeGeer, *supra* note 6, at 183.

[97] *Id.*; Patent Act of 1952, 35 U.S.C. §§ 101-103 (2000).

expressions of indigenous peoples are usually the result of efforts spanning generations.[98] Thus, this knowledge is probably not "new" or "novel" enough to reach patentable standards.[99] Second, and foremost among these hindrances, is the fact that under patent requirements, a specific identifiable inventor is usually necessary. Often the definition of "inventor" does not fit with the realities of how indigenous traditional knowledge is created.[100] Traditional knowledge is usually the result of generations of communal effort with no single, identifiable inventor or creator.[101] Although patent law does provide for joint inventors, it is still premised on the fact that the multiple inventors are easily identifiable individuals.[102] To many indigenous people the concept of an individual or even a few individuals who are part of a larger indigenous community "owning" and having sole rights to knowledge that is the result of collective effort by the whole community often spanning centuries is incomprehensible.[103] Accordingly, traditional knowledge normally falls outside the conventional patent system.[104]

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[98] DeGeer, *supra* note 6, at 183-93.

[99] de Beer, *supra* note 93, at 97.

[100] *Id.*

[101] *Id.*

[102] *See* Patent Act of 1952, 35 U.S.C. § 116 (2000). "Joint invention occurs when more than one person contributes to the conception of the invention." DONALD S. CHISUM, CHISUM ON PATENTS § 2.01 (Matthew Bender & Co. 2006). The court in *Monsanto Co. v. Kamp* stated:

> A joint invention is the product of collaboration of the inventive endeavors of two or more persons working toward the same end and producing an invention by their aggregate efforts. To constitute a joint invention, it is necessary that each of the inventors work on the same subject matter and make the same contribution to the inventive thought and to the final result.

269 F. Supp. 818, 824 (D.D.C. 1967). The Federal Circuit in *Fina Oil & Chemical Co. v. Ewen* stated that "[t]he case law . . . indicates that to be a joint inventor, an individual must make a contribution to the conception of the claimed invention that is not insignificant in quality, when that contribution is measured against the dimension of the full invention." 123 F.3d 1466, 1473 (Fed. Cir. 1997). However, particularly regarding traditional medicinal knowledge, traditional knowledge does not contribute to all aspects of the development of a pharmaceutical, particularly the chemical structure and isolation of the compound making up the drug. Traditional knowledge, although incredibly important to the pharmaceuticals development, mainly contributes to the chemical compound discovery and its healing potential. This may not be recognized as part of the conception of the invention. Moreover, whether the role of traditional knowledge is part of the conception of the invention depends on the characteristics of the collaboration between the bioprospecting company and the indigenous community. Michael J. Huft, *Indigenous Peoples and Drug Discovery Research: A Question of Intellectual Property Rights*, 89 NW. U. L. REV. 1678, 1723-24 (1995).

[103] *See* discussion *supra* Part III.C

[104] de Beer, *supra* note 93, at 97.

Copyright law is also inadequate to protect rights of indigenous people.[105] The Copyright Act of the United States provides several requirements for copyright protection: "Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[106] The first problem is that copyright law is geared towards the written and printed word, thus excluding from protection many indigenous creations and knowledge, which are generally orally transmitted.[107] Second, indigenous creations are often unable to satisfy the copyright originality requirement as the creative work is usually the result of many "authors" who have contributed input through many generations and thus may be deemed unoriginal.[108] Third, copyright, similar to patents, is premised on individuality.[109] Copyright is for the protection of authors and generally gives an author the exclusive right to capitalize on a work for the usual span of the author's life plus fifty years.[110] For many works of indigenous folk art, however, there is not necessarily any identifiable author, creator, or creators of the work as much of the art is communal in nature, created through generations of effort.[111] Like patent law, copyright law does not recognize indigenous forms of communal ownership.[112] The communal method of creating a piece of work places the origin of the work in the community, not in any one individual or group of individuals.[113] Even if a work were the creation of one individual, it is unlikely that this individual will claim "authorship" in the Western sense, as the work is viewed

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[105] *See* Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE H.R. & DEV. L.J. 51, 60-62 (2004).

[106] 17 U.S.C. § 102 (2000).

[107] Riley, *supra* note 65, at 185-86.

[108] *Id.* at 187-89. Copyright law does provide for joint authorship. The requirements for joint authorship, however, are extremely high and are likely a threshold that may be impossible for indigenous peoples to meet. *See* Carpenter, *supra* note 105, at 67-68.

[109] *See* Riley, *supra* note 65, at 178-81.

[110] Godshall, *supra* note 15, at 511.

[111] *Id.*

[112] *See* Riley, *supra* note 65, at 190-93. Copyright law does recognize joint works, which is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 6 NIMMER ON COPYRIGHT § 6.01 (Matthew Bender and Co. 2006). "The authors of a joint work are co-owners of copyright in the work." 17 U.S.C. § 201 (2000). However, this joint works doctrine (joint authorship) is unable to meet the needs and realities of indigenous creations as it is still premised on individuality. A joint work essentially has several identifiable individual authors, each of which must meet the requirement of authorship. Thus, this still requires indigenous communities to mold their creation process to the Romantic form of authorship. Riley, *supra* note 65, at 193-94.

[113] Riley, *supra* note 65, at 190-92.

as the product of the community.[114] Lastly, copyright law assumes that the work being copyrighted is unchanging and complete in nature.[115] This is not reflected in native folklore, which transforms and is added to over time as it is passed from person to person.[116] Therefore, copyright law often does not offer protection to indigenous creations and traditional knowledge.

### *E. Public Domain*

There is an unanticipated risk that indigenous knowledge will become alienated from the original holders if IP protections are extended to indigenous, traditional knowledge. This is due to the fact that once IP protections expire, the protected subject matter is released into the public domain, for all to utilize, commercialize, and take advantage of.[117] Once in the public domain, the involved indigenous community can no longer control the knowledge or its use as it is now in the public domain.[118] What results is a permanent alienation of this indigenous, traditional knowledge from the very community which created and fostered the knowledge.[119]

## IV. INTELLECTUAL PROPERTY AND *KALO*

In the 1990s, UH researchers developed three new hybridized varieties of taro that were resistant to fungal leaf blight disease, which destroyed ninety-seven percent of taro in Samoa.[120] To produce the blight resistant hybrids, UH scientist Eduardo Trujillo used traditional methods in breeding Hawaiian varieties of *kalo* with taro from Palau, an island nation in the Micronesian area of the Western Pacific.[121] Over centuries of cultivation, Native Hawaiians bred nearly three hundred varieties of taro suited to different environmental and cultivation conditions for its color, taste, medicinal qualities, and different cultural and ceremonial purposes.[122] These three hundred varieties included Maui Lehua, the Hawaiian taro variety Trujillo cross bred with the Palauan

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[114] *Id.*

[115] Godshall, *supra* note 15, at 511.

[116] *Id.*

[117] Debra Harry & Le'a Malia Kanehe, *Asserting Tribal Sovereignty over Cultural Property: Moving Towards Protection of Genetic Material and Indigenous Knowledge*, 5 SEATTLE J. FOR SOC. JUST. 27, 52 (2006).

[118] *Id.*

[119] *Id.*

[120] Press Release, Univ. of Haw., Taro Patent Discussions Advancing (May 16, 2006), *available at* http://manoa.hawaii.edu/ovcrge/taro/.

[121] Ritte & Kanehe, *supra* note 4, at 132.

[122] *Id.* at 134.

strain. Maui Lehua is one of the primary types of *poi* taro farmed today.[123] In 2002, UH obtained plant patents to the three new hybridized varieties of taro.[124]

The patents were on taro plants named "Paakala," "Pauakea," and "Palehua."[125] According to UH faculty union contracts, as well as an agreement between the UH Professional Assembly and the UH Board of Regents, such research developments must be patented.[126] The UH faculty union contract stipulates that the researcher who develops the invention receives half of the net profits from the sale or exploitation of the patent after the University's patenting costs are covered.[127] A commercial farmer may buy a patented cultivar from the University for $2 per starter shoot, and thereafter farmers can grow the patented strain for three years, then pay a royalty of two percent of their profits.[128] Taro that is obtained by trading with other farmers or is produced for home or personal use is not subject to any fees.[129]

In January 2006, a group of Native Hawaiians began to pressure UH to relinquish its patents on the three disease-resistant varieties.[130] Longtime activist Walter Ritte, Jr. spearheaded the efforts.[131] In February 2006, Ritte and taro farmer Chris Kobayashi sent a letter demanding that UH give up its

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[123] JOHN J. CHO, THE HAWAIIAN KALO FACT SHEET 2005 (DRAFT) 3 (2005) (copy on file with author).

[124] Essoyan, *supra* note 1. Plant patents are granted to an inventor who has invented or discovered an asexually reproduced, distinct, and new variety of plant. U.S. Patent and Trademark Office, General Information About 35 U.S.C. § 161 Plant Patents, http://www.uspto.gov/web/offices/pac/plant/index.html (last visited Mar. 11, 2007). The patent lasts for twenty years. *Id.* Plant patents are provided for by 35 U.S.C. § 161, which states: "Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and new found seedlings . . . may obtain a patent therefore, subject to the conditions and requirements of this title." 35 U.S.C. § 161 (2000). Congress, in 1930, first extended IP protections to plants by enacting the Plant Patent Act. Jonathan D. Carpenter, *Intellectual Property: The Overlap Between Utility Patents, Plant Patents, the PVPA, and Trade Secrets and the Limitations on That Overlap*, 81 N. DAK. L. REV. 171, 175-76 (2005). In 1970, Congress enacted the Plant Variety Protection Act which created patent-like protection for sexually reproduced plants. *Id.* Unlike plant patents, however, this protection is derived from a certificate issued by the Plant Variety Protection Office within the Department of Agriculture. *Id.*

[125] *Id.*

[126] Press Release, Univ. of Haw., *supra* note 120.

[127] Univ. of Haw., Faculty Union Contract 25 (1995-99), *available at* http://www.uhpa.org/uhpa-bor-contract/archives/9599-contract.pdf/view; Jan TenBruggencate, *Many Questioning Why UH Should Own Hybrids*, HONOLULU ADVERTISER, May 2, 2006, at B3.

[128] TenBruggencate, *supra* note 127.

[129] *Id.*

[130] *Id.*; Essoyan, *supra* note 1.

[131] Interview with Walter Ritte, Jr., Lead Protestor, in Honolulu, Haw. (Aug. 30, 2006).

taro patents.[132] In their letter they claimed that the patented varieties were not sufficiently different from other taro varieties and were therefore "invalidated by considerations of prior art."[133] Additionally, they claimed that UH failed to validate the claimed properties as required under U.S. patent law and argued that the collection of royalties was abhorrent and an "unjust levy on Hawaiian taro farmers" instituted by a state university that received tax monies from the public, which includes farmers.[134] Ritte and Kobayashi requested that UH abandon its U.S. patents as well as any world-wide patent rights it may hold over taro.[135] UH did not respond to this letter.[136]

On April 30, 2006, those opposed to the taro patents rallied on the UH campus to bring attention to UH's patenting of taro.[137] Roughly two hundred people attended the demonstration, participating in *hula*, *oli*, and erecting a large stone *ahu*, or altar, all dedicated in honor of *Haloa*, the sacred *kalo* and ancestor of the Native Hawaiian people.[138] UH offered no official response.[139] On May 18, 2006, protesters continued to pressure UH to relinquish its taro patents by chaining and padlocking shut the entrance to the University's medical school, "locking out" the University's Board of Regents, which was to hold its monthly meeting there.[140] The lockout lasted only thirty minutes and was mainly symbolic, as another entrance to the medical school was left open.[141] The protestors made their point, and UH subsequently entered into direct talks with them.[142]

Through the discussions, UH officials began to understand the reasons behind the objections to the patenting of taro.[143] In a joint press release, UH-Manoa Chancellor Denise Konan and UH-Manoa Vice-Chancellor for Research Gary Ostrander stated that the University had "come to both recognize and appreciate the unique place that taro occupies in the lives and culture of indigenous peoples and in particular our Native Hawaiian community. . . . [and intends to] make an exception to the process relating to

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[132] Letter from Walter Ritte, Jr. & Chris Kobayashi to David McClain, Interim President, Univ. of Haw. (Feb. 23, 2006) (on file with author).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] Interview with Walter Ritte, Jr., *supra* note 131.

[137] *Id.*

[138] TenBruggencate, *supra* note 127.

[139] Interview with Walter Ritte, Jr., *supra* note 131.

[140] Craig Gima, *Native Hawaiians Temporarily Shut UH Medical School*, HONOLULU STAR-BULL., May 18, 2006, at A1, *available at* http://starbulletin.com/2006/05/18/news/story01.html.

[141] Manolo Morales, *Protestors Lock UH Regents Out of Board Meeting*, May 18, 2006, http://khon.com/khon/print/cfm?sid=1152&storyID=13703.

[142] *Id.*

[143] Press Release, Univ. of Haw., *supra* note 120.

patenting and licensing surrounding taro."[144] It was at this point that UH began to look into possible exceptions to its patenting and licensing process. In early June 2006, UH officials offered to transfer the patents to an appropriate Hawaiian entity to do what it pleased with the patents.[145] Ritte and others objected, however, stating their consistent belief that no person or entity should hold patents on taro.[146]

Finally, in a June 12, 2006 meeting between Ostrander and Ritte, UH agreed to abandon its taro patents.[147] On June 16, 2006, the University filed "Terminal Disclaimers" with the U.S. Patent Office, officially dissolving its proprietary and ownership interests in the three varieties of taro.[148] The events culminated in the June 20, 2006 gathering in which Walter Ritte, Jr., Chris Kobayashi, and Center for Hawaiian Studies Professor Jonathan Osorio destroyed copies of the three taro patents before representatives of UH and the Native Hawaiian community.[149]

### *A. The Native Hawaiian Worldview: Kalo Is Sacred*

The controversy over the patenting of *kalo* is an indication of how Western notions of property and IP do not "fit" with and, in some ways, are an anathema to indigenous traditional knowledge and cultural heritage. To a Native Hawaiian, as with many other indigenous peoples, understanding genealogy is crucial to understanding one's place in the world. Genealogy specifically links the "Hawaiian people to the land, nature and each other" and allows them to trace from where and whom they have descended.[150] "In . . . oral traditions, genealogical chants identifying family names would last for hours."[151] The *Kumulipo*, the main genealogical creation chant for Native Hawaiians,[152] consists of 2,100 lines broken into sixteen sections representing sixteen time periods.[153] This epic recounts the intricate creation of all things and their inter-relatedness starting with the emergence of creatures of the sea,

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[144] *Id.*

[145] Interview with Gary Ostrander, Univ. of Haw. at Manoa Vice Chancellor for Research and Graduate Studies, in Honolulu, Haw. (Sept. 5, 2006).

[146] Interview with Walter Ritte, Jr., *supra* note 131.

[147] Blaine Tolentino, *Taro Unpatented*, KA LEO O HAWAII, June 22, 2006, at 1.

[148] Press Release, Univ. of Haw., UH Files Terminal Disclaimers on Taro Patents (June 20, 2006), *available at* http://manoa.hawaii.edu/mco/pdf/taro_resolution_release.pdf.

[149] Essoyan, *supra* note 1.

[150] Ritte & Kanehe, *supra* note 4, at 131.

[151] *Id.*

[152] THE KUMULIPO: A HAWAIIAN CREATION CHANT (Martha Warren Beckwith ed. & trans., Univ. of Chicago Press 1951) (English translation with explanation).

[153] *See id.* at 187-252.

to insects, land plants, animals, and, finally, human beings.[154] The life created ranges from coral polyps to strains of seaweed, to the creation of taro, and the formation of man.[155] The *Kumulipo* describes how:

> The gods *Wakea*, sky father, and *Hoohokukalani*, star mother, gave birth to *Haloa*, the first born. *Haloa* was stillborn and placed in the earth outside the front door. *Haloa* grew into *kalo*, the first taro plant. The second born of *Wakea* and *Hoohokukalani* was man, whose *kuleana* (responsibility) was to care for *Haloa*, the elder brother. *Haloa*, the *kalo*, became the staple food crop for the Hawaiian people.[156]

In the *Kumulipo* genealogy, all living things are interconnected and dependent on one another.[157] Specifically, Native Hawaiians have an obligation to "*malama* (take care of and protect) their eldest brother," *Haloa*.[158] In some ways, caring for *Haloa* is also representative of the *kuleana*, the care, stewardship, and responsibility Native Hawaiians must undertake for all living entities in Hawai'i.[159] According to this view a patent on a Hawaiian strain of taro is reprehensible and misguided. Ritte recounts that owning a patent on Hawaiian taro is like owning a patent on one's older sibling, one's ancestry.[160] How can an older brother be owned? According to Ritte and many other Native Hawaiians, this is a resurrected form of slavery.[161]

This belief is exemplified by the refusal of Ritte and many other Native Hawaiians to agree to the compromise that the patents could be turned over to

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[154] *See id.* at 42-152; *see also* Kumulipo: A Hawaiian Creation Chant, *available at* http://www.ling.hawaii.edu/faculty/stampe/Oral-Lit/Hawaiian/Kumulipo/kumulipo-comb.html (containing an English translation).

[155] *See* KUMULIPO, *supra* note 152, at 42-152.

[156] Ritte & Kanehe, *supra* note 4, at 131.

[157] *See* Paoakalani Declaration, *supra* note 35, at 777-78.

[158] Ritte & Kanehe, *supra* note 4, at 131.

[159] *Id.* Noted Native Hawaiian Professor Lilikala Kame'eleihiwa states:

> [T]hroughout Polynesia, it is the reciprocal duty of the elder siblings to *hanai* (feed) the younger ones, as well as to love and *hoomalu* (protect) them. The relationship is thereby further defined: it is the *Aina*, the *kalo* . . . who are to feed, clothe, and shelter their younger brothers and sisters, the Hawaiian people. So long as younger Hawaiians love, serve and honor their elders, the elders will continue to do the same for them, as well as to provide for all their physical needs. Clearly, by this equation, it is the duty of the Hawaiians to *Malama Aina*, and, as a result of this proper behavior, the *Aina* will *malama* Hawaiians. In Hawaiian, this perfect harmony is known as pono . . . .

LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LAE PONO AI? 25 (1992).

[160] Interview with Walter Ritte, Jr., *supra* note 131.

[161] *Id.* Respected Native Hawaiian activist Alapa'i Hanapi explains that "ownership of taro 'is like slavery' . . . it is as if someone owns your relatives." Craig Gima, *Protestors Block Medical School*, HONOLULU STAR-BULL., May 19, 2006, at A3, *available at* http://starbulletin.com/2006/05/19/news/story06.html.

an appropriate Native Hawaiian entity.[162] In the midst of negotiations with Ritte and other Native Hawaiians, UH expressed its intention to assign the three patents to the greater Native Hawaiian community and was engaging in discussions to determine the appropriate entity to receive the patents.[163] Ritte and other Native Hawaiians objected, stating that, "Hawaiians are saying that taro cannot be owned, so why would the Hawaiians want to own it?"[164] Ritte and Native Hawaiian attorney Le'a Kanehe explained that "Hawaiians would never dream of patenting *kalo*. *Kalo* is a gift handed down to us by our ancestors. We have a *Kuleana* or responsibility to honor, respect, and protect *Haloa*, so he in turn will sustain us."[165] According to this belief, *kalo* is sacred, and any Hawaiian varieties of taro should not be patented.

Simply put, IP law does not have an answer to the dilemma of patenting sacred cultural resources. This is because, according to Western notions of property, culture and property are separate phenomena. The value of property does not come from its cultural roots, but from the value the market places on the object. IP law does not fully appreciate nor understand the indigenous perspective on property. It does not have a category for intangible cultural heritage that exists primarily for the maintenance of culture. In essence, the taro patent controversy goes to the root of the collision between IPRs and traditional knowledge and cultural heritage. "[K]nowledge is not regarded as property subject to individual ownership. Instead, Native Hawaiians view traditional knowledge and cultural heritage as 'deeply personal and spiritual,' a resource not subject to exploitation and misappropriation."[166]

### *B. "Mana Mahele"*

The patenting of taro is also reflective of another tension between Western ideas of IP and traditional knowledge and cultural heritage. The controversy over the taro patents is symbolic of what some Native Hawaiians term as the "*Mana Mahele*."[167]

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[162] Interview with Walter Ritte, Jr., *supra* note 131; Interview with Gary Ostrander, *supra* note 145.

[163] Press Release, Univ. of Haw., UH Manoa Will Assign Taro Patents to Native Hawaiian Community (June 2, 2006), *available at* http://manoa.hawaii.edu/cgi-bin/uhnews?20060602161015.

[164] Alexandre Da Silva, *Lab Work on Taro Opposed*, HONOLULU STAR-BULL., June 6, 2006, at A5, *available at* http://starbulletin.com/2006/06/06/news/story09/html.

[165] Ritte & Kanehe, *supra* note 4, at 131.

[166] Conway-Jones, *supra* note 54, at 745-46 (quoting Jon Osorio, Protecting Our Thoughts, Speech Delivered at Voices of Earth Conference (Nov. 10, 1993), *available at* http://www.hawaii.edu/chs/osorio.html)).

[167] Ritte & Kanehe, *supra* note 4, at 131-32.

"*Mana*" refers to the "spiritual force Hawaiians have which comes from their knowledge and intricate relationship with nature,"[168] including what is termed "biological diversity."[169] In the Native Hawaiian worldview, the Earth and its biodiversity are the tangible forms of "*Akua*," or gods.[170] All life forms have an inherent living energy that is shared by all living things and sustains all living things, creating a familial-like network of interdependent relationships.[171] Ritte states: "Hawaiians call it *mana*. It's our spiritual power, the essence of who we are. It's kept us alive for thousands of years . . . . The problem is that someone gave the *mana* a new name—biodiversity."[172]

What is known as the *Mahele*[173] of 1848 served as the instrument through which Native Hawaiians were displaced from their historic lands.[174] In 1848,

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[168] *Id.*

[169] Paoakalani Declaration, *supra* note 35, at 777.

[170] *Id.*

[171] *Id.*

[172] Catharine Lo, *Patents on Life: The World in Whose Hands?*, HONOLULU WEEKLY, Apr. 5, 2006, at 8, *available at* http://honoluluweekly.com/cover/2006/04/patents-on-life/.

[173] *Mahele* is literally defined as "portion, division, section, zone, lot, piece . . . ." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 219 (1986). It is also the term used to describe the division of lands of the Hawaiian Kingdom in 1848. *Id.*; *see also* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 101 (1998). Furthermore:

> The most significant event in the conversion of the communal land system to the western system of private property ownership was the *Mahele* of 1848, during which the King conveyed about 1.5 million acres of the 4 million acres in the islands to the main chiefs, retaining about one million for himself (which became the "Crown Lands") and assigning the final 1.5 million to the government (as "Government Lands"). Although it was expected that the common people would receive a substantial share during this distribution, only 28,600 acres were given to about 8,000 individual farmers. The fewer than 2,000 Westerners who lived on the islands were able to obtain large amounts of acreage from the chiefs and from the Government Lands, and by the end of the nineteenth century they had taken "over most of Hawaii's land . . . and manipulated the economy for their own profit."

Van Dyke, *supra*, at 101-02 (quoting Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 858 (1975)).

[174] GAVAN DAWS, SHOAL OF TIME 128 (1968). The official purpose of the *Mahele* was to create a class of landed commoners (*makaainana*) who would prosper through the creation of small farms and the "proper" use of land. KAME'ELEIHIWA, *supra* note 159, at 297. In fulfilling this purpose, the *Mahele* was an utter failure. *Id.* The amount of land awarded was not sufficient to either feed a family nor produce much profit and only about nine percent of the entire population of the nation of Hawai'i actually received land. *Id.* Moreover, Native Hawaiians were "not culturally predisposed to capitalism" and did not comprehend such a system of commodification. *Id.* at 297-98. Land became a commodity and over time, Westerners consolidated land ownership and by the end of the nineteenth century a small number of Westerners owned over half of all private lands in Hawai'i. PHYLLIS MYERS, ZONING HAWAII, AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND CLASSIFICATION LAW 17 (1976).

the Hawaiian Kingdom went through an unprecedented privatization process by which all of the Hawaiian lands, which were communally held, were divided among the monarchy, *Alii* (chiefs) and the *makaainana* (common people).[175] In the subsequent decades, the introduction of Western notions of property led to the severance of Native Hawaiians from their lands and their eventual political disenfranchisement.[176] Historian Gavan Daws wrote:

> In the old days the taro patch and the family had flourished together; a single word, *ohana*, served to describe both a cluster of taro roots and a family group. The Great *Mahele*, the great division, cut [this] connection. . . . So the great division became the great dispossession. By the end of the nineteenth century white men owned four acres of land for every one owned by a native . . . .[177]

Native Hawaiians view the exercise of Western IP rights over Hawaiian biodiversity and traditional knowledge similarly. The privatization of biodiversity such as patenting taro is viewed as the instrument through which Native Hawaiians will be further severed from their natural environment and traditional lifestyle in a manner similar to the *Mahele* of 1848. As this environment gives their lives meaning and is their responsibility to steward, severing Native Hawaiians from their environment through privatization divides them from the very thing that sustains their lives and culture.[178] Some Hawaiians believe that "[Westerners] have taken our lands and now they come to take our *Mana*, our very soul."[179]

### *C. Native Hawaiian Customary Right*

"The Hawaiian people have been modifying and growing taro for one thousand years, and probably five thousand years before that in Polynesia. What seems counterintuitive now is that a faculty member can make an improvement . . . and patent it."[180]

Native peoples around the world, including Native Hawaiians, have carefully cultivated plants and animals through the centuries to produce various strains of plants and animals known for their special and unique characteristics.[181] In Hawai'i, more than three hundred varieties of *kalo* were produced to match the various local soil, water, and climate characteristics.[182]

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[175] *See* Van Dyke, *supra* note 173, at 101-02.

[176] *Id.*

[177] *Id.*

[178] *See* Ritte & Kanehe, *supra* note 4, at 131-32.

[179] *Id.* at 132.

[180] Essoyan, *supra* note 1; *see also* Interview with Gary Ostrander, *supra* note 145.

[181] *C.f.* Michael Blakeney, *Bioprospecting and Biopiracy*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES, *supra* note 8, at 393, 393.

[182] Ritte & Kanehe, *supra* note 4, at 132.

"'Native cultivation of taro in Hawai'i had created a greater number of varieties adaptable to varying conditions of locale, soil and water than are found anywhere else in Polynesia or . . . in the world.'"[183] Therefore, new varieties of taro needed to be nurtured to grow in these areas.[184] Traditional Native Hawaiian society created various divisions of talent, one of which was the specialization in the planting and developing of taro.[185] Hawaiian planters who held unique knowledge regarding taro and were skilled in identifying different varieties and mutations of taro, had the responsibility of developing the different varieties of taro.[186] It has even been suggested that many varieties of taro were produced through genetic cross breeding by ancient Native Hawaiians.[187] As the Native Hawaiian population increased, different arid areas of the islands that were not necessarily suitable for taro cultivation were needed for food production.[188] Archaeological studies indicate that dry leeward areas of Maui and Hawai'i islands were cultivated with both taro and sweet potato by Hawaiian farmers.[189] Native Hawaiian ingenuity led to the creation and stewardship of a diverse variety of taro found nowhere else in the world.[190] Furthermore, Native Hawaiians cultivated different types of taro suited for an array of uses including medicinal, ceremonial, and religious purposes.[191]

The three patented hybridized varieties of taro carried with them various qualities that Native Hawaiians and other Polynesians have carefully bred through the centuries.[192] The Palauan Ngeruuch variety of taro, bred by Micronesians and known for its resistance to leaf blight disease, was bred with the Hawaiian Maui Lehua variety known by Hawaiians for its taste.[193] This produced three varieties of taro that are resistant to leaf blight disease as well as superior in taste.[194] These varieties were not only a product of UH research, but were also a product of centuries of development performed by Native Hawaiians and Micronesians.

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[183] *Id.* at 131-32 (quoting E.S. CRAIGHILL HAND & ELIZABETH GREEN HAND WITH COLLABORATION OF MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE & ENVIRONMENT 71 (1991).

[184] Interview with John Cho, Professor of Plant Pathology, Univ. of Haw., in Honolulu, Haw. (Oct. 31, 2006).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] CHO, *supra* note 123, at 3.

[189] Interview with John Cho, *supra* note 184.

[190] *Id.*

[191] *See* CHO, *supra* note 123, at 4-5.

[192] *Id.* at 3.

[193] Ritte & Kanehe, *supra* note 4, at 132.

[194] *Id.*

Some have claimed that the process that UH and its researcher engaged in was in the same vein as what Hawaiians have done in selectively cross breeding taro in the past.[195] Native Hawaiians, however, have never claimed "an exclusive, monopolistic ownership over *kalo* through patenting."[196] Moreover, according to Chris Kobayashi, who objected to the patents and whose family has farmed taro for generations, "[s]ome of us have been cooperators with UH on different taro research programs including breeding, cultivation and diseases. More importantly, how can anyone claim ownership of plants that have evolved and been selected or bred by farmers for specific environmental conditions and desirable properties over generations?"[197]

This is one of indigenous peoples' central objections to Western IP law. IP law does not take into account that traditional knowledge of biodiversity is a product of generations of empirical observation and research no less vital than the work done in today's research laboratories.[198] Therefore, how can one claim a monopolistic right to a new variety of plant, when the very plant and its sought-after properties have been bred by indigenous peoples for generations prior? These indigenous people have no legal recourse. Biological diversity for many indigenous peoples, especially Native Hawaiians, is a responsibility to be stewarded and managed properly, not owned.[199] IP law has no answer to this dilemma.

## V. A SOFT LAW PROPOSAL TO THE TARO PATENT CONTROVERSY

Indigenous peoples worldwide face a dilemma. Their traditional knowledge and cultural heritage are being appropriated and there does not seem to be adequate protection under the current Western IP rights regime. Native Hawaiian traditional knowledge in particular is at great risk of misappropriation. As Hawai'i is one of the most biologically diverse states in the United States with more than twenty-two thousand species of plants and animals, nine thousand of which are exclusively found in Hawai'i, the state is a prime target for bioprospecting.[200] Therefore, guidance on how to maneuver in this controversial area is especially necessary in Hawai'i.

The Convention on Biological Diversity ("CBD"),[201] one of the key agreements adopted at the Earth Summit of 1992, is a comprehensive

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[195] *Id.* at 133.

[196] *Id.*

[197] *Id.* (quoting Chris Kobayashi, taro farmer).

[198] Paoakalani Declaration, *supra* note 35, at 778-79.

[199] *See* TAULI-CORPUZ, *supra* note 26, at 13-14.

[200] Lo, *supra* note 172.

[201] Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 793, *available at* http://www.biodiv.org/convention/convention.shtml [hereinafter CBD].

multilateral agreement signed by 190 nations that attempts to address all aspects of biological diversity and sustainable development.[202] The Convention has three main goals: (1) the conservation of biological diversity, (2) the sustainable use of biological diversity, and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[203] Despite being general in nature, the CBD can serve as a de facto global protocol for bioprospecting and recognizing rights of traditional farmers and indigenous peoples. Although the vast majority of governments are parties to the Convention, the United States has unfortunately only signed, but not ratified, the CBD and is therefore not a party to the multi-lateral treaty.[204] Moreover, no state in the United States, "including Hawai'i, has enacted any legislation governing bioprospecting."[205] According to a comprehensive January 2006 state study on bioprospecting in Hawai'i, there are no state regulations in place that specifically address bioprospecting on state lands in Hawai'i.[206] Although the Hawai'i Department of Land and Natural Resources ("DLNR") requires written permission for the collection of any plant, animal, marine species, and geological material that it has jurisdiction over, this provides no check on the activities of bioprosecpectors as they do not have to reveal their intentions in this permitting process.[207]

Interestingly, although there are currently six public bioprospecting projects in Hawai'i,[208] according to DLNR no permits were ever issued relating to bioprospecting, even though permits are required to collect natural specimens on state lands.[209] It is this unregulated environment, especially in a state which has an obligation to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed"[210] by Hawaiians and where public lands held by the State and "all public natural resources are held in trust by the State for the benefit of the people,"[211] which leads many to

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[202] Burton Ong, *Harnessing the Biological Bounty of Nature: Mapping the Wilderness of Legal, Socio-Cultural, Geo-Political and Environmental Issues*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES, *supra* note 8, at 1, 10; Convention on Biological Diversity, Sustaining Life on Earth, http://www.biodiv.org/doc/publications/guide.shtml?id=action (last visited Mar. 11, 2007) [hereinafter Sustaining Life on Earth]; Parties to the CBD/Cartagena Protocol on Biosafety, http://www.biodiv.org/world/parties.asp (last visited Mar. 11, 2007) [hereinafter Parties to the CBD].

[203] Sustaining Life on Earth, *supra* note 202.

[204] Parties to the CBD, *supra* note 202.

[205] Lo, *supra* note 172.

[206] PETER G. PAN, LEGISLATIVE REFERENCE BUREAU, REPORT NO. 1: BIOPROSPECTING: ISSUES AND POLICY CONSIDERATIONS 57-70 (2006)

[207] Lo, *supra* note 172.

[208] PAN, *supra* note 206, at 57-58.

[209] *Id.*

[210] HAW. CONST. art. XII, § 7.

[211] HAW. CONST. art. XI, § 1.

worry that bioprospectors will exploit this vacuum to the detriment of the public, especially Native Hawaiians.[212] For example, in 2004, Massachusetts, with permission from DLNR, collected more than ten thousand marine mollusks from Hawaiian waters.[213] These mollusks were eventually shipped to a French pharmaceutical company.[214] The shipment was intercepted and impounded en route by the U.S. Fish and Wildlife Service.[215] The state had no mechanism in place to track this type of activity and, furthermore, had no way of ensuring that these appropriated state resources were ever fully compensated for.

In light of the loose environment in which bioprospectors in Hawai'i function and the federal and state governments' failure to act to protect biological and genetic resources, it is necessary to develop other avenues through which Native Hawaiian IP interests can be safeguarded. Since its creation in 1993, CBD has triggered much thought and discussion regarding access to biodiversity, traditional knowledge, and plant genetic materials.[216] Article 8(j) of CBD states that parties to the Convention shall:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices[.][217]

CBD has often served as a template for creating policies and procedures that guide access to the biodiversity of indigenous peoples.[218] Since its adoption, the number of codes of conduct, best practices, and institutional policies has gradually increased.[219] Although these types of instruments are often trivialized because they are non-binding, they can be influential in generating a reference point between indigenous peoples and Western organizations when dealing with issues of traditional knowledge and biodiversity.[220] These instruments can go a long way in building confidence between indigenous

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[212] *See* PAN, *supra* note 206, at 77-78, 82.

[213] Lo, *supra* note 172.

[214] *Id.*

[215] *Id.*

[216] Jorge Caillaux & Susanna E. Clark, *A Brief Review of Legislation on Access to Genetic Resources and the Protection of Traditional Knowledge in Selected Megadiverse Countries*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES, *supra* note 8, at 226, 226.

[217] CBD, *supra* note 201, art. 8(j).

[218] Caillaux & Clark, *supra* note 216, at 235-37.

[219] *Id.*

[220] *Id.*

peoples and Western organizations such as large universities, research centers, and corporations.[221] "'Peer pressure' within academia and industry can also act as an enforcement mechanism," as it acts as a coercive power in pressuring Western organizations to create these internal instruments that regulate conduct, and then abide by them.[222]

Using CBD as a framework, this section will detail some of the major principles and procedures that can be included in an institutional policy that UH and companies operating in Hawai'i could adopt when dealing with indigenous, traditional knowledge. Although not comprehensive, these principles can serve as a guide that may reduce or prevent unneeded collisions between Western IP interests and indigenous, traditional knowledge, and cultural heritage.

### *A. Recognition of the Right to Cultural Integrity*

The right to cultural integrity, an emerging international law norm, is the right of indigenous peoples to advance their group cultural identity through the unhindered and unimpeded use of their religion, language, and cultural practices.[223] This right is also closely tied to the right of protection of indigenous culturally sacred sites.[224] Article 27 of the International Covenant on Civil and Political Rights ("ICCPR"), which the U.S. has signed and ratified, recognizes and affirms the right to cultural integrity.[225] It states that, "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[226] Respected international law scholar S. James Anaya asserts that international practice indicates that this right is an affirmative one, where governments must affirmatively protect the indigenous culture.[227]

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[221] *Id.*

[222] COMM'N ON INTELLECTUAL PROPERTY RIGHTS, WORKSHOP 10: RESEARCH TOOLS, PUBLIC PRIVATE PARTNERSHIPS AND GENE PATENTING (Jan. 22, 2002).

[223] John D. Smelcer, Comment, *Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in U.S. and Australian Domestic Courts*, 15 PAC. RIM L. & POL'Y J. 301, 313 (2006).

[224] *Id.*

[225] International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, G.A. Res. 2200 (XXI), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

[226] *Id.*

[227] ANAYA, *supra* note 44, at 138-40.

Moreover, international adjudications have recognized the right to cultural integrity as an important international law norm.[228] In the case of the Yanomami people of Brazil, despite the fact that Brazil was not a party to ICCPR, the Inter-American Commission on Human Rights held that "international law in its present state . . . recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity."[229] The Commission found that the various intrusions by the Brazilian government on the Yanomami's traditional lands threatened the cultural integrity of Yanomami people in violation of ICCPR Article 27.[230]

Among the many reasons to protect the traditional knowledge of indigenous peoples, a UN University Institute of Advanced Studies report states that it should be protected in order to support and maintain the cultural integrity of indigenous peoples, secure the human rights of indigenous peoples and local communities, prevent the theft and illegal use of traditional knowledge, and ensure equity and justice.[231] The protection of indigenous, traditional knowledge is intimately linked to safeguarding the cultural integrity of indigenous peoples. Thus, Western organizations need to recognize this and ensure that the traditional knowledge of indigenous peoples is not misappropriated in violation of the right to cultural integrity.

A 2001 comprehensive UN paper detailing the special relationship indigenous peoples have with their traditional lands and natural resources states that "it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values."[232] The paper continues, stating that "[t]he relationship

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[228] Ominayak, Chief of Lubicon Lake Band v. Canada, Communication No. 167/1984, Report of the Human Rights Committee, U.N. GOAR, 45th Sess., Supp. No. 40, Vol. 2, U.N. Doc. A/45/40, Annex 9 (A) (1990). In *Ominayak*, the U.N. Human Rights Committee found that the right of the Lake Lubicon Indians of Canada to cultural integrity under Article 27 was violated when the Canadian government, which is a party to the ICCPR, allowed leases for oil and gas exploration and timber development on the Bands traditional lands. *Id.*; *see also Yanomami v. Brazil*, Case No. 7615 Inter-Am. C.H.R. 24, Report No. 12/85, OEA/Ser. L/V/II.66, doc. 10 rev. 1 ¶ 10 (1985), *available at* http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm.

[229] *Yanomami*, Case No. 7615 Inter-Am. C.H.R. 24, Report No. 12/85, OEA/Ser. L/V/II.66, doc. 10 rev. 1 ¶ 7 (1985).

[230] *Id.* ¶ 10.

[231] INST. FOR ADVANCED STUDIES, UNITED NATIONS UNIV., THE ROLE OF REGISTERS AND DATABASES IN THE PROTECTION OF TRADITIONAL KNOWLEDGE: A COMPARATIVE ANALYSIS 11 (Jan. 2004), *available at* http://www.ias.unu.edu/binaries/UNUIAS_TKRegistersReport.pdf (emphasis added).

[232] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Sub-Comm. on the Promotion & Prot. of Human Rights, *Final Working Paper: Prevention of Discrimination and*

[indigenous peoples have] with the land and all living things is at the core of indigenous societies."[233] The study details an example of the indigenous Limbu people of Nepal who utilize a traditional land tenure system known as "*Kipat*."[234] The study found that any attack on this tenure system would essentially be an attack on the existence of the Limbu as a distinct and separate indigenous community.[235] Similarly, if organizations do not ensure the protection of indigenous traditional knowledge in their dealings with indigenous peoples, the cultural integrity of indigenous peoples may be put at risk.

### *B. Recognition of Communal Rights*

Individualism and individual rights underpins the Western legal system.[236] If group rights are addressed at all, the group is viewed as a collection of individuals, each with a specific identity.[237] Indigenous peoples, however, view "their place in the world as that of a people born into a network of group relations, and whose rights and duties in the community arise from, and exist entirely within the context of the group."[238] For many indigenous peoples "one's clan, kinship, and family identities make up [one's] personal identity."[239]

By recognizing this characteristic of indigenous cultures, Western organizations may avoid some of the major opportunities for conflict. For example, in *Yumbulul v. Australian Reserve Bank*,[240] if this aspect of aboriginal culture were recognized early on, it would have been understood that Yumbulul, the artist rendering the Morning Star Poles, was not the sole aboriginal party who had an interest in the poles. It would have been recognized that his aboriginal clan had a deep interest in the poles, thus lending a measure of insight in dealing with Yumbulul, as well as depictions of the Morning Star Poles.

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*Protection of Indigenous Peoples and Minorities*, ¶ 13, U.N. Doc. E/CN.4/Sub.2/2001/21 (June 11, 2001) (*prepared by* Erica-Irene A. Daes).

233 *Id.*

234 *Id.*

235 *Id.*

236 Riley, *supra* note 65, at 202-03.

237 *Id.*

238 *Id.*

239 *Id.*

240 Yumbulul v. Reserve Bank of Australia (1991) 21 I.P.R. 481.

### *C. Recognition of Indigenous Customary Law*

According to Tauli-Corpuz, "[t]he fundamental flaw of existing national and international [Intellectual Property Rights] regimes is their failure to acknowledge and recognize the customary laws and systems developed and used by [indigenous peoples] to protect, safeguard and perpetuate [indigenous] heritage and traditional knowledge."[241] Furthermore, Tauli-Corpuz states that it is discriminatory to neglect these indigenous customary systems that do not fit with Western economic and legal structures.[242]

Western organizations should recognize that the indigenous holders of traditional knowledge are guardians of this knowledge and that many indigenous communities have established customary laws and principles governing the handling of such knowledge. These organizations also need to recognize that existing IP law offers little protection to indigenous holders of traditional knowledge.[243] Therefore, these organizations should, to the extent feasible, adhere to the customary law of the indigenous community they deal with.[244] For example, in *Yumbulul v. Australian Reserve Bank*, customary law would have prohibited the depictions of the Morning Star Poles on the Australian Bank Note.[245] Adhering to indigenous customary law provides the appropriate protection needed for indigenous, traditional knowledge and an amicable process through which Western organizations may access indigenous, traditional knowledge.

### *D. Environmental and Cultural Impact Assessments*

Articles 14-1(a) and -1(b) of the CBD require that signatory parties perform environmental impact assessments on activities that may have a detrimental effect on biodiversity.[246] In addition to environmental impacts, cultural impacts should be evaluated as well. In 2000, the Hawai'i Legislature amended Hawai'i Revised Statutes ("HRS") Section 343-2 to expand the definition of "environmental impact statement."[247] The purpose of the amendment was to include, within environmental impact statements, a disclosure of the effects of a proposed action on the cultural practices of a

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[241] TAULI-CORPUZ, *supra* note 26, at 7-8.

[242] *See id.*

[243] *See supra* Part II.

[244] *See* Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275, 284 (2001).

[245] (1991) 21 I.P.R. 481, ¶ 4, ¶ 21.

[246] *See* CBD, *supra* note 201, art. 14-1(a) and -1(b).

[247] Emi L. Morita, Recent Development, *The 2000 Legislative Session: Important Legislation for Practicing Attorneys*, 23 U. HAW. L. REV. 389, 401-02 (2000).

community and the State.[248] Although the definition of an environmental impact assessment is now written broadly to include all cultural impacts, the amendment was specifically tailored to protect the Hawaiian culture, particularly cultural resources that have been lost due to a failure to act in the past.[249]

Although HRS Section 343-2 specifically deals with the cultural impacts from land development, its principle can easily be translated to the context of indigenous, traditional knowledge and IP. Performing a similar "cultural impact assessment" or "cultural background report" as part of pre-field preparation is a progressive policy that can be useful when dealing with indigenous, traditional knowledge.[250] Conducting such a report will not only assist in safeguarding the interests of indigenous peoples, but can also yield critical information before working with an indigenous community.

For example, Shaman Botanicals, formerly Shaman Pharmaceuticals, retains an in-house medical anthropologist who prepares a cultural background report as part of pre-fieldwork preparation.[251] Similarly, the U.S. Army, through its Cultural Resources Management Program, has sought to manage and protect the cultural resources that it possesses in its vast land holdings.[252] To fulfill this purpose, the U.S. Army Environmental Command hires staff "cultural resource professionals, including archaeologists, architectural historians, and preservation planners."[253] These professionals assist the Army in ensuring that the Army is in compliance with various federal laws and regulations respecting the rights of indigenous peoples.[254]

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[248] *Id.* The definition of an "environmental impact statement" is now:

> an information document prepared in compliance with the rules adopted under section 343-6 and which discloses the environmental effects of a proposed action, effects of a proposed action on the economic welfare, social welfare, and cultural practices of the community and State, effects of the economic activities arising out of the proposed action, measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.

HAW. REV. STAT. § 343-2 (Supp. 2006).

[249] SEN. STAND. COMM. REP. NO. 3298, 20th Leg., Reg. Sess. (2000), *reprinted in* 2000 HAW. SEN. J. 1378, 1378.

[250] *See* Steven R. King et al., *Traditional Knowledge, Biological Resources and Drug Development: Building Equitable Partnerships to Conserve, Develop and Respect Biocultural Diversity*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES, *supra* note 8, at 284, 293-95; PAN, *supra* note 206, at 7.

[251] King et al., *supra*, note 250, at 293.

[252] U.S. Army Envtl. Command, Cultural Resource Management Program, http://aec.army.mil/usaec/cultural/index.html (last visited Mar. 8, 2007).

[253] *See* U.S. Army Envtl. Command, Cooperative Agreements and Federal Agency Partnerships, http://aec.army.mil/usaec/cultural/partnerships.html (last visited Mar. 8, 2007).

[254] *Id.*

According to internal U.S. Army regulations regarding cultural resources, each Army installation commander must establish an installation specific cultural resources management program.[255] This is done through designating an installation Cultural Resource Manager, who is responsible for gathering information and advising commanding officers regarding the management of cultural resources.[256] These officers take an active role in ensuring that the U.S. military does not run afoul of any Native American Graves Protection and Repatriation Act[257] provision as well as ensure that Cultural Resource Management Plans are complied with.[258] These installation Cultural Resource Managers also enter into cooperative agreements with indigenous stakeholders, namely American Indians, Native Alaskans, and Native Hawaiians, who partner with the Army in providing for effective and long term stewardship of cultural resources, including indigenous resources.[259] The purpose of the Army's Cultural Resources Management Program is to ensure that long-term and sound stewardship of cultural resources occurs throughout the U.S. Army.[260]

Performing a cultural background report alongside an environmental impact assessment not only benefits an outside organization in navigating the area of indigenous, traditional knowledge, but also helps to safeguard against the misappropriation of traditional knowledge.

### *E. Mutuality and Equitable Sharing of Benefits*

It has been estimated that less than 0.001 per cent of profits from drugs developed using indigenous, traditional knowledge have been equitably shared with the indigenous peoples who own such knowledge.[261] The Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of their Utilization[262] includes a fairly comprehensive list of potential monetary and non-monetary benefits from access and benefit

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[255] U.S. DEP'T OF ARMY, REG 200-4, CULTURAL RESOURCES MANAGEMENT 1-2 (Nov. 1, 1998).

[256] *Id.*

[257] 25 U.S.C. §§ 3001-3013 (2000).

[258] *Id.*

[259] *Id.*; U.S. Army Envtl. Command, *supra* note 253.

[260] Cultural Resources Program Assistance Announcement, PAA 00-2, at 2, U.S. Army Envtl. Ctr. (2004).

[261] Michael I. Jeffery, *Intellectual Property Rights and Biodiversity Conservation: Reconciling the Incompatibilities of the TRIPS Agreement and the Convention on Biological Diversity*, *in* INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES, *supra* note 8, at 185, 204.

[262] Convention on Biological Diversity [CBD], *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization* (Apr. 2002) [hereinafter Bonn Guidelines].

sharing.[263] The equitable sharing of benefits should rest upon an understanding of the cultural value system and worldview of the indigenous peoples being dealt with so that satisfactory benefits are shared with indigenous communities.[264] Therefore, the list of potential benefits to be shared is not static but dynamic, based on the needs and wants of the respective indigenous community. Potential benefits other than monetary benefits to be shared with indigenous peoples may include joint ventures, joint ownership of IP rights, education and training, conservation and sustainability consultation, contributions to the local economy, access to adequate health care, research directed by the needs of the indigenous community, social recognition, food security, and enhanced environmental management and biodiversity conservation.[265] The possible shared benefits can be limitless but should be determined by the needs and wants of the respective indigenous community.

### *F. Prior Informed Consent*

It is generally agreed that conducting research without the consent of research participants is unethical.[266] One of the most important requirements of CBD is prior informed consent ("PIC"), which gives parties to the Convention the chance to assess the benefits and risks of taking part in any research endeavor before the resources are shared or any collaborative research is done.[267] Unfortunately, under the CBD, indigenous peoples are recognized only as holders of traditional knowledge and not as communities sovereign over natural resources found in their territories from which consent must be obtained before accessing these resources.[268] This is due to the fact that the CBD only recognizes states as sovereigns over natural resources and, thus, consent need only be obtained from states.[269] "[S]overeign rights to control

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[263] *Id.* app. II.

[264] *See* World Intellectual Property Organization, InterGovernmental Comm. on Intellectual Prop. and Genetic Res., Traditional Knowledge and Folklore, *Genetic Resources: Draft Intellectual Property Guidelines for Access and Equitable Benefit-Sharing* 15, WIPO Doc. WIPO/GRTKF/IC/7/9 (July 30, 2004) [hereinafter WIPO Access and Equitable Benefit-Sharing Guidelines].

[265] Bonn Guidelines, *supra* note 262, app. II.

[266] Sivaramjani Thambisetty, *Human Genome Patents and Developing Countries*, *in* COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 49 (Jan. 22, 2002) (copy on file with author).

[267] *See* King et al., *supra* note 250, at 293-95.

[268] Debra Harry & Le'a Malia Kanehe, *The BS in Access and Benefit Sharing (ABS): Critical Questions for Indigenous Peoples*, *in* THE CATCH: PERSPECTIVES IN BENEFIT SHARING 81, 97 (Beth Burrows ed., 2005).

[269] *Id.* at 88.

access to genetic resources are only recognized for the contracting Parties, i.e., the states."[270] PIC should be extended to indigenous communities as it gives these communities the ability to negotiate and allow or deny access to both the traditional knowledge and corresponding resources.[271]

Often, however, it is difficult to determine whether consent should be obtained from the individuals involved or from the indigenous community as a whole.[272] As much as is realistically possible, PIC should be obtained from involved individuals as well as from the respective indigenous communities involved in the research. Much like receiving PIC from an individual respects that individual's right to personal autonomy, receiving PIC from the relevant indigenous community respects the group's right to self-determination.[273] Although it may be difficult determining who is authorized to give consent on behalf of an indigenous community, organizations should obtain communal consent when possible. It is important to identify and receive consent from an indigenous organization or group that represents a majority of the indigenous community's interests.[274]

PIC also requires full disclosure on the part of the entity seeking access to indigenous, traditional knowledge.[275] According to the Social Science Task Force of the U.S. Interagency Arctic Research Policy Committee, full disclosure includes disclosures regarding all sponsors and sources of financial support, full identification of the management hierarchy of the project, the purposes, goals, and time frames of the research, the data gathering techniques to be utilized and the uses to which they will be put, foreseeable positive and negative implications of the research, and explanations in terms understandable to the local community.[276]

PIC should also specify uses for which consent has been granted. It should be clear what uses are allowed, and PIC should be obtained for any change in the use of the indigenous, traditional knowledge or material, including the utilization of the knowledge by third parties.[277] Therefore, PIC should also include disclosure of the potential for commercialization.[278] It is important that holders of traditional knowledge be aware that they are engaging in a commercial endeavor that could result in economic exploitation of their

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[270] *Id.*

[271] *Id.*

[272] *See* Jeffery, *supra* note 261, at 206.

[273] Thambisetty, *supra* note 266, at 50.

[274] King et al., *supra* note 250, at 300.

[275] Rekha Ramani, Comment, *Market Realities v. Indigenous Equities*, 26 BROOK. J. INT'L L. 1147, 1166 (2001).

[276] Interagency Arctic Research Policy Comm., National Science Found., Principles for the Conduct of Research in the Arctic, *available at* http://www.nsf.gov/od/opp/arctic/conduct.jsp.

[277] Bonn Guidelines, *supra* note 262, ¶¶ 26, 27.

[278] *See* King et al., *supra* note 250, at 294-95.

knowledge. PIC should not simply be an aspect undertaken at the beginning of a research endeavor. It should be a process by which ongoing discussions regarding the research are maintained throughout the project.[279] Interpreted as such, PIC is an important aspect in relationship and trust building between a Western research organization and an indigenous community.

### *G. Time Frames*

A time frame governing use of indigenous, traditional knowledge should be established by the parties and should not only include absolute time limits for the use of the traditional knowledge, but should also include establishment of milestones and the requisite obligations incurred at each milestone.[280] The establishment of a time frame should ensure that benefits are shared with indigenous communities at corresponding points throughout the process of developing a marketable product from the indigenous, traditional knowledge.

For example, during the initial step when indigenous, traditional knowledge is shared, some form of compensation should be given. Subsequently, if a product is developed from traditional knowledge and approved for commercialization by the traditional knowledge holders, at this milestone either certain established benefits should ensue, or negotiation of additional shared benefits should be initiated.[281] Establishing a time frame that institutionalizes compensation or renewed negotiations at the various milestones that may be achieved during the process of research and development of a marketable product goes a long way in addressing concerns regarding the misappropriation of indigenous, traditional knowledge.

### *H. Relationship Building*

Finally, it is important for Western organizations to understand that, most importantly, a relationship of trust is essential to any profitable access to indigenous, traditional knowledge. Accessing indigenous, traditional knowledge is essentially entering into a partnership with the indigenous holders of such knowledge. Trust is essential to such a partnership. During the resolution of the taro patent controversy, UH officials, including Vice-Chancellor for Research Gary Ostrander, stated that through resolving the controversy, UH felt that it had developed a "foundation of a relationship based on mutual trust" with the Native Hawaiian community that it could build

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[279] *Id.*

[280] *See* WIPO Access and Equitable Benefit-Sharing Guidelines, *supra* note 264, at Annex 9.

[281] *Id.*

on for the future.[282] Similarly, Western organizations should be keen to develop trust relationships with the indigenous peoples they partner with. A relationship of trust can play a meaningful role in ensuring the needs of Western organizations and indigenous peoples.

## VI. CONCLUSION

Pursuant to Western IP considerations, the University of Hawai'i patented three varieties of taro that it had developed to ward off the spread of taro fungal leaf blight disease. According to the Native Hawaiian worldview, *kalo* is a sacred plant that is intricately linked to Native Hawaiian culture and spirituality. Spurred on by these beliefs, many Native Hawaiians pressured the University to relinquish its taro patents. In June 2006, the University relented, relinquishing its rights to the patents, essentially transferring the three varieties to the public. In many ways, the controversy surrounding the patenting of taro in Hawai'i is representative of the collision between Western IP law and the worldview and values of indigenous peoples around the world.

Because indigenous, traditional knowledge is relatively unprotected on the international and national level and vulnerable to abuse, it is important that other avenues be developed to ensure that traditional knowledge and cultural heritage of indigenous peoples are not misappropriated. It is in the best interests of Western organizations, such as pharmaceutical companies, research organizations, and institutions like the University of Hawai'i, to adopt and implement progressive policies, standard operating procedures, and ethical codes of conduct that will, first and foremost, ensure the protection of traditional knowledge and thereafter provide a fair and equitable process for access to indigenous, traditional knowledge and corresponding resources.

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[282] Press Release, Univ. of Haw., *supra* note 148.

[283] J.D. Candidate 2008, William S. Richardson School of Law, University of Hawai'i at Manoa. The author would like to express his gratitude to Le'a Malia Kanehe, Professor Melody K. Mackenzie, Professor Alfred L. Brophy, and especially my family. Finally, *mahalo* to members of the University of Hawai'i Law Review.